

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS  
*RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS  
FONDAMENTAUX*

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN POLAND IN 2004

submitted to the Network by Professor **Marek Antoni NOWICKI** \*

on 3 January 2005

Reference: CFR-CDF/PL/2004



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

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\* This report was prepared within the Helsinki Foundation for Human Rights in Warsaw with the assistance of Ms. Magdalena Kmak



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**Le Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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.

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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), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moysse (Luxembourg), 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), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen.

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## CHAPTER I - DIGNITY

### Article 1. Human dignity

#### *Practice of national authority*

The limitation of the right of imprisoned individuals to intimacy and the respect of human dignity during medical examinations, introduced by the Penal Executive Code, was the subject of the General Approach of the Commissioner for Civil Rights (Ombudsman) to the Minister of Justice – General Prosecutor<sup>1</sup>. The Ombudsman drew attention to the fact that prisoners are subjected to medical treatment in the presence of Prison Service officers. Also disputable is the subjection of prisoners to frequent physical check-ups, during which they are forced to undress completely.

#### *Reasons for concern*

Frequent violations of the imprisoned individuals' human dignity and intimacy by prison service officers.

### Article 2. The Right to Life

#### *National legislation, regulation and case law*

On 3 May 2002 Poland signed, but has not yet ratified, Protocol No. 13 to the European Convention on Human Rights (Convention), which prohibits the death penalty under all circumstances.

On 22 October 2004 the Sejm (the lower chamber of the Polish parliament) voted on the amendment of the Penal Code, which would introduce the death penalty for the crimes of genocide and murder with extreme atrocity. The amendment fell three votes short of being passed. It sparked a renewed discussion on the subject of reintroducing the death penalty. According to the polls, conducted by the Public Opinion Research Centre (CBOS), three out of four Poles accept the reinstatement of the death penalty for the severest crimes despite the fact that it has not been used for almost 20 years<sup>2</sup>.

#### *Practice of national authorities*

During the period in question, no cases of euthanasia<sup>3</sup> were reported. Data from the General Headquarters of the Police shows that during the period from January to September 2004 the Police noted 22,610 cases of crimes against life and health, including 719 murders, 11,288 cases of wounding, as well as 10 143 fights, assaults and batteries. The detection rate for crimes against life and health investigated by the police amounted to 83,5 %<sup>4</sup>.

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<sup>1</sup> General Approach to the Minister of Justice - General Prosecutor of 20 July 2004 No. RPO/393877/01/VII

<sup>2</sup> Public Opinion Research Centre (CBOS), The Sense of Threat from Crime and the Attitude towards the Death Penalty, A Report from the Research, Warsaw, March 2004, No. BS/53/2004

<sup>3</sup> Artykuły 149, 152, 153, 154 i 157a Kodeksu Karnego z 6 Czerwca 1997 (Dz.U. z 1997 nr 88, poz 553 z późniejszymi zmianami)[Articles 149, 152, 153, 154 and 157a of the Penal Code of 6 January 1997 (The Official Journal of 1997, No. 88, item 553, as amended)] Statistics: Police [www.kwp.gov.pl](http://www.kwp.gov.pl)

<sup>4</sup> Data from the General Headquarters of the Police

**Article 3. The right to integrity of the person***National legislation, regulation and case law*

The Code of Medical Ethics, amended on 20 September 2003, came into effect on 15 January 2004. It prohibits doctors from participating in procedures of euthanasia and human cloning, for both therapeutic as well as reproductive purposes. A new article concerns genetic prediction that is predicting the patient's future health condition on the basis of their genetic code<sup>5</sup>. In compliance with the code, a doctor who participates in examinations aimed at identifying the carrier of a disease gene or a genetic susceptibility to an illness, is only allowed to carry them out for health reasons, or related research, after receiving permission from the patient and allowing him/her the opportunity to receive genetic consultation. The doctor can only perform an intervention within a human genome for prophylactic or therapeutic purposes.

**Article 4. Prohibition of torture and inhuman and degrading treatment***International case law and concluding observation of international organs*

The UN Human Rights Committee (HRC) issued its concluding observations after considering Poland's fifth periodic report at its meetings held on 27 and 28 October 2004. In its observations, the HRC expressed concern that many prisoners in Poland occupy cells, thus not fulfilling the criteria established in the UN Standard Minimum Rules on the Treatment of Prisoners, and that judges do not use alternative types of punishment, which are available under the law. According to the HRC, the Polish authorities should take further measures to address overcrowding in prisons and ensure compliance with their international obligations. The judiciary should be encouraged to impose alternative forms of punishment<sup>6</sup> more frequently.

The HRC also welcomed various programmes undertaken by Polish authorities to deal with domestic violence but expressed concern about the high number of cases of domestic violence and the lack of appropriate forms of protection, including shelters and other forms of protection for victims.

The HRC recommended that the Polish authorities should ensure that law enforcement officials are properly trained and that appropriate measures to address domestic violence cases, including restraining orders, are available as required. According to the HRC, Poland should also increase the number of shelters and other means of protection for victims throughout the country<sup>7</sup>.

*National legislation, regulation and case law*

On 1 December 2003, the Polish Prime Minister issued a regulation aimed at ensuring public control over the execution of the punishment of imprisonment. It provides, *inter alia*, for the opportunity to talk with prisoners, inspect cells and control the use of therapeutic measures<sup>8</sup>.

<sup>5</sup> Artykuły 31, 35, 39a i 51h Kodeksu Etyki Lekarskiej z 2 stycznia 2004 r. [Articles 31, 35, 39a and 51h The Code of Medical Ethics of 2 January 2004]

<sup>6</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 12

<sup>7</sup> Concluding Observations of the HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 11

<sup>8</sup> Rozporządzenie Prezesa Rady Ministrów z 1 grudnia 2003 r. w sprawie szczegółowego zakresu i trybu uczestnictwa podmiotów w wykonywaniu kar, środków karnych, zabezpieczających i

*The practice of national authorities*

During the period covered by this report the number of people in prisons decreased slightly. On the 31 of October around 79.807 individuals were imprisoned, and 30.339 convicts awaited the execution of their punishment<sup>9</sup>. Concurrently, the number of cases of conditional release from serving the full sentence is decreasing. Twenty one thousand convicts benefited from such conditional releases in 2003, and during the period between January and March 2004, 4,776 out of 12,435 applicants were granted release<sup>10</sup>.

According to the information received from the Central Directorate of Prison Service (CZSW) in 2003<sup>11</sup> prisoners made 3,000 complaints about the way the Prison Service officers treated them. 66 complaints were related to the way in which physical restraint was used, 117 concerned beatings, 289 verbal abuse and 2,528 concerned other forms of improper treatment. The CZSW does not have data for 2004 yet.

At the same time the prisoners made 1,372 complaints about the living conditions in penitentiary institutions. Of these complaints, 333 concerned the conditions in living quarters, 124 concerned placing non-smokers and smokers in the same cell, 330 concerned meals and 585 concerned other issues related to the conditions in the penitentiary institutions.

As of 30 September 2004 there were 186 investigations completed in disciplinary cases against officers of the Prison Service. 13 disciplinary punishments were handed out for violations of the code of professional ethics, 171 for the violations of discipline and two punishments for misconduct.

According to the Helsinki Foundation for Human Rights,<sup>12</sup> it is necessary to verify the data concerning overcrowding in penitentiary institutions referred to by the Central Management of the Prison Service. The data concerning living space at prisons also specifies the number of square meters which should be allocated at each prison for such facilities as club rooms, gymnasiums and briefing rooms, but currently serve as living quarters. After deduction of these surfaces it appears that the prison capacity is only a little over 45,000 prisoners (assuming 3 sq. m per person), meaning that the actual overcrowding amounts to 200%.

Overcrowding in prisons was the reason behind several riots, which broke out on 24 May 2004. The protest began at the prison in Wołów when the institution's management wanted to place an eighth bed inside five-person cells, which already housed seven prisoners. The prisoners went on strike by refusing to accept meals. The next day, riots began at the prisons in Kłodzko and Wronki. The protests were ended by means of negotiations with the prisoners<sup>13</sup>.

On 3 October 2004 the Senate (the upper chamber of the Polish Parliament) passed a resolution concerning the issue of changing penal policy. The senators stipulated for more frequent adjudgment of punishments rather than uncompromised imprisonment, as well as the

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zapobiegawczych, a także społecznej kontroli nad ich wykonywaniem. [The Polish Prime Minister's Regulation concerning the issue of the detailed extent and procedure concerning the participation of parties in the execution of punishment, the measures of punishment, protective and preventive measures, as well as public control over their execution of 1 December 2003 (The Official Journal of 2003, No. 211, item 2051)].

<sup>9</sup> Letter from CZSW of 3 December 2004, No. BPZ-073-43/04/1275

<sup>10</sup> Daily "Rzeczpospolita" of 14 June 2004, p.C1

<sup>11</sup> Letter from CZSW of 3 December 2004, No. BPZ-073-43/04/1275

<sup>12</sup> Comments from the Helsinki Foundation for Human Rights to the Polish Republic's V Periodical Report from the Implementation of the Rulings of the International Covenant on Civil and Political Rights for the period of January 1995 to 1 October 2003, October 2004, <http://www.hfhrpol.waw.pl>

<sup>13</sup> Daily "Rzeczpospolita" of 7-8 August 2004, p. C3

implementation of rectifying justice through public work and other obligations placed upon the convicts. The senators demanded an increase in the number of professional and social parole officers, the improvement of their work conditions, as well as permanent training<sup>14</sup>.

According to the Helsinki Foundation for Human Rights, the Polish authorities have not worked out policies for reacting to the cases of cruel, inhuman or degrading treatment by police or prison service officers. In particular, there is a lack of systematic preventive actions and proper training of future officers.

The Helsinki Foundation criticised the Polish authorities before the HRC with regards to prosecutors discontinuing cases of assaults against people arrested by the police<sup>15</sup>.

There are cases of police involvement in crimes and gross mistakes in activities conducted by the police. In 2004 a court trial began concerning a gang that kidnapped children for ransom. Police officers are amongst those accused.

Another example was the case concerning the fatal shooting of one man and the wounding of another man by the Poznań police in 2004. The police officers fired allegedly without warning, whilst acting on the basis of a mistake resulting from negligence, and subsequently attempted to escape justice. In another case, police officers allegedly shot an agitated, mentally disturbed man in the legs who refused to hand over a knife to a police patrol in the street. The police officers did not attempt to use other measures to disarm him. They also did not warn him about their intention to use a weapon.

As a result of police actions and the use of weapons, two people were killed in Łódź in 2004 during an intervention carried out during a student festival. Live ammunition was used instead of rubber bullets because of police negligence.

There is also a problem with regard to the lack of guarantees that Prison Service officers use appropriate direct coercion measures at prisons.

This issue was the subject of intervention by the Ombudsman, who receives many complaints concerning the use of unlawful coercion against prisoners<sup>16</sup>.

### **Institutions for the detention of persons with a mental disability**

According to the information from the Office for Patients' Rights, which co-operates with the Ministry of Health, during the period of January - November 2004 the Office received 16 complaints concerning violations of the rights of patients with mental disorder in mental institutions<sup>17</sup>.

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<sup>14</sup> Uchwała Senatu z 23 czerwca 2004 r. w sprawie polityki karnej w Polsce [A Resolution of the Polish Senate on the issue of the penal policy in Poland of 3 June 2004, (Polish Monitor 2004, No. 26, item 431)]

<sup>15</sup> Comments from the Helsinki Foundation for Human Rights to the Polish Republic's V Periodical Report from the Implementation of the Rulings of the International Covenant on Civil and Political for the period of January 1995 to 1 October 2003, October 2004,

<sup>16</sup> General Approach to the Minister of Justice – General Prosecutor of 3 March 2004, No. RPO/316163/99/VII

<sup>17</sup> Letter from the Office for Patients' Rights of 6 December 2004, No. BPP-794-075-20/IJR/04

### **Centres for the detention of foreigners**

Organisations offering assistance to aliens and refugees carried out a monitoring of selected deportation arrests and the Guarded Detention Centre for Foreigners in Lesznowola. The survey highlighted numerous problems, both in the observance of the rights of aliens, as well as the living conditions at the detention centres. The report pointed out inadequate standards of hygiene at some institutions, insufficient lighting and ventilation, as well as a lack of privacy, e.g. under the shower, and the inaccessibility of free clothes, underwear and shoes, appropriate to the season<sup>18</sup>.

According to the representatives of the Helsinki Foundation for Human Rights and the Halina Nieć Human Rights Association – an organisation engaged in aid for aliens – the living conditions at the border crossing between Belarus and Poland in Terespol are an insult to the dignity of people awaiting interviews, which are part of a refugee status application procedure.

### Domestic violence

In the report from the implementation of the International Covenant on Civil and Political Rights filed before the HRC and debated on 27 and 28 October 2004, the government representatives acknowledged that domestic violence is a major problem. Each year around 130,000 people, mainly women and children, fall victims to domestic violence. Nearly one third of all murders are domestic homicides. The Polish authorities acknowledge that there are an insufficient number of shelters for victims of domestic violence, most of which are run by non-governmental organisations<sup>19</sup>.

The Government Plenipotentiary for the Equal Status of Men and Women prepared a draft bill on preventing and counteracting violence in close relationships. The Act included entries prohibiting the perpetrator from contacting the victim of domestic violence and approaching closer than a given distance to the victim of such violence, as well as an order for the perpetrator to leave his place of residence. According to the provisions the perpetrators may also be obliged to undergo treatment and participate in re-education programmes<sup>20</sup>.

### *Positive developments*

The regulation of the Prime Minister, which provides for public control over the execution of the punishment of imprisonment and applying preventive measures;

Work on the draft bill on preventing and counteracting violence in close relationships.

### *Reasons for concern*

Overcrowding in prisons;

Lack of proper and sufficient mechanisms for reacting to cases of cruel, inhuman or degrading treatment by the Police and prison service officers;

An increase in the number of domestic violence.

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<sup>18</sup> A Report, The Rights of Aliens Placed in Deportation Detention Facilities and the Guarded Centre, The Helsinki Foundation for Human Rights, Warsaw 2004, p. 93-98

<sup>19</sup> The Polish Republic's V Periodical Report from the Implementation of the International Covenant on Civil and Political Rights for the period of January 1995 to 1 October 2003

<sup>20</sup> [http://www.rownystatus.gov.pl/ver\\_pl/r\\_ochrona.htm](http://www.rownystatus.gov.pl/ver_pl/r_ochrona.htm)

## Article 5. Prohibition of slavery and forced labour

### *National legislation, regulation and case law*

By means of regulation No. 23 of 5 March 2004, the Polish Prime Minister created an inter-departmental Team for Combating and Preventing Human Trafficking<sup>21</sup>, the members of which include representatives of state institutions and non-governmental organisations. Its aim is to co-ordinate and evaluate the implementation of the National Programme on Combating and Preventing Human Trafficking and propose activities leading to the combating of human trafficking.

### *Practice of national authorities*

According to “La Strada”, a non-governmental organisation which helps the victims of human trafficking, following Poland’s entry into the European Union the number of Polish victims of human trafficking has increased. This situation can be explained by the greater ease in travelling throughout Europe. The number of such victims in other countries remains on the same level.

During the period between January and September 2004 the police noted 243 cases of pimping, 33 cases of forced prostitution and 117 cases of distributing pornographic materials. At the same time, the Border Guard noted 2 cases during the period between January and November 2004.

Part 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 and accepted in 2003, has been implemented. Numerous training courses have been conducted and “La Strada” carried out a witness protection programme in cases of human trafficking. However, the fundamental aim of the programme, that is the analysis and adequate interpretation of the legal acts in force, which is supposed to standardise its use, has not yet been implemented. As a result of the lack of clarity as to the proper qualification of human trafficking crimes, the perpetrators are pursued on the basis of various Penal Code provisions.

The National Programme against Trafficking in Human Beings has not been fully implemented either. As of 30 November, a decision concerning the use of indispensable financial resources had not been made. It is not yet clear which police department should be responsible for gathering information about the trafficking of human beings at the national level. Many of the programme’s objectives, which did not require financial expenditure, have been completed, such as the appointment of Voivodship police teams for the handling of human trafficking or appropriate units within the structures of the district (powiat) police. As part of this programme, the Ministry of Justice prepared guidelines for prosecutors handling cases of human trafficking. Unfortunately, the lack of legal regulations concerning financial issues associated with the temporary residence of the victims of human trafficking in Poland still constitutes a serious problem.

The practice of deporting women working as prostitutes was the subject of the Ombudsman’s General Approach to the Deputy Prime Minister – the Minister of Interior and Administration<sup>22</sup>. The Ombudsman pointed out that it is impossible to have these women

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<sup>21</sup> Rozporządzenie Prezesa Rady Ministrów z 5 marca 2004 w sprawie utworzenia Zespołu do Spraw Zwalczenia i Zapobiegania Handlowi Ludźmi [The Polish Prime Minister’s Regulation No. 23 of 5 March 2004 on the establishment of a Team for Combating and Preventing Human Trafficking,] <http://bip.kprm.gov.pl/bip/index.jsp?artId=794>

<sup>22</sup> General Approach of the Ombudsman to the Deputy Prime Minister - Minister of Interior and



testify against the perpetrators of the crimes mentioned above. The regulations in force enable the legalisation of the aliens' stay for the time of the proceedings.

The report from the monitoring of selected deportation detention facilities and the Guarded Detention Centre in Lesznowola shows that the officers employed there were not properly trained and were unable to identify the victims of human trafficking<sup>23</sup>.

*Positive developments*

The appointment of the inter-departmental Team for Combating and Preventing Human Trafficking.

The elaboration of guidelines by the Ministry of Justice for prosecutors handling cases of human trafficking.

*Reasons for concern*

Lack of appropriate training for Border Guard and police officers, which would prepare them to identify the victims of human trafficking among the aliens being held at deportation arrests and the detention centre.

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Administration of 12 February 2004, No. RPO/360481/00/X

<sup>23</sup> A Report: The Rights of Foreigners Being Held at Deportation Arrests and the Detention Centre, Helsinki Foundation for Human Rights, Warsaw, p. 97

## CHAPTER II - FREEDOMS

### Article 6. The right to liberty and security

#### *International case law and concluding observations of international organs*

In the period between 1 January and 15 December 2004 the European Court of Human Rights (ECHR) identified violations of Article 5 para. 1 of the Convention<sup>24</sup> in three cases, violations of Article 5 para. 3<sup>25</sup> in six cases, and Article 5 para. 4 of the Convention<sup>26</sup> in three other cases.

In the case of *G.K. v. Poland* the ECHR adjudged a violation of Article 5 para. 1, 3 and 4 on account of detaining the applicant for 24 hours without legal grounds, long periods of pre-trial detention lasting up to three years, as well as the lack of possibility to file a complaint against the decision on the pre-trial detention<sup>27</sup>. In another case the ECHR decided that detention was not justified during the period of pre-trial proceedings, therefore there was a violation of Article 5 para. 3 of the Convention<sup>28</sup>.

The ECHR also considered the case of a prisoner ill with Marfan syndrome, who died during the proceedings. The ECHR decided that the detention made by the public prosecutor's office and not the court constituted a violation of Article 5 para. 3 of the Convention. The ECHR also stated a violation of Article 5 para. 4 of the Convention, because neither the defendant nor his attorney had the opportunity to participate in the session of the court that considered the complaint against the pre-trial detention<sup>29</sup>.

All these cases concern a legal situation which no longer exists and events dating from several years ago.

In its concluding observations the HRC welcomed the changes in the legislation in 1997 designed to reduce pre-trial detention, but expressed its concerns about the fact that the number of individuals in pre-trial detention remains high<sup>30</sup>. The HRC also noted that the duration of alternative military service is 18 months, whereas in the case of military service - only 12 months<sup>31</sup>.

<sup>24</sup> Eur.Ct. H.R. *D.P. v. Poland* of 20 January 2004, 34221/96; Eur.Ct. H.R. *G.K. v Poland* of 20 January 2004, appl. No. 38816/97; Eur.Ct. H.R. *Ciszewski v. Poland* of 13 July 2004, appl. No. 38668/97

<sup>25</sup> Eur.Ct. H.R. *D.P. v. Poland* of 20 January 2004, 34221/96; Eur.Ct. H.R. *G.K. v Poland* of 20 January 2004, appl. No. 38816/97; Eur.Ct. H.R. *J.G. v. Poland* of 6 April 2004, appl. No. 36258/97; Eur.Ct. H.R. *M.B. v. Poland* of 27 April 2004, appl. No. 34091/96; Eur.Ct. H.R. *Wesolowski v. Poland* of 22 June 2004, appl. No. 29687/96; Eur.Ct. H.R. *Paszkowski v. Poland* of 28 October 2004, appl. No. 42643/98

<sup>26</sup> Eur.Ct. H.R. *G.K. v Poland* of 20 January 2004, appl. No. 38816/97; Eur.Ct. H.R. *M.B. v. Poland* of 27 April 2004, appl. No. 34091/96; Eur.Ct. H.R. *Wesolowski v. Poland* of 22 June 2004, appl. No. 29687/96

<sup>27</sup> Eur.Ct. H.R. *G.K. v. Poland* of 20 January 2004, appl. No. 38816/97

<sup>28</sup> Eur.Ct. H.R. *J.G. v. Poland* of 6 April 2004, appl. No. 36258/97

<sup>29</sup> Eur.Ct. H.R. *M.B. v. Poland* of 27 April 2004, appl. No. 34091/96

<sup>30</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 13

<sup>31</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 15

*National legislation, regulation and case law*

On 12 March 2004 the Sejm passed an amendment to the penal code, which tightened the penalties for organised crime, abductions and organising illegal border crossings. The definition of crime of a terrorist nature was introduced in the Act in connection with Poland's commitments to the framework decision of the Council of the European Union of 13 June 2002 on the combating of terrorism (2002/475/JHA)<sup>32</sup>.

A Regulation of the Council of Ministers of 23 March 2004, concerning the entities in which the punishment of imprisonment and community work is carried out, came into effect on 22 April 2004. It imposes the obligation of co-operation on the courts, court probation officers, local government organs and other institutions and organisations in the course of executing the punishment of imprisonment and community work<sup>33</sup>.

In the regulation of 9 February 2004 on the detailed principles of employing convicts, the Minister of Justice described the principles of the paid and unpaid employment of convicts and their wages, and lowered the minimal hourly basic pay rate to half of the minimal wage for employment. Such a solution may encourage employers to employ prisoners.

*Practice of national authorities*

The imprisonment of an individual, who avoids paying alimony, is considered ineffective and costly and leads to the overcrowding of prisons. Prisoners are not offered the opportunity to take up work because employers do not wish to hire them. As a result of the lack of employment these prisoners are financially dependent on the state.

Only approximately 15,000 out of a total of approximately 60,000 prisoners have employment. However, only around 10,000 of them receive payment for their work from employing companies.

In his General Approach to the Minister of Justice, the Ombudsman pointed out numerous irregularities in the execution of the punishment of imprisonment and community work in exchange for a non-executable fine<sup>34</sup>, especially long periods of waiting for this kind of employment, the convicts' reluctance to report for work, a lack of initiative on the part of courts in searching for jobs for convicts, as well as a lack of supervision and appropriate documentation of the convicts' work. The Ombudsman also addressed such issues as the lack of actions against the convicts' evasion of punishment and obligations that were imposed upon them, an insufficient amount of workplaces, less than satisfactory access to social welfare, sobering up treatment and therapy. The Ombudsman emphasised the need for greater involvement of the state and local government institutions in the process of executing non-prison forms of punishment, and increased participation of the public factor in this process. Also, the number of full-time professional probation officers is not adequate to the extent and character of these tasks<sup>35</sup>.

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<sup>32</sup> Ustawa z 16 kwietnia 2004 r. o nowelizacji ustawy Kodeks Karny i niektórych innych ustaw (Dz.U. z 2004 r. nr 93, poz. 889) [The Act on the amendment of the Act – The Penal Code and some other Acts of 16 April 2004 (The Official Journal of 2004, No. 93, item 889)]

<sup>33</sup> Rozporządzenie Rady Ministrów z 23 marca 2004 r. w sprawie podmiotów w których jest wykonywana kara pozbawienia wolności oraz praca społecznie użyteczna (Dz.U. z 2004 r. nr 56, poz. 544) [The regulation of the Council of Ministers on the institutions, in which the punishment of imprisonment and community work is carried out of 23 March 2004 (The Official Journal of 2004, No. 56, item 544)]

<sup>34</sup> General Approach of the Ombudsman to the Minister of Justice - General Prosecutor of 9 December 2003, No. RPO/437520/03/VII

<sup>35</sup> General Approach of the Ombudsman to the Minister of Justice - General Prosecutor of 4 February 2004, No. RPO/437520/03/VII

Pre-trial detention

Pre-trial detention is still the most commonly used preventive measure in criminal cases and its duration still remains a serious problem.

As of 30 June 2004, 4,505 persons were detained on the basis of regional courts' decisions, and 1,126 of them had been detained for a period longer than two years. In cases of pre-trial detention applied by district courts, the numbers were 8,754 and 228 respectively. Only a very small percentage of the appeals against court decisions concerning the pre-trial detention was allowed and more lenient measures, mainly police supervision, were then used<sup>36</sup>.

The Ombudsman questioned the practice of pre-trial detention and underlined the problem of the duration of this measure in his General Approach to the Minister of Justice – General Prosecutor<sup>37</sup>.

Incapacitation

The internal inspection carried out by the Ministry of Justice at the request of the Ombudsman showed that courts often broke legal procedures in cases of incapacitation by unjustifiably complying with the arguments of the relatives of the person, who was the subject of the incapacitation motion, announcing their decisions without summoning that person to the hearing. Furthermore, many courts interpreted the law in a way that prevented the incapacitated person from submitting an application to review the grounds for continuing the incapacitation.

The Ombudsman received many letters from incapacitated persons who were the subjects of such decisions and were placed in social welfare houses as a result of conflicting family interests<sup>38</sup>. In his letter to the Chairman of the Social Insurance Institution (ZUS) he pointed out the legal regulations that force the family members of mentally disabled people to approach the court with motions concerning their incapacitation as a condition for receiving social pensions<sup>39</sup>.

Sobering up chambers

On 4 February 2004 the Minister of Health issued a regulation on the procedure of bringing, admitting and releasing intoxicated people and the organisation of sobering up chambers and institutions established or appointed by local government units<sup>40</sup>. It concerns the procedure of escorting and admitting to sobering up chambers, police units and other institutions created for this purpose. The regulation introduces an obligation to inform, in writing, the individuals being released of the possibility to file a complaint against the factual grounds and lawfulness of the detention. The regulation also defines the conditions at sobering up chambers and the cost of residing in the facilities.

*Positive developments*

The regulation by the Minister of Health on the procedure of bringing, admitting and releasing intoxicated people and the organisation of sobering up chambers and institutions created for this purpose.

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<sup>36</sup> Data received from the Common Court Department of the Ministry of Justice

<sup>37</sup> General Approach of the Ombudsman to the Minister of Justice - General Prosecutor of 8 April 2004, No. RPO/454434/03/II

<sup>38</sup> The "Gazeta Wyborcza" daily of 6 September 2004, p. 13

<sup>39</sup> General Approach to the Prime Minister of 28 September 2004, No. RPO/414315/02/XI, General Approach to the Minister of Social Policy of 16 June 2004, No. RPO/414315/02/XI

<sup>40</sup> The Official Journal of 2004, No. 20, item 192

*Reasons for concern*

Too frequent use of pre – trial detention in criminal cases;

Excessive duration of pre-trial detention;

Lack of sufficient opportunities of employment for prisoners, including those convicted for evading the payment of alimony;

Frequent violations of procedures by courts in cases of incapacitation.

**Article 7. Respect for private and family life***International case law and concluding observations of international organs*

The HRC, in its concluding observations, reiterated its deep concern about the restrictive abortion law in Poland and the unavailability of abortion in practice even in the cases permitted by law, and the lack of information on the use of the objection clause by medical practitioners.

The HRC also expressed its concerns about the lack of information on the extent of illegal abortions and their consequences for women. The HRC recommended that the Polish authorities should liberalise the legislation and practice on abortion and provide further information on the use of conscientious objections by medical practitioners and the number of illegal abortions that take place in Poland<sup>41</sup>.

In one case the ECHR has found a violation of Article 8 of the Convention due to censorship of the detainee's letter to the organs in Strasbourg<sup>42</sup>.

*National legislation, regulation and case law*

The Ombudsman brought an action before the Constitutional Tribunal (CT) against certain provisions of the Act on tax control concerning powers of tax inspectors as part of the tax enquiry. According to the Ombudsman they violate *inter alia* the constitutional principle of equality and equal treatment of taxpayers before the law (Article 32 of the constitution). and the principle of the protection of private life<sup>43</sup>.

*Practice of national authorities*

The Ombudsman pointed out in his General Approach to the Minister of Justice – General Prosecutor – the violation of the right to privacy of those in detention on remand. This concerned the control of their correspondence with organs and institutions operating on the basis of ratified international treaties on human rights protection, as well as their correspondence with organs of the prosecution, jurisdiction and other state and local government institutions as well as the Ombudsman<sup>44</sup>. The Ombudsman points out that the complaints sent to his office are often read beforehand by institutions and individuals, whose activity the correspondence concerns.

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<sup>41</sup> Concluding Observations of the HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. Para. 8

<sup>42</sup> Eur.Ct. H.R. *G.K. v. Poland* of 20 January 2004, appl. No. 38816/97

<sup>43</sup> The Complaint of the Ombudsman to the CT, case No. K 8/04, <http://www.trybunal.gov.pl>

<sup>44</sup> General Approach to the Minister of Justice - General Prosecutor of 22 January 2004, No. RPO/336897/00/VII, of 17 August 2004 No. RPO/480974/04/VII

### Voluntary termination of pregnancy

There have been cases of refusals to carry out an abortion under circumstances when the procedure is permitted, according to the provisions of the Act of 7 January 1993 on family planning, the protection of the human foetus and conditions of permissibility of abortion, i.e. in situations of justified suspicion that the pregnancy is the result of a crime<sup>45</sup>.

The Supreme Court decided that in cases when an abortion is clearly permissible under the Act, the woman has a right to have this procedure. In the case of an illegal refusal she is entitled to financial compensation for the resulting damages (this concerns every financial loss)<sup>46</sup>.

#### *Reasons for concern*

Work on the preparation and amendment of laws (the Telecommunications Law, Protection of Classified Information Law) in a manner that would lead to the restriction of the right to privacy;

Too restrictive abortion law according to the HRC;

Cases of refusals to carry out an abortion under circumstances when the procedure is permitted, according to the provisions of the Act of 7 January 1993.

## **Article 8. Protection of personal data**

### *National legislation, regulation and case law*

In one of its rulings, the Voivodship Administrative Court in Warsaw (WSA) stated that the system “Poltax”, used in tax settlements, contains loopholes which violate the regulations of the Act on the Protection of Personal Data, because it makes it impossible to register information about transmitting the taxpayers’ data “outside”<sup>47</sup>. In another ruling, concerning the so-called sale of debt, the WSA in Warsaw ruled that transferring the consumer’s data to a vindication company requires his/her consent given by means of an individual agreement<sup>48</sup>.

#### *Practice of national authorities*

According to the information from the General Inspector for Personal Data Protection (GIODO), 1,901 questions concerning the interpretation of laws, 749 complaints and 239 legal acts to be opinionated were addressed to the GIODO between January and October 2004. The GIODO lodged 59 notifications of criminal offences<sup>49</sup>.

In the complaints directed to the Bureau of the GIODO<sup>50</sup> in 2004 the most frequently raised issues were related to the illegal processing of personal data by marketing companies, companies not fulfilling obligations of disclosing the source of personal data, telecommunications companies disclosing information about restricted telephone numbers, banks passing out-of-date information about their clients to the Bureau of Credit Information (BIK), processing of personal data by banks for marketing purposes without obtaining consent from the clients, passing of client information by administrators of personal data to

<sup>45</sup> The Official Journal of 2001, No. 154, item 1792

<sup>46</sup> Judgment of the Supreme Court of 21 November 2003, No. V CK 16/03

<sup>47</sup> Daily “Rzeczpospolita” of 8 April 2004, C2

<sup>48</sup>A Judgment of the Regional Administrative Court of 7 April 2004, No. 1603/03

<sup>49</sup> GIODO Statistics, <http://www.giodo.gov.pl>

<sup>50</sup> Letter from GIODO of 7 December 2004 No. GI-DP-024/2163/04/2464

debt collection companies, and illegal publishing of personal data by housing cooperatives and housing boards. After investigating these cases, the GIODO found many violations of the Act on personal data protection<sup>51</sup>.

The GIODO approached the chairman of the Social Insurance Institution (ZUS) with the case, where a person deprived of the right to pension benefits was denied information concerning the adjudicating doctor's specialisation. The GIODO decided that the ZUS is a state organisational unit and is obliged to inform about the specialisation of such a doctor<sup>52</sup>.

The Ombudsman approached the Minister of Interior and Administration with the case concerning this organ's practice of refusing to make personal data available. According to the Ombudsman the Ministry of Interior and Administration violates the principles of administrative proceedings, because it doesn't deliver administrative decisions in such cases<sup>53</sup>.

In his General Approach to the GIODO the Ombudsman pointed out the lack of regulations indicating the form of an administrator's refusal to grant access to data. According to the Ombudsman it would be advisable to define whether a refusal should take the form of an administrative decision or any other document containing justification of the legal and actual grounds for the refusal. In the opinion of the Ombudsman the proper definition of the refusal's form will contribute to the limitation of arbitrariness of decisions, and therefore strengthen the effectiveness of exercising the right to access to personal data<sup>54</sup>.

#### *Reasons for concern*

Lack of regulations indicating the form of the administrator's refusal to grant access to personal data.

### **Article 9. The right to marry and the right to found a family**

#### *National legislation, regulation and case law*

When making the ruling on the conditions of receiving permission to settle in Poland, the Voivodship Administrative Court in Warsaw (WSA) stated that not only Polish citizens, but also persons of Polish origin can seek this right, as long as they prove the existence of indissoluble family ties in the Republic of Poland<sup>55</sup>.

#### *Practice of national authorities*

The Polish Registry Offices still refuse to accept declarations concerning the intention to marry if they are filed by aliens staying on the territory of Poland without legal documents, even though they may have fulfilled all of the requirements of the Registry Office Records Act of 29 September 1986<sup>56</sup>.

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<sup>51</sup> Ustawa z 29 sierpnia 1997 r. o ochronie danych osobowych (Dz.U. z 2002 nr 101, poz. 926) [The Act on protection of personal data of 29 August 1997 (The Official Journal of 2002, No. 101, item. 926 as amended)]

<sup>52</sup> Daily "Rzeczpospolita" of 1 April 2004, p. C1

<sup>53</sup> General Approach to the Minister of Interior and Administration of 23 March 2004, No. RPO/458218/03/X

<sup>54</sup> General Approach to the GIODO of 17 August 2004, No. RPO/479964/04/X

<sup>55</sup> A Judgment of the Regional Administrative Court of 10 September 2004, No. VSA/Wa 888/04

<sup>56</sup> The Official Journal of 1986, No. 36, item 180

*Positive developments*

Judgment of the WSA, which allows not only Polish citizens, but also persons of Polish origin, to seek permission to settle in Poland, as long as they prove the existence of indissoluble family ties in the Republic of Poland.

*Reasons for concern*

The continuation of the practice of refusing to accept declarations concerning the marriages of aliens staying in Poland illegally.

**Article 10. Freedom of thought, conscience and religion***International case law and concluding observations of international organs*

The HRC expressed its concerns about incidents of desecration of Catholic and Jewish cemeteries and that the acts of anti-Semitism have not always been properly investigated and the perpetrators punished. The HRC has stressed that the authorities should intensify their efforts to combat and punish all such incidents and the law enforcement and judiciary officials should be properly trained and instructed on how to address such complaints<sup>57</sup>.

*Practice of national authorities*

The Act of 17 May 1989 on guarantees of freedom of conscience and denomination ensures the opportunity to benefit from freedom of conscience and denomination i.e. through the participation, in accordance with the principles of the given denomination, in religious activities and ceremonies, as well as the fulfilment of religious duties and celebrating religious holidays. This right, as well as the right to possess and use items necessary to perform a religious cult or practice, is also available to people performing military service, staying in health and social care facilities, children and youth during holidays and camps organised by state institutions, people staying at penal, correctional and educational institutions, as well as detention facilities, social adaptation centres and youth shelters.

Indeed, the remaining problem concerns the right to religious service for minority members performing military service, and results from the small number of chaplains of other religious denominations employed by the Ministry of National Defence (MON). This mainly concerns chaplains of the Greek-Catholic denomination. The case was a subject of an inquiry by the Ombudsman, but the MON refused to increase the number of Greek-Catholic chaplains because the fulfilment of this demand could cause an increase in requests from representatives of other denominations<sup>58</sup>.

Churches and religious associations have the right to carry out religious courses, but most schools do not have organised classes for pupils, who do not attend religion education conducted by Roman Catholic teachers. The survey carried out in 2002 by the Helsinki Foundation for Human Rights showed 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.

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<sup>57</sup> Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 19

<sup>58</sup> Sławomir Łodziński, The problem of discriminating persons belonging to national and ethnic minorities in Poland, The Chancellery of the Sejm, The Office of Studies and Expertise, The Department of Economic and Social Analysis, December 2003, Report no. 219, p. 28



*Reasons for concern*

Limiting the right to religious services for minority members performing military service on account of the small number of chaplains of other religious denominations than Roman Catholic employed by the MON – this mainly concerns chaplains of Greek-Catholic denomination;

Not enough ethics classes provided to the pupils at schools of different levels.

**Article 11. Freedom of expression and information***National legislation, regulation and case law*

The frequent initiation of criminal defamation cases against journalists *ex officio* exerts negative influence on the freedom of the press.

The CT delivered a judgment concerning the conformity with the constitution of press law regulations, which describe the principles of criminal responsibility for a refusal to publish a rectification. The CT decided that they were inconsistent with the constitution, because they were not precise enough.

As a result of the ruling of the Supreme Court which, quoting Article 10 of the ECHR, stated that freedom of expression includes not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population, the District Court in Biskupiec acquitted the editor-in-chief of the newspaper "Panorama Mazurska" of the charge of defamation resulting from the publication of articles, in which he called the District Governor (starosta) a "one-armed bandit". The District Court decided that the articles were satirical in nature, and journalists' freedom also includes the possibility to use provocation or exaggeration<sup>59</sup>.

The Ombudsman filed for cassation to the Supreme Court concerning the conviction of the author of a publication in the local newspaper. The Ombudsman states that neither the prosecutor nor the court can demand the disclosure of the data, which would enable the identification of the author's informers, as well as the letters to the editor, if they had reserved the right to anonymity. This should in practice strengthen the freedom of press and public media<sup>60</sup>.

Pressure on local press, especially by local government authorities, constitutes a serious problem. Journalists who write unfavourably about prominent individuals in particular communities are often blackmailed. The most common means of revenge is the withdrawal of advertisements from newspapers by local authorities and entrepreneurs associated with local politicians. Newspapers, whose editors refuse to make concessions, encounter great difficulties and may even be forced into bankruptcy<sup>61</sup>.

*Practice of national authorities*

Frequent initiations of criminal proceedings against journalists in cases of defamation.

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<sup>59</sup> Daily "Rzeczpospolita" of 16 September 2004, p. C1

<sup>60</sup> Daily "Rzeczpospolita" of 7 October 2004, p. C1

<sup>61</sup> Daily "Rzeczpospolita" of 3 November 2004, p. A1

*Positive developments*

The Supreme Court's judgment confirming that freedom of expression includes not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb

*Reasons for concern*

Practice of prosecutors initiating criminal proceedings against journalists in cases of defamation;

Pressure on local press, especially by local government authorities.

**Article 12. Freedom of assembly and association***International case law and concluding observations of international organs*

The ECHR declared inadmissible as manifestly ill founded the complaint based on Article 11 of the Convention in the case of *P. and Others v. Poland*<sup>62</sup> concerning the refusal to register the Association of Polish Victims of Bolshevism and Zionism, which was supposed to bring together Poles persecuted by the Jewish minority. The ECHR based its decision on Article 17 of the Convention.

*National legislation, regulation and case law*

The peace march held during the demonstration of gays and lesbians, which was part of the gay and lesbian culture festival which took place on 6-9 May 2004 in Cracow, was disrupted and the demonstrators came under attack from the Pan-Polish Youth (*Młodzież Wszechpolska*) and the youth movement of the Polish Families League (*Liga Polskich Rodzin*).

The President of Warsaw refused to grant permission to hold the annual gay and lesbian parade planned for 11 June 2004. The reason for this was the planned counter parade of the same youth groups. The refusal was upheld despite the changes made to the parade's course<sup>63</sup>.

*Reasons for concern*

The refusal to guarantee the right of a gay and lesbian organisations to a peaceful assembly.

**Article 13. Freedom of the arts and sciences***National legislation, regulation and case law*

On 22 April 2004, the Regional Court in Gdansk reversed the judgment of the lower instance court, which condemned and sentenced the author of the "Passion" installation 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) to six months' imprisonment for offending religious feelings, and ordered the case to be reconsidered<sup>64</sup>.

<sup>62</sup> Eur.Ct. H.R. *P. and Others v. Poland* of 2 September 2004, appl. No. 42264/98

<sup>63</sup> Daily "Rzeczpospolita" of 25 May 2004 p. A11

<sup>64</sup> Polish Press Agency, the *Gazeta Wyborcza* daily of 29 April 2004, available on the website

## Article 14. The right to education

### *National legislation, regulation and case law*

The Act of 28 May 2004 on the amendment of the Act on higher education, the Act on higher vocational schools, the Act on student loans and credits and the amendment of some other Acts<sup>65</sup>, providing the opportunity for all students, regardless of form of studies and school type, to apply for financial assistance, has come into force on 17 July 2004.

The Minister of National Education and Sport issued a regulation on pedagogical supervision thereby reinstating the institution of inspector for the observance of students' rights and children's rights, which should improve the situation in schools in this field<sup>66</sup>.

Young people from rural areas and those threatened by marginalisation can benefit from structural funds that are part of the Integrated Programme for Operational Regional Development 2004-2006<sup>67</sup>. However, in order to receive the scholarship, candidates are required to present a certificate showing permanent registration within the territory of a district (powiat) included in the assistance programme. This excludes young people who fulfil all the other criteria, but are not in permanent residence in these districts, meaning mainly those children whose parents neglected the obligation of registration, and foster-children from educational facilities and foster families. With regards to this, the Ombudsman approached the Minister of the Economy, Labour and Social Policy with an observation that this regulation is discriminatory in nature<sup>68</sup>.

### *Practice of national authorities*

There are periodically cases where children of aliens whose stay in Poland is not legalised, are refused admission to schools. This constitutes a violation of Article 28 of the Convention on the Right of the Child and Article 94a of the Act on the educational system. During the 2003/2004 school year, the Director of the Warsaw Magistrate Office of Education sent a letter to school directors instructing them not to admit the children of foreigners whose stay is not legalised. The instruction was withdrawn after the intervention of the Helsinki Foundation for Human Rights. However, this practice is still in effect<sup>69</sup>.

According to the Ombudsman, it is necessary to limit the number of special education centres in favour of establishing specialised rehabilitation and revalidation centres providing professional assistance for handicapped children. Research conducted by the Ombudsman has shown that the cost of maintenance of special centres is very high and there are no more funds available for professional rehabilitation<sup>70</sup>. The Ombudsman underlined that a considerable

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<http://wiadomosci.gazeta.pl/wiadomosci/2029020. . 2048730>

<sup>65</sup> The Official Journal of 2004, No. 152, item 1598

<sup>66</sup> Rozporządzenie Ministra Edukacji Narodowej i Sportu z 23 kwietnia 2004 r. w sprawie szczegółowych zasad sprawowania nadzoru pedagogicznego, wykazu stanowisk wymagających kwalifikacji pedagogicznych, kwalifikacji niezbędnych do sprawowania nadzoru pedagogicznego, a także kwalifikacji osób, którym można zlecać prowadzenie badań i opracowywanie ekspertyz. (Dz.U. z 2004r. Nr 89, poz. 845) [Regulation detailed rules of pedagogical supervision, register of positions requiring pedagogical qualifications, qualifications necessary for executing pedagogical supervision and qualifications of persons to whom conducting researches and making up expertise may be commissioned (The Official Journal of 2004, No. 89, item 845)]

<sup>67</sup> The Official Journal of 2004, No. 166, item 1745

<sup>68</sup> General Approach to the Minister of Economy and Labour of 3 September 2004, No. RPO/467500/04/

<sup>69</sup> Information obtained in Helsinki Foundation for Human Rights

<sup>70</sup> General Approach to the Minister of National Education and Sport of 4 May 2004, No. RPO/470256/04/XI

number of children should study at normal schools in their place of residence, or at integrative schools. Placing children in special education centres, away from home, should be considered as a last resort. On a national scale, around 30,000 children, who attend special schools, live in dormitories<sup>71</sup>. The local authorities often refuse to organise integrative classes or to finance transport to such classes from other towns. Yet the Minister of National Education and Sport did not agree with the Ombudsman's comments<sup>72</sup>.

The Ombudsman also pointed out to the Minister of National Education and Sport violations of the right to education of children studying under an individual system<sup>73</sup> by means of arbitrary establishment of the minimal limit of hours of teaching regardless of the ruling of the psychological-pedagogical guidance service, as well as to the Minister of Social Policy concerning the lack of funds for local government authorities to organise occupational therapy workshops, which are often the only form of public activity for the handicapped, who completed special education<sup>74</sup>.

#### *Positive developments*

Reinstating the institution of inspector for the observance of students' rights and children's rights;

Work on the Act on the educational system changing the principles of granting scholarships and improving the system of assistance for students.

#### *Reasons for concern*

The continuing practice of refusing to admit to schools the children of aliens, whose stay within the territory of Poland is not legalised;

Irregularities in the organisation and activity of special educational centres;

The violation of the rights of children who study under individual systems, through an arbitrary establishment of the minimal limit of hours of teaching, regardless of the ruling made by the psychological-pedagogical guidance service.

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

#### *National legislation, regulation and case law*

In 2004, two legislative Acts indicating a new approach of the State to the problem of unemployment came into force. Their aim is mainly to promote the creation of new jobs by entrepreneurs. They are the Act on the promotion of employment and on labour market institutions of 20 April 2004<sup>75</sup> and the Act on pre-retirement benefits of 30 April 2004<sup>76</sup>.

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<sup>71</sup> General Approach to the Minister of National Education and Sport of 30 June 2004, No. RPO/470256/04/XI

<sup>72</sup> The reply of 4 August 2004

<sup>73</sup> General Approach to the Minister of National Education and Sport of 27 August 2004, No. RPO/472266/04/XI

<sup>74</sup> General Approach to the Minister of Social Policy of 23 September 2004, No. RPO/485520/04/XI

<sup>75</sup> Ustawa z 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy (Dz.U. z 2004 nr 99, poz. 1001) [The Act on the promotion of employment and on labour market institutions of 20 April 2004 (The Official Journal of 2004, No. 99, item 1001)]

<sup>76</sup> Ustawa z 30 kwietnia 2004 r. o świadczeniach przedemerytalnych (Dz.U. z 2004 nr 120, poz. 1252) Act on pre-retirement benefits of 30 April 2004 (The Official Journal of 2004, No. 120, item 1252)

The majority of provisions of the Act on the promotion of employment and on labour market institutions came into effect on 1 May 2004. Some of the objectives of the Act are to direct the employment offices to the 'activation' of the unemployed, to make the unemployed independently search for jobs and obtain new sources of income, as well as to encourage employers to create new jobs<sup>77</sup>.

Also, on 1 June, most of the provisions of the Act on pre-retirement benefits came into force. The Act regulates the right to these benefits and the rules that govern granting and disbursing them. The Act also introduces protection from dismissal in the period of four years before reaching retirement age.

On 1 January 2004 the Act on the employment of temporary workers took effect<sup>78</sup>. Employers assess the regulations as rigid, costly and not taking into account civil law contracts. The advantage of the Act for employers is that they can hire temporary workers without asking for the consent of the trade unions in the company; they simply have to give the unions a prior notice. The Act is however criticised by the organisations of employers. The main problem lies in the regulations that make it illegal for Temporary Employment Agencies to delegate the same temporary worker for longer than 12 months to the same employer. This can leave up to 100,000 such workers without jobs<sup>79</sup>.

The regulations concerning the employment of some categories of foreigners without the necessity of obtaining a permit have been changed. This concerns in particular, under certain conditions, foreigners acting as members of management boards of legal entities conducting economic activity, spouses of Polish citizens and teachers of foreign languages, teaching their mother tongues<sup>80</sup>.

#### *Practice of national authorities*

The number of foreigners legally employed in Poland is very low. Data obtained from the Ministry of Economy, Labour and Social Policy indicates that 18,841 work permits were issued in 2003. However, the total number of foreigners working in Poland is much higher. It is estimated that the number of such persons, working without the required documents, is approximately 100,000 – 150,000<sup>81</sup>. These foreigners mainly come from the territory of the former Soviet Union and undertake seasonal work.

#### *Positive developments*

Entering into force of the legislative Acts, which are the sign of a new approach of the State to the problem of unemployment.

#### *Reasons for concern*

High level of unemployment in Poland, presently at 18,7 %.

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<sup>77</sup> Articles 51-60 of the Act

<sup>78</sup> Ustawa z 9 lipca 2003 o zatrudnianiu pracowników tymczasowych (Dz.U. z 2003 r. nr 166, poz. 1608) [Act on hiring temporary employees of 9 July 2003, (The Official Journal of 2003, No. 166, item 1608)]

<sup>79</sup> Daily "Rzeczpospolita" of 15 October 2004 p. C2

<sup>80</sup> Rozporządzenie Ministra Gospodarki, Pracy i Polityki Społecznej z 9 lutego 2004 r. zmieniające rozporządzenie w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę (Dz.U. z 2004 nr 27, poz. 238) [The regulation amending the regulation concerning the employment of some categories of foreigners without the necessity of obtaining a permit of 9 February 2004 (The Official Journal of 2004, No. 27, item 238)]

<sup>81</sup> Golinowska S. (ed.) Demand for the work of foreigners, Warsaw 2004: Institute of Labour and Social Studies, p. 137.

## **Article 16. Freedom to conduct business**

### *National legislation, regulation and case law*

The Sejm of the Republic of Poland passed the Act on Freedom of Economic Activity, which replaced the Law on Economic Activity. The new Act widens the extent of economic freedoms and facilitates both starting, as well as conducting economic activity. Yet the Act Amending the Act on Freedom of Economic Activity has been criticised by business organisations for increasing the possibility of conducting inspections and audits in companies<sup>82</sup>.

### *Practice of national authorities*

The World Bank's "Doing Business in 2005" report gives a positive assessment of the law and its application in the domain of economic activity. In the report, Poland was recognised as one of ten countries that introduced reforms facilitating economic activity<sup>83</sup>.

### *Positive developments*

The World Bank's positive assessment of the legal provisions and their application in the domain of economic activity.

## **Article 17. The right to property**

### *International case law and concluding observations of international organs*

The ECHR has found a violation of Article 1 of Protocol No. 1 to the Convention due to refusal to order eviction of a tenant, notwithstanding the landlord's offer of alternative premises<sup>84</sup>.

### *National legislation, regulation and case law*

Until now re-privatisation laws have not yet been passed. Persons deprived of property can file for compensation, if the nationalisation took place with a flagrant infringement of the law in force.

In its judgment of 31 March 2004, the CT declared unconstitutional the provision requiring a person buying a housing cooperative member's right to their own apartment to become a member of the cooperative. According to the CT, the provision violates the constitutional right to property<sup>85</sup>.

### *Practice of national authorities*

Creditors have big problems with debt collection. They manage to recover about 60% of debts. One of the reasons is the ineffectiveness of debt collectors<sup>86</sup>.

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

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<sup>82</sup> Daily "Rzeczpospolita" of 24 June 2004, p. C1

<sup>83</sup> The World Bank, Report "Doing business in 2005", Removing obstacles to growth

<sup>84</sup> Eur.Ct H.R. *Schrimer v. Poland* of 21 September 2004, appl. No. 68880/01

<sup>85</sup> Daily "Rzeczpospolita" of 3-4 April 2004, p. C3

<sup>86</sup> Daily "Rzeczpospolita" of 28 June 2004, p. C4

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

*International case law and concluding observations of international organs*

On 22 June 2004 the ECHR delivered a judgment in the case of Broniowski v. Poland regarding the so-called “properties beyond the Bug River” (“mienie zabużańskie”). The ECHR held that failure of the government to allow realisation of the right to an adequate compensation for the property left after World War II beyond the Bug River is a violation of Article 1 of Protocol No. 1 (protection of property) to the Convention. The ECHR stated that Poland has not created an effective mechanism for securing the implementation of the right to receive an equivalent redress in lieu of the “property beyond the Bug River”<sup>87</sup>.

*National legislation, regulation and case law*

The Polish courts have not yet worked out a uniform legal approach to cases concerning “the properties beyond the Bug River”. In one of the cases the Supreme Court decided that a person who cannot get a redress due to a lack of money in the municipal or district budget can claim damages as long as that person can prove that he or she incurred damage as a result of negligence by public officials<sup>88</sup>.

After the ECHR ruling in the Broniowski case, the first national courts' judgment that was favourable for the Bug River re-settlers was pronounced on 6 October 2004. The Supreme Court decided that the State owes the re-settlers compensation for 60 years of waiting in vain for reimbursement for the properties left in the Borderlands. However it did not indicate the criteria for granting the redress<sup>89</sup>.

167 cases concerning the “properties beyond the Bug River” pending before the ECHR have been suspended until the Polish authorities find an adequate solution that could be regarded as an execution of the judgment in the Broniowski case.

*Positive developments*

The Supreme Court judgment stating that a person who cannot, due to a lack of money in the municipal or district budget, get compensation for the property left beyond the Bug River, can claim compensation after proving that he/she incurred damage as a result of negligence by public officials.

The Supreme Court judgment decreeing that the State owes the re-settlers from “the territories beyond the Bug River” compensation for 60 years of waiting in vain for reimbursement for properties left in the Borderlands.

*Reasons for concern*

Failure to adopt a “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.

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<sup>87</sup> Eur.Ct. H.R. *Broniowski v. Poland* of 22 June 2004, appl. No. 31443/96

<sup>88</sup> Judgment of the Supreme Court of 16 January 2004, No. III CK 266/03

<sup>89</sup> Judgment of the Supreme Court of 6 October 2004, No. I CK 447/03

**Article 18. The right to asylum***National legislation, regulation and case law*

On 3 November 2004 the Sejm received a draft bill amending the Act on Aliens and the Act on Granting Protection to Aliens on the Territory of Poland. The purpose of the bill is to change Polish law so that it conforms to EU regulations and to introduce changes in the rules of granting aliens permits for a tolerated stay.

*Practice of national authorities*

Very few aliens applying for refugee status receive positive decisions. In Poland this problem concerns mainly Russian Federation citizens of Chechen nationality. The majority of them (95%) are not granted refugee status, although they meet the requirements of the Geneva Convention and New York Protocol, in that they have reasonable grounds to fear persecution because of their nationality and political beliefs.

Aliens applying for refugee status, during their detention prior to deportation or stay in a guarded centre, do not have necessary information about their legal situation and possibilities of turning for help to non-governmental organisations. Another problem with the right to seek asylum is that refusal decisions given to aliens in detention for the purpose of expulsion or in a guarded centre are given solely in the Polish language. It significantly restricts the possibility of appealing against negative decisions<sup>90</sup>.

*Reasons for concern*

Lack of comprehensible information for aliens staying in a deportation detention facility or a guarded centre;

Issuing to such aliens decisions of refusal to grant refugee status solely in the Polish language.

**Article 19. Protection in the event of removal, expulsion or extradition***National legislation, regulation and case law*

In the Act of 23 July 2004 the Sejm of the Republic of Poland permitted the President of the Republic of Poland to ratify the Convention on a Simplified Extradition Procedure between the Member States of the European Union (drawn up in Brussels on 10 March 1995)<sup>91</sup>. At the same time, the Sejm permitted the ratification by the President of the Republic of Poland of the Convention on Extradition between the Member Countries of the European Union (drawn up in Dublin on 27 September 1996).

*Practice of national authorities*

Polish authorities commonly violate the regulations on the placing and stay of aliens in a guarded centre and deportation detention facilities. The rules of stay in a guarded centre for aliens are more favourable than in deportation detention facilities. Article 102, item 2 of the Act on Aliens and Article 41 of the Act on Granting Protection to Aliens on the territory of Poland provide that in principle an alien should be placed in a guarded centre. The arrest for

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<sup>90</sup> Report, Rights of aliens placed in arrests for the purpose of expulsion and in a guarded centre, Helsinki Foundation for Human Rights, Warszawa 2004, pages 93-98

<sup>91</sup> The Official Journal of 2004, No. 191, item 1955



the purpose of expulsion can only be used in the cases precisely defined in the Act. As there is only one guarded centre for about 200 aliens in Poland, and the number of detained aliens is much higher, the courts routinely place aliens in deportation detention facilities, thus violating the above-mentioned provisions<sup>92</sup>.

Polish law does not provide for the possibility of issuing a residence permit to an alien being in a relationship with a Polish citizen with whom he/she did not enter into marriage. These aliens, staying in Poland illegally, receive an expulsion decision. Such practice often raises doubts in terms of Article 8 of the Convention.

Serious doubts are raised by the cases of repeated placing in a deportation detention facility of aliens who stayed for a year in such an institution and were subsequently released due to the impossibility of removal from the territory of Poland. They often do not obtain permission for a tolerated stay, although the law in force provides for it<sup>93</sup>. Instead, they are placed again in a detention facility or a guarded centre.

*Reasons for concern*

Lack of legal provisions allowing for legalisation and protection from expulsion of aliens who are in family relationships with Polish citizens;

Cases of repeated placing of aliens in deportation detention facilities;

Lack of sufficient number of places in guarded centres.

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<sup>92</sup> Comments of the Helsinki Foundation for Human Rights to the Fifth periodical report of the Republic of Poland on the realization of international Covenant on Civil and Political Rights for the period of 1 January 1995 to 1 October 2003, Sept. 2004

<sup>93</sup> Artykuł 97 p. 2 Ustawy z 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Dz.U. z 2003, nr 128, poz. 1176) [Article 97 p. 2 of the Act on granting protection to aliens within the territory of the Republic of Poland of 13 June 2003 (The Official Journal of 2003, No. 128, item 1176)]

### CHAPTER III - EQUALITY

#### Article 20. Equality before the law

##### *National legislation, regulation and case law*

In the Act of 23 July 2004 the Sejm permitted the President to ratify the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (drawn up in Brussels on 26 May 1997).<sup>94</sup>

##### *Practice of national authorities*

The survey published in June 2004 by the Public Opinion Research Centre (CBOS) dealing with the perception of corruption in Poland shows that 95% of Poles think about corruption as a serious problem. 77% of the respondents are convinced that many public officials profit illegally from the positions they hold. 71% of those surveyed think that in Poland one can influence the passage of a bill or a law change through corruption.

The area most vulnerable to corruption is public procurement, and most corruption is associated with the construction industry.

##### *Positive developments*

The provisions of the Penal Code amended in 2003 that for the first time allow punishment for people giving bribes.

##### *Reasons for concern*

Perceived a high level of corruption among public officials.

#### Article 21. Non-discrimination

##### *International case law and concluding observations of international organs*

The HRC expressed its concerns that the right of sexual minorities to not to be discriminated against is not fully recognised and that discriminatory acts and attitudes against persons on the grounds of sexual orientation are not adequately investigated and punished. The HRC recommended that Polish authorities should provide appropriate training to the law enforcement officials and judiciary to sensitise them to the rights of these minorities. According to the HRC, discrimination on the grounds of sexual orientation should be explicitly prohibited in Polish law<sup>95</sup>.

The HRC also expressed its concerns about the lack of general non-discrimination provisions covering all appropriate grounds and recommended that the Polish authorities extend the scope of non-discrimination law to areas other than employment<sup>96</sup>.

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<sup>94</sup> The Official Journal of 2004, No. 194, item 1981

<sup>95</sup> Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 18

<sup>96</sup> Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 16

*National legislation, regulation and case law*

The implementation of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is not satisfactory. In 2003 only the regulations concerning the ban on discrimination in employment<sup>97</sup> were entered into Polish law. To date, the General Inspector for Discrimination Affairs has not yet been appointed. The Law on the General Inspector for Discrimination Affairs has been prepared. However, according to unofficial information, this institution will not be established in the near future because of a lack of funds in the State budget<sup>98</sup>. Until the establishment of this institution, the Government Plenipotentiary for the Equal Status of Women and Men performs some of his/her tasks which include, *inter alia*, the preparation of the activity of the office for counteracting discrimination resulting from race, ethnic descent, religion and sexual orientation, the preparation of draft bills, as well as the preparation of the activity of the General Inspector's office.

In Poland there are difficulties with obtaining information about discrimination in employment due to nationality or ethnic origin. There is no institution or organisation that would study the extent of the phenomenon. According to the European Commission report *Equality, diversity and enlargement, Measures to combat discrimination in acceding and candidate countries*<sup>99</sup> on the subject of discrimination in EU countries very rarely do the acts of discrimination end up prosecuted in courts even though their occurrence is quite common. Moreover, there is a widespread perception that going to court will not bring a desired result, because of the lengthy and ineffective proceedings. The high court costs are an additional barrier<sup>100</sup>. Even though the report was published in 2003 its conclusions are still valid.

The Government approved the *National Programme Against Racial Discrimination, Xenophobia and Related Intolerance 2004-2009*. The programme is supposed to cover activities related to fighting xenophobia, racism (including anti-Semitism) and should promote tolerance.

*Positive developments*

Approval of the *National Programme Against Racial Discrimination, Xenophobia and Related Intolerance 2004-2009*;

*Reasons for concern*

Lack of adequate investigation and punishment in cases of discrimination on the ground of the sexual orientation;

Delay in forming the institution of the General Inspector for Discrimination Affairs;

Lack of general non-discrimination law.

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<sup>97</sup> The Labour Code has been amended – the Act concerning changes in the law – Labour Code and changes in some of the acts of 14 November 2003 (The Official Journal of 2003, No. 213, item 2081), as well as the Act on employment and counteracting unemployment (The Official Journal of 2003, No. 58, item 514)

<sup>98</sup> Information received from the Helsinki Foundation for Human Rights

<sup>99</sup> [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/prog/studies\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm)

<sup>100</sup> European Commission (2003), *Equality, Diversity and Enlargement – Report on Measures to Combat Discrimination in Acceding and Candidate Countries*, p. 92.

## Article 22. Cultural, religious and linguistic diversity

### *International case law and concluding observations of international organs*

In the concluding observations about Poland, the HRC noted that the Polish authorities are taking measures to improve the situation of the Roma community, but expressed its concerns about prejudice and discrimination of Roma, in particular in access to health services, social assistance, education and employment. The HRC also noted that acts of violence against the Roma community are not properly investigated and punished. The HRC recommended that Poland should intensify its efforts to prevent discrimination against the Roma community and ensure their full enjoyment of their Covenant rights. The police and judiciary have to be properly educated and trained to investigate and punish all acts of violence against Roma<sup>101</sup>.

The HRC also expressed its concerns that current legislation does not allow linguistic minorities to use their own language when dealing with administrative authorities in the geographical areas where their numbers warrant it. The HRC recommended that new legislation should be prepared in full compliance with Article 27 of the Covenant in particular in regard to this issue<sup>102</sup>.

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.

In 1996 the Polish authorities refused to register the Silesian People's Association. The Association lodged an application with the ECHR in Strasbourg. The ECHR ruled in favour of the Polish authorities twice and in its judgment of 17 February 2004 the Grand Chamber of the ECHR stated that Article 11 of the Convention was not violated, because it was not the applicant's freedom of association per se that was restricted by the State and that the authorities did not prevent the applicants from forming an association to express and promote distinctive features of a minority, but from creating a legal entity which, through registration under the law on association and the description it gave itself in its memorandum of association, would inevitably become entitled to a special status under the 1993 Election Law<sup>103</sup>.

### *National legislation, regulation and case law*

On 4 November 2004 the Sejm passed the Act on national and ethnic minorities in the Republic of Poland. The Act defines national and ethnic minorities and contains guarantees of minority rights: the ban on discrimination, the right to freely choose membership in a minority, the ban on forcing people to disclose their ethnicity, and the right to write their names according to the rules of the language of the minority.

### *Practice of national authorities*

National minorities make up only 1.23% of the Polish population (out of 38.2 million citizens).

According to the information from the Ministry of Interior and Administration, Poland is

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<sup>101</sup> Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 17

<sup>102</sup> Concluding Observations of HRC: Poland of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 20

<sup>103</sup> Eur. Ct. H.R. *Gorzelik and Others. v. Poland* of 20.12.2001 and 17.02.2004, appl. no. 44158/98, para. 106

inhabited by representatives of nine national minorities: Belarussians, Czechs, Lithuanians, Germans, Armenians, Russians, Slovaks, Ukrainians, Jews and four ethnic minorities: the Karaites, Lemks, Roma and Tatars. Furthermore, the Kashebes, a community that uses its own regional language, inhabits the territory of the Pomorskie Province. The Kashebes are treated as a regional community by the Polish authorities, despite the fact that the results of the census, which was carried out in 2002, showed that many people declare to be of Kashebe nationality<sup>104</sup>.

The public prosecution services usually discontinue criminal cases against persons distributing anti-Semitic propaganda (mainly books, leaflets, or magazines). In the years 2002-2003 there were only 11 prosecutions due to inciting racial hatred or insulting national minorities, especially Jews (violation of Articles 256 and 257 of the Penal Code). Eight of the cases were discontinued, one was sent to court and two investigations are still pending<sup>105</sup>. This problem was the subject of the General Approach of the Ombudsman to the Minister of Justice – General Prosecutor<sup>106</sup>.

In Poland there are no studies or statistics on the criminal offences against national and ethnic minorities. As a result, it is hard to judge the extent of the problem.

#### Protection of Gypsies / Roma

According to official statistics, the Roma are an ethnic minority made up by 12,731 citizens. In Poland, the Roma belong to four main ethnic groups: Polish Roma, Carpathian Roma (Mountain Roma, Bergitka Roma), Kelderasze and Lowarzy<sup>107</sup>.

The Polish authorities undertake actions aimed at the improvement of the Roma community's situation in Poland. An example of this is the Government's pilot programme in support of the Roma community in the Małopolska Province for the years 2001-2003, which has already been implemented. A general Programme in support of the Roma community in Poland is currently being carried out.

The above mentioned programmes include *inter alia* assistance in the access of Roma children to education. Poland abandoned the creation of Roma classes. It was assumed that such classes would increase the level of the Roma children's knowledge of the Polish language and thereby force the children to start attending school. Currently, the Roma classes are carried out for older students, and the youngest children attend school along with the others. About 30% of the population of Roma children do not fulfil the school obligation at all. The reason behind this is the poor command of the Polish language among the Roma community and the lack of pre-school education, as well as cultural differences and poor material conditions of this minority<sup>108</sup>.

#### *Positive developments*

Activities intended to improve the situation of people of Roma descent.

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<sup>104</sup> During the Census, which was carried out in 2002, 5,053 people, who have Polish citizenship, declared to be of Kashebe nationality. Population, Demographic and social state and structure Table no. 33. Population according to national declaration and having a Polish citizenship in 2002, <http://www.stat.gov.pl> (16.09.04)

<sup>105</sup> Daily "Rzeczpospolita" of 19-20 June 2004, p. C3

<sup>106</sup> General Approach to the Minister of Justice – General Prosecutor of 4 December 2003, No. RPO/454786/03/I

<sup>107</sup> [http://www.mswia.gov.pl/index\\_a.html](http://www.mswia.gov.pl/index_a.html)

<sup>108</sup> Programme for the Roma community in Poland, II. Description of the problems, 1. Education; available at the webpage [http://www.mswia.gov.pl/spr\\_oby\\_mn\\_prog\\_romowie\\_txt.html](http://www.mswia.gov.pl/spr_oby_mn_prog_romowie_txt.html) (16.09.04)

*Reasons for concern*

Too frequent discontinuance of criminal cases by the public prosecution services against persons distributing anti-Semitic propaganda.

**Article 23. Equality between men and women***International case law and concluding observations of international organs*

The HRC in its concluding observations welcomed with satisfaction the improvements in the area of women's rights, particularly by the appointment of a Government Plenipotentiary on the Equal Status of Women and Men. Despite this fact, the HRC reiterated its concern about the low number of women in senior positions and disparities in remuneration between men and women. The HRC recommended that the Polish authorities should ensure equal treatment of men and women at all levels of public service and to ensure that women enjoy equal access to the labour market and equal wages for work of equal value<sup>109</sup>.

*Practice of national authorities*

The work on the bill on the equal status of women and men is not yet complete. The draft bill considered by the Sejm contains a definition of discrimination on the basis of gender, prohibits sexual harassment, obliges the authorities to support equal status of women and men and to create necessary conditions for fulfilling this principle, introduces regulations on the retirement age equal for women and men, defines the percentage of women who should sit in the collective bodies created or nominated by public authorities. The bill also prohibits discriminating men in raising children and taking parental leave. It establishes a central organ of administration responsible for equality of the status of women and men – the President of the Office for the Equal Status of Women and Men<sup>110</sup>.

The report of the World Bank and the Plenipotentiary for the Equal Status of Women and Men entitled "Gender and the economic possibilities in Poland: Did women lose because of the transformation?"<sup>111</sup>, as well as the latest report of the State Labour Inspection (Państwowa Inspekcja Pracy – PIP) published in 2004<sup>112</sup>, shows that Poland has problems with guaranteeing and promoting equal status of women and men. Women, in spite of legal guarantees, receive lower salaries and pensions. Men in Poland are more than twice as likely to hold higher positions in the public sector. The issue of discrimination is most vivid in the area of remuneration, and the highest discrepancies are in remunerations for senior positions.

*Positive developments*

Drafting a bill on the equal status of women and men.

*Reasons for concern*

Discrimination of women in the labour market – especially issues of remuneration and pensions, as well as holding senior positions.

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<sup>109</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. paras. 5 and 10.

<sup>110</sup> The bill is available on the Sejm web pages <http://www.sejm.gov.pl>

<sup>111</sup> Chancellery of the Prime Minister, Government Press Centre, available on the page <http://www.kprm.gov.pl>

<sup>112</sup> State Labour Inspection report of 2003, available at the webpage [http://pip.bip.ornak.pl/pl/bip/sprawozd\\_pip\\_2003](http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2003)

## Article 24. The rights of the child

### *National legislation, regulation and case law*

On 23 July 2004 the Sejm passed the Act that permitted to the President to ratify the Optional Protocol to the Convention on Rights of the Child on children in armed conflict (drawn up in New York on 25 May 2000)<sup>113</sup>.

The Ministry of Justice is working on a Act on minors, which will replace the current Act on procedure in cases involving minors. The Ministry intends to improve the current too complicated procedures on dealing with minors.

The Minister of Education and Sport issued a regulation regarding the detailed procedures of referring, registering, transferring, releasing and holding of minors in special juvenile correctional and socio-therapy centres <sup>114</sup>.

### *Practice of national authorities*

The problem of lack of sufficient capacity in re-socialisation centres and the placing of minors in police child stations was the subject of General Approach of the Ombudsman to the Minister of Justice<sup>115</sup>. The Ombudsman underlined that the lack of capacity in such centres cannot be a justification for violating the human rights of minors.

On 13 January 2004 the Government approved “Procedures for teachers and methods of cooperation of schools with police in situations of endangerment of children by crime and demoralisation, especially by drugs, alcohol and prostitution”. These procedures are part of the National Programme for Preventing Social Unadjustedness and Crime among Children and Young People. Some provisions of the Procedures were the subject of General Approach by the Ombudsman to the Minister of Education and Sport<sup>116</sup>. The main problem with the document – according to the Ombudsman – is the excessive police involvement and their unnecessary engagement in the life of schools – while at the same time no guarantees are given for the proper protection of rights and freedoms of children and their parents.

The Ombudsman also intervened in the matter of lack of financial resources for the development of aid programmes for children and families<sup>117</sup>.

### *Positive developments*

Ratification of the Optional Protocol to the Convention on Rights of the Child on children in armed conflict;

Work on the Act on minors, which will replace the current Act on procedure in cases involving minors.

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<sup>113</sup> The Official Journal of 2004, No. 194, item 1982

<sup>114</sup> Rozporządzenie z 26 lipca 2004 r. wydane na podstawie artykułu 81 Ustawy 26 października 1982 o postępowaniu w sprawach nieletnich (Dz.U. z 2002 r. nr 11, poz. 109 I nr 58, poz. 542, z 2003 nr 137, poz. 1304, nr 223, poz. 2217) [Regulation of 26 July 2004 based on Article 81 of the Act of 26 October 1982, on procedures in minors cases (The Official Journal of 2002, No. 11 item 109 and No. 58, item 542, 2003, No. 137, item 1304 and No. 223, item 2217)]

<sup>115</sup> General Approach to the Minister of Justice of 9 January 2004, No. RPO/434183/XI

<sup>116</sup> General Approach to the Minister of National Education and Sport of 25 May 2004, No. RPO/439954/03/XI

<sup>117</sup> General Approach to the Minister of National Education and Sport of 30 July 2004, No. RPO/479916/04/XI

*Reasons for concern*

Unlawful placement of minors in police child stations in the case of lack of capacity in re-socialisation centres;

Lack of adequate financial resources for the development of aid programmes for children and families.

**Article 25. The rights of the elderly***National legislation, regulation and case law*

The Act on the promotion of employment and on labour market institutions came into effect on 1 May 2004. It provides for the refunding of costs of caring for close relatives – children, older people – to an unemployed person who will find employment or will be sent to an internship, training or job preparation course<sup>118</sup>.

*Practice of national authorities*

Poland lacks a system of long-term care for the elderly. This problem was the subject of General Approach by the Ombudsman to the Minister of Health. The Ombudsman also pointed out the limitations that elderly persons have in accessing care institutions. These limits are the result of a resolution No. 226/2003 of the Board of National Health Fund dated 30 September 2003. According to the Ombudsman, because they were not introduced by a general law they do not meet the requirements of the constitution<sup>119</sup>.

On 1 May 2004 the provisions for a family benefit for spouses were cancelled. The benefit was intended for people who had a spouse who was over 60 years old (women) or 65 (men) and was significantly or moderately disabled and lived in the same household<sup>120</sup>.

*Positive developments*

Introduction of provisions that allow refunding of the costs of care for a close relative living in the same household to a person who is participating in an employment activation programme.

*Reasons for concern*

Lack of adequate system of care for an elderly person who is dependent on others;

Lack of government programmes aimed directly at elderly persons.

**Article 26. Integration of persons with disabilities***National legislation, regulation and case law*

On 26 November 2004 the Sejm passed an Act that gave permission to the President of the Republic of Poland to ratify Convention No. 159 of the International Labour Organisation (ILO) on vocational rehabilitation and employment of persons with disabilities ( drawn up in

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<sup>118</sup> Article 61 of the Act

<sup>119</sup> General Approach to the Minister of Health of 29 June 2004, No. RPO/472544/04/XIII

<sup>120</sup> Daily “Rzeczpospolita” of 7 September 2004, p. C2



Geneva on 20 June 1983)<sup>121</sup>.

The Act on vocational rehabilitation and employment of persons with disabilities<sup>122</sup> has been amended 31 times. This is one of the reasons why the institutions and persons that this Act concerns have insufficient knowledge of the law. Work is currently in progress on new amendments regarding the latest rules of adjudicating disability determinations, and altered principles of providing supplementary financing of employment of disabled persons. The amendments also propose radical changes in regulating the activities of the National Fund for Rehabilitation of Persons with Disabilities. The new Act is aimed at lowering the number of unemployed persons with disabilities.

The Regulation of 18 May 2004 specified detailed conditions of granting public assistance to entrepreneurs who employ persons with disabilities<sup>123</sup>. According to the National Council for Employment of Persons with Disabilities this regulation unlawfully decreased public assistance provided for in the Act on vocational rehabilitation and employment of persons with disabilities. It narrowed down the group of people the aid is intended for and the catalogue of costs that can be compensated<sup>124</sup>.

Changes in the act on higher education, higher education institutions and student loans provided a possibility to increase scholarships for disabled persons that would cover the increased costs of studying<sup>125</sup>.

The Ombudsman made a General Approach to the Minister of Economy and Labour pointing out the discriminating character of the Act on the promotion of employment and on labour market institutions and the Act of 13 June 2004 on social work. Disabled persons were excluded from the legal definition of the unemployed because they receive social welfare, which makes it impossible for them to benefit from financial aid for unemployed persons<sup>126</sup>.

#### *Practice of national authorities*

Changes to the structure of central public administration organs – the transformation of the Ministry of Economy, Labour, and Social Policy and the creation of a separate Ministry of Social Policy – gives an opportunity to improve the situation of disabled persons.

In the previous report there were indications that the National Fund for the Rehabilitation of Persons with Disabilities (PFRON), an institution dedicated to promoting employment of disabled persons, will be dissolved. The final decision was to maintain its existence. The dissolution of PFRON was criticised by associations of disabled persons.

There are an increasing number of public institutions signing agreements with local governments to eliminate architectural barriers in public places.

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<sup>121</sup> The Act of 26 November 2003 on ratification of Convention no. 159 of the ILO regarding vocational rehabilitation and employment of persons with disabilities; adopted in Geneva on 20 June 1983. (The Official Journal of 2004, No. 9, item 68).

<sup>122</sup> The Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities (The Official Journal of 1997, No. 123, item 776).

<sup>123</sup> The Regulation of the Council of Ministers of 18 May 2004 regarding detailed conditions of granting help for conducting business by persons with disabilities (The Official Journal of 2004, No. 114, item 1192).

<sup>124</sup> Daily "Rzeczpospolita" of 25 October 2004, p. C4

<sup>125</sup> Act of 28 May 2004 amending the Act on higher education, Act on Schools of Higher Vocational Education, Act on student loans and changes of some other Acts (The Official Journal of 2004, No. 152, item 1598).

<sup>126</sup> General Approach to Minister of Economy and Labour of 5 October 2004, No. RPO/418208/04/XI

*Positive developments*

Ratification of Convention No. 159 of the ILO on vocational rehabilitation and employment of disabled persons;

Legislative work on the new Act on the promotion of employment and on vocational and social rehabilitation of persons with disabilities;

Elimination of architectural barriers in public places.

*Reasons for concern*

Lack of comprehensive legal provisions allowing disabled persons' access to the job market.

## CHAPTER IV - SOLIDARITY

### Article 27. The worker's right to information and consultation within the undertaking

#### *National legislation, regulation and case law*

The Act of 13 March 2003, on the specific principles for dissolving employment contracts for reasons not attributable to employees came into effect on 1 January 2004<sup>127</sup>. One of the changes is the extension of the obligation of the employer to notify trade unions in case of group dismissals<sup>128</sup>.

Also on 1 January 2004 the provisions of the Labour Code obliging the employer *inter alia* to inform employees within seven days of signing the employment contract about conditions regarding working hours, date of salary/wages payments, vacations, and possibilities of giving notice came into effect.

### Article 28. The right to collective bargaining and action

#### *National legislation, regulation and case law*

On 26 March 2004 the Regional Court in Elbląg upheld a judgment of the district court<sup>129</sup> which reinstated to work seamstresses fired for organising a trade union in the "Hetman" textile factory<sup>130</sup>.

#### *Practice of national authorities*

According to a report published in 2004 by PIP, there is a fall in the percentage of refusals of regional labour inspectors to consider applications for registering collective labour agreements. The awareness of the provisions of the law in this area is insufficient.

There is a tendency to limit the scope or the size of employee benefits. The PIP inspections have revealed cases of violations of requirements associated with implementing the collective bargaining agreements. Generally the number of breaches by employers of provisions regulating work conditions set in the collective bargaining agreements has fallen, however the percentage of employers violating the provisions regarding salaries has risen to 61%.

#### *Reasons for concern*

Cases of violations of requirements associated with implementing the collective bargaining agreements.

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<sup>127</sup> The Official Journal of 2003, No 90, item 844

<sup>128</sup> Artykuły 2, 3, 4 Ustawy z 13 marca 2003 o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników (Dz.U. 2003 nr 90, poz. 844) [Articles 2, 3, 4 of the Act, on the specific principles for dissolving employment contracts for reasons not attributable to employees of 13 March 2003 (The Official Journal of 2003, No. 90, item 844)]

<sup>129</sup> Daily "Rzeczpospolita" of 1 October 2003, p. C2

<sup>130</sup> Daily "Rzeczpospolita" of 27-28 March 2004, p. C2

**Article 29. The right to access to placement services***National legislation, regulation and case law*

On 19 March 2004 The Sejm passed the Act permitting the President to ratify Convention No. 161 of the ILO on occupational health services (drawn up in Geneva on 26 June 1985).

On 2 April 2004 the Sejm passed the Act on the promotion of employment and on labour market institutions, which will replace the Act on employment and counteracting unemployment. The Act contains provisions regarding labour bureaus, which should consult and help to find employment rather than just pay out unemployment benefits. The employment market services are carried out primarily by the public, primarily district, employment offices.

Among the services offered are job services and EURES services which became available with Poland's accession to the European Economic Area. The services consist of aiding the unemployed and job seekers in gaining employment according to the principle of free movement of labour in the European Union. The unemployed can also take advantage of employment advice and help in active pursuit of jobs as well as organised training.

*Positive developments*

Ratification of Convention No. 161 of the ILO on occupational health services;

The legal changes positively affecting the functioning of employment services.

**Article 30. Protection in the event of unjustified dismissal***National legislation, regulation and case law*

The Act of 30 April 2004 on pre-retirement benefits (came into effect on 1 June 2004) has extended the protection of workers and introduced a prohibition on giving notice to a worker who has less than four years to retirement age. This is supposed to prevent dismissals of older employees<sup>131</sup>.

**Article 31. Fair and just working conditions***International case law and concluding observations of international organs*

The Sejm passed the Act permitting the President to ratify Convention No 148 of the ILO on the protection of workers against occupational hazards at work caused by polluted air, excessive noise and vibrations ( drawn up in Geneva on 20 June 1997)<sup>132</sup>.

*National legislation, regulation and case law*

Labour Code provisions that came into effect on 1 January 2004 prohibit mobbing, reinstate the rule that the third temporary employment contract automatically becomes a permanent employment contract, sets a forty hour working week and regulate issues related to working time, vacations, and work safety and hygiene rules<sup>133</sup>.

<sup>131</sup> Daily "Rzeczpospolita" of 14 May 2004, p. C1

<sup>132</sup> The Official Journal of 2004, No 29, item 225

<sup>133</sup> Daily "Rzeczpospolita" of 15 October 2003, p. C3

The chain of stores “Biedronka” lost the first lawsuit with employees, in which the court awarded damages for overtime work. The court ruled that the company violated the rights of its employees *inter alia* forcing them to work more than a dozen hours per day, even though they were part-time workers and by forcing them to do work beyond their physical abilities, which could result in grave damage to their physical well-being<sup>134</sup>.

The judgment encouraged a blizzard of suits to be filed at labour courts not only by employees of the “Biedronka” chain, but also employees of other supermarket chains. On 6 October 2004 proceedings started before the labour court in Poznań in which nine employees of the supermarket chain “Kaufland” sued for overtime pay. The employees stated that according to the contracts they were to work six hours per day and they worked even up to twelve hours<sup>135</sup>.

#### *Practice of national authorities*

Each year about 32,000 complaints are filed with the PIP, of which more than 80% are individual complaints of employees. A great majority of them were justified. According to the report, most complaints were against smaller firms and regarded salary payments not being made.

In the report period (the last three years and the first quarter of 2004) the labour inspectors issued more than 200,000 addresses to employers and more than 190,000 decisions. In over 10,000 cases, the persons guilty of violations were referred to labour courts or magistrate courts and over 20,000 fines were issued. The problem of constant violations of law by the non-payment of salaries by employers was the subject of General Approach of the Ombudsman to the Minister of Justice – General Prosecutor. The Ombudsman pointed out the inability to successfully pursue and execute claims related to labour issues using the existing civil law instruments<sup>136</sup>.

#### *Positive developments*

Ratification of Convention No. 148 of the ILO on the protection of workers against occupational hazards at work caused by polluted air, excessive noise and vibrations.

#### *Reasons for concern*

Numerous violations of employee rights by employers, especially the non-payment of salaries.

### **Article 32. Prohibition of child labour and protection of young people at work**

#### *National legislation, regulation and case law*

The labour law provisions that came into effect on 1 January 2004 regulate the hiring of young people under the age of 16 and limit the areas in which children can work to culture, sport, and advertising. A requirement was made for children to obtain permission from their legal guardians and a labour inspector before employment.

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<sup>134</sup> Weekly Newsweek Polska of 10 October 2004

<sup>135</sup> Daily “Rzeczpospolita” of 7 October 2004, p. C2

<sup>136</sup> General Approach to the Minister of Justice - General Prosecutor of 12 February 2004, No. RPO/462665/04/II

The Council of Ministers issued a regulation defining the list of jobs forbidden for juveniles and the conditions for hiring for some of these jobs<sup>137</sup>. The regulation defines the list of jobs forbidden to juveniles that can be performed by them, if it is necessary for their professional training.

*Practice of national authorities*

According to the report of the PIP the observance of the law regulating the work of juveniles has improved. However, in almost one out of six cases, juveniles were hired without receiving proper initial training. Violations on a similar scale affect preliminary medical examinations of juveniles. There is a decrease in delays in paying salaries to juveniles.

**Article 33. Family and professional life**

*International case law and concluding observations of international organs*

In its concluding observations, the HRC reiterated its concerns about the system of family planning in Poland, especially the high cost of oral contraceptives and decreased refunding of their costs, lack of free family planning services and the nature of sexual education. The HRC stated that Poland should assure availability of contraceptives and free access to family planning services. Accurate and objective sexual education should be included in the school curricula<sup>138</sup>.

*National legislation, regulation and case law*

The Act of 12 November 2003 introducing the system of family benefits, changing the rules for granting family benefits and dissolving the Alimony Fund came into effect on 1 May 2004. The Fund will be supplanted by a benefit for single parents.

*Practice of national authorities*

According to the PIP report there are fewer violations of provisions regulating the labour of women<sup>139</sup>.

*Reasons for concern*

The system of family planning in Poland, especially the high cost of oral contraceptives and decreased refunding of their costs, lack of free family planning services and the nature of sexual education.

**Article 34. Social security and social assistance**

*National legislation, regulation and case law*

On 12 March 2004 the Sejm passed the Act on welfare aid (which came into effect on 1 May

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<sup>137</sup> Rozporządzenie Rady Ministrów z 24 sierpnia 2004 r. w sprawie wykazu prac wzbronionych młodocianym i warunków ich zatrudnienia przy niektórych z tych prac (Dz.U. z 2004 nr 200, poz. 2047) [Regulation of the Council of Ministers on the list of jobs forbidden to juveniles and the conditions on hiring them for some of these jobs of 24 August 2004 (The Official Journal of 2004, No. 200, item 2047)]

<sup>138</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1. para. 9

<sup>139</sup> P. 6 – Rights of parents associated with parenthood, <http://www.pip.gov.pl>

2004), which was necessary because of the social changes and the fact that the earlier Act had been amended many times. Situations that can be a basis for granting welfare aid are poverty, being orphaned, homelessness, unemployment, being disabled, long term illness, family violence, the need to protect maternity, having many children, helplessness, alcoholism, drug addiction, catastrophes, natural disasters, inability to adjust after leaving a care institution. It can also be granted to refugees and people released from prison. In place of the nine types of welfare benefits three were introduced – permanent, short-term, and special-purpose.

The Act makes it possible to form a foster family for a child, which is not adapted to the society. It also creates three types of care institutions for children – intervention, family and socialising. The Act also introduced an additional benefit – dependent on income – to the family benefits for single parents raising children<sup>140</sup>.

#### Family benefits

Many controversies were associated with the Act that came into effect on 1 May 2004 on family benefits, which dissolved the Alimony Fund and introduced in its place a benefit for single parents raising children that is paid out by the communes. Many communes are afraid that they will not have sufficient funds to pay the benefits. There is no statistical data that would make it possible to predict the number of people who are entitled to receive such a benefit<sup>141</sup>.

On the basis of the Act the right to benefit is only granted to single parents raising children. Multi-child families are not entitled. This has resulted in many parents going to court and requesting a divorce or separation.

The Ombudsman has asked the CT to declare the provisions of the Act unconstitutional. According to the Ombudsman the Act is unjust in giving a privileged position to parents who are not married, which results in an increased number of requests for a divorce or separation. According to the new rules the benefits for single parents are higher than the family benefits and other welfare payments. According to the Ombudsman this violates the constitutional principle of equality, and discriminates legally and factually married parents of children<sup>142</sup>. Also the Ombudsman for Children pronounced the provisions dissolving the Alimony Fund as unconstitutional<sup>143</sup>.

#### Pensions and disability payments

On 31 March 2004 the Sejm amended the Act on pensions and disability payments paid from the Social Security Fund and some other Acts related to it (the amendments came into force on 1 May 2004). The changes created a two instance qualification bodies for disability payments, changed the rules for indexation of the initial capital for pensions and contributions to pensions. They also standardised the rules for insuring workers who sign additional contracts to perform a specified task with their employer. In addition, the procedures for challenging the state of the retirement account in the Social Insurance Institution (ZUS) were elaborated<sup>144</sup>.

The Act on financial support for the establishment in the years 2004-2005 of welfare outlets, hostels and shelters for the homeless came into effect in July 2004. It makes it possible to spend 50 million PLN in the years 2004-2005 on hostels and welfare outlets. The communes will be able to apply for financial help in refurbishing and modernising public housing (or changing their intended use). As a result of this, public housing will be made available. The

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<sup>140</sup> Daily “Rzeczpospolita” of 24 February 2004, p. C4

<sup>141</sup> Daily “Rzeczpospolita” of 8 March 2004, p. C3

<sup>142</sup> Daily “Rzeczpospolita” of 7 April 2004, p. C1

<sup>143</sup> Daily “Rzeczpospolita” of 15 March 2004, p. C3

<sup>144</sup> Daily “Rzeczpospolita” of 1 April 2004, p. C1

communes can also receive help in building hostels and homeless shelters<sup>145</sup>.

*Practice of national authorities*

The authorities verified the decisions about social pensions in all regions of the country. As a result many people lost their benefits. The Ombudsman made General Approach to the Minister of Economy, Labour and Social Policy appealing for help for people who lost their social pensions and were declared fit for work<sup>146</sup>.

**Article 35. Health care**

*National legislation, regulation and case law*

On 1 October 2004 the Act of 27 August 2004 on medical services financed from public funds came into effect. It was passed after the CT ruled the former medical services law unconstitutional. The Act permits, for example, treating the homeless from special budgetary funds and allows EU citizens to use medical services. It also enumerates the types of treatments that people who have medical insurance are not entitled to – infertility treatment, in vitro fertilization, sex change. The Act provides for giving patients information in writing about the planned date of the medical procedure they are waiting for and the possibility of obtaining information about waiting times for other regions of Poland<sup>147</sup>.

In spite of passing this Act and making it effective, the situation in health services is still critical. The health care institutions do not have sufficient funds to provide medical services. The hospitals are in debt and many of them are threatened with closure.

*Reasons for concern*

The critical situation in the health care sector.

**Article 36. Access to services of general economic interest**

No significant issues to be reported.

**Article 37. Environmental protection**

*National legislation, regulation and case law*

On 21 September 2004 the Council of Ministers accepted the bill on amending the environmental protection law. The goal of the amendment is to limit the participation of ecological organisations in the environmental impact assessments. The bill allows only participation of organisations that are active in the region of the given project. The government also wants to increase the number of such decisions that can be taken without such consultations<sup>148</sup>.

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<sup>145</sup> Ustawa z 29 kwietnia 2004 o finansowym wsparciu tworzenia w latach 2004-2005 lokali socjalnych, noclegowni i domów dla bezdomnych (Dz.U. z 2004 nr 145, poz. 1533) [Act on financial support for the establishment of welfare outlets, hostels and shelters for the homeless of 29 April 2004 (The Official Journal of 2004, No. 145, item 1533)]

<sup>146</sup> General Approach of the Ombudsman to the Minister of Economy, Labour and Social Policy of 4 March 2004 - RPO/459621/03/III

<sup>147</sup> The Official Journal of 2004, No. 210, item 2135

<sup>148</sup> Daily "Rzeczpospolita" of 22 September 2004, p. C1



The Ministry of Environment is preparing a bill amending the environmental protection law that adjusts it to the new EC Directive 2003/4/EC<sup>149</sup> concerning public access to information about the environment and its protection.

The Sejm is working on a Act amending the Act on genetically modified organisms<sup>150</sup>, which is supposed to change the make-up of the Genetically Modified Organisms (GMO) commission working at the Ministry of Environment. It is responsible for expressing opinions about the applications for permission to work on GMOs (closed use, introduction to the environment, allowing sales of GMO products, export and transit of GMOs).

#### *Practice of national authorities*

According to the information of the Environmental Law Centre<sup>151</sup> the representatives of non-governmental organisations were included in the steering committees of programmes working on allocating and overseeing spending of EU funds, such as the European Regional Development Fund, and Cohesion Fund. Similarly, representatives of non-governmental organisations were included in other steering committees and similar bodies, for example the Steering Committee for the Rural Development Plan (at the Ministry of Environment), to public benefit councils (at the Marshal of the Voivodship Offices).

National Fund for Environmental Protection and Water Management (Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej - NFOŚiGW) introduced in 2004 a programme for supporting the activities of non-governmental environmental organisations. As a part of this programme, the organisations whose applications will be chosen by NFOŚiGW can receive financing for several months of their activities. It is expected that the programme will be continued in the following years<sup>152</sup>.

#### *Positive developments*

Legislative works in order to expand the right of the public to information about the environment and its protection;

Inclusion of representatives of non-governmental organisations to steering committees active in the area of environmental protection;

Support for non-governmental environmental organisations from the NFOŚiGW

#### *Reasons for concern*

Draft bill amending the environmental protection Act that limits the participation of environmental organisations in the environmental impact assessment of new investment projects.

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<sup>149</sup> Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

<sup>150</sup> Parliamentary document No. 3374

<sup>151</sup> Jendrośka Jerzmański Bar i Wspólnicy. / Jendroska Jerzmanski Bar & Partners.

Prawo gospodarcze i ochrony środowiska. Sp. z o.o. / Environmental Lawyers Wrocław - Kraków - Toruń

<sup>152</sup> Ibidem

### **Article 38. Consumer protection**

#### *National legislation, regulation and case law*

On 19 March 2004 the Sejm passed the Act on the protection of some consumer rights, which includes regulations concerning agreements for remote financial services.

The aim of these regulations is to better protect the consumers by defining necessary information that has to be provided by each company offering financial services through the Internet or telephone. The Act also allows the consumers to withdraw from such an agreement within 14 days of signing it without declaring a reason<sup>153</sup>.

On 19 March 2004 the Sejm passed changes to the Act on protection of competition and consumers, which take into account the European Union Council Resolution 1/2003 of 16 December 2002 regarding the implementation of competition rules defined in Articles 81 and 82 of the Treaty Establishing the European Community. The changes introduce the new rules for competition protection<sup>154</sup>.

#### *Practice of national authorities*

On 25 August 2004 the Office for Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK) presented a report on its activities in 2003 to the Sejm Economic Committee. According to this report the Office undertook over 2,000 investigations. 1,705 cases concerned consumer protection policy, of which 628 were concerned with practices violating group interests of consumers. As a result UOKiK issued almost 100 rulings ordering desisting from unlawful activities.

319 investigations concerned violations of the Act on prevention of unfair competition. In 2003, the Office led 758 investigations about forbidden legal clauses in contracts. 99 cases were referred to the Court for Competition and Consumer Protection<sup>155</sup>. The Office also keeps a register of contract clauses outlawed by the Court for Competition and Consumer Protection.

From the UOKiK report it is clear that many of the violations of consumer rights occur in relation to Internet shopping. UOKiK is planning to create a “black list” of Internet sites that violate the laws.

Practices that violate the competition rules were the subject of General Approach of the Ombudsman (RPO) to the President of UOKiK, in which the Ombudsman pointed out numerous complaints about the functioning of the customer protection system of “Telekomunikacja Polska” (Polish Telecom)<sup>156</sup>. He also made General Approach to UOKiK concerning usage by some banks of illegal clauses in the loan contracts. Such clauses force unreasonable conditions on consumers, especially high interest rates for loans, which are higher than statutory ones. This can be a cause to declare contract clauses forcing such conditions as forbidden<sup>157</sup>.

#### *Reasons for concern*

Frequent violations of consumer rights.

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<sup>153</sup> Daily “Rzeczpospolita” of 12 March 2004, p. C3

<sup>154</sup> Daily “Rzeczpospolita” of 22 March 2004, p. C1

<sup>155</sup> <http://www.uokik.gov.pl>

<sup>156</sup> General Approach to UOKiK of 26 March 2004, No. RPO/465208/04/VI

<sup>157</sup> General Approach to UOKiK of 26 August 2004, No. RPO/461601/04/VI



**CHAPTER V - CITIZENSHIP****Article 39. The right to vote and to stand as a candidate in elections to the European Parliament**

European Parliament elections took place in Poland; the voting frequency was about 20%.

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

No significant issues to be reported.

**Article 41. The right to good administration**

No significant issues to be reported.

**Article 42. The right to access to documents**

No significant issues to be reported.

**Article 43. Ombudsman**

No significant issues to be reported.

**Article 44. The right to petition**

No significant issues to be reported.

**Article 45. Freedom of movement and of residence**

No significant issues to be reported.

**Article 46. Diplomatic and consular protection**

No significant issues to be reported.

## CHAPTER VI - JUSTICE

### Article 47. The right to an effective remedy and fair trial

#### *International case law and concluding observations of international organs*

In the period of 1 January to 15 December 2004 the ECHR found in 56 cases against Poland a violation of Article 6 para. 1 of the Convention<sup>158</sup> due to the length of court proceedings. The cases concerned complaints lodged with the Strasbourg organs in the years 1997-2003. Several hundred similar cases are still pending before the ECHR. Two cases have been struck off the list following friendly settlements<sup>159</sup>. In two cases the ECHR has also found breach of Article 13 due to the lack of the right to an effective remedy<sup>160</sup>.

<sup>158</sup> Eur. Ct. H.R.: *Panek v. Poland* of 8 January 2004, appl. No. 38663/97; *Grela v. Poland* of 13 January 2004, appl. No. 73003/01; *Kranz v. Poland* of 17 February 2004, appl. No. 6214/02; *Skowronski v. Poland* of 17 February 2004, appl. No. 52595/99; *Kaszubski v. Poland* of 26 February 2004, appl. No. 35577/97; *Jablonska v. Poland* of 9 March 2004, appl. No. 60225/00; *Hulewicz v. Poland* of 30 March 2004, No. 35656/97; *Pachnik v. Poland* of 30 March 2004, appl. No. 53029/99; *Krzak v. Poland* of 6 April 2004, appl. No. 51515/99; *Góra v. Poland* of 27 April 2004, appl. No. 38811/97; *Janik v. Poland* of 27 April 2004, appl. No. 38564/97; *Krzewicki v. Poland* of 27 April 2004, appl. No. 37770/97; *Surman-Januszewska v. Poland* of 27 April 2004, appl. No. 52478/99; *Politikin v. Poland* of 27 April 2004, appl. No. 6893001; *Gesiarz v. Poland* of 18 May 2004, appl. No. 9446/02; Eur.Ct. H.R. *Rychlicy v. Poland* of 18 May 2004, appl. No. 51599/99; Eur. Ct. H.R. *Domanska v. Poland* of 25 May 2004, appl. No. 74073/99; Eur. Ct. H.R. *Hajnrich v. Poland* of 25 May 2004, appl. No. 44181/98; Eur. Ct. H.R. *Piekara v. Poland* of 15 June 2004, appl. No. 77741/01; Eur. Ct. H.R. *Leszczynska v. Poland* of 22 June 2004, appl. No. 47551/99; Eur.Ct. H.R. *Listawska v. Poland* of 13 July 2004, appl. No. 37761/97; Eur.Ct. H.R. *Wrobel v. Poland* of 20 July 2004, appl. No. 46002/99; Eur. Ct. H.R. *Adamsy v. Poland* of 27 July 2004, appl. No. 49975/99; Eur. Ct. H.R. *Bialy v. Poland* of 27 July 2004, appl. No. 52040/98; Eur. Ct. H.R. *ML and AL v. Poland* of 27 July 2004, appl. No. 44189/98; Eur. Ct. H.R. *Guzicka v. Poland* of 27 July 2004, appl. No. 55383/00; Eur.Ct. H.R. *Kreuz v. Poland (no.2) v. Poland* of 27 July 2004, appl. No. 46245/99; Eur. Ct. H.R. *Radek v. Poland* of 27 July 2004, appl. No. 30311/02; Eur. Ct. H.R. *Bednarska v. Poland* of 15 July 2004, appl. No. 53413/99; Eur. Ct. H.R. *A.W. v. Poland* of 24 June 2004, appl. No. 34220/96; Eur. Ct. H.R. *Zynger v. Poland* of 13 July 2004, appl. No. 66096/01; Eur. Ct. H.R. *Marszal v. Poland* of 14 September 2004, appl. No. 63391/00; Eur.Ct. H.R. *Koblanski v. Poland* of 28 September 2004, appl. No. 59445/00; Eur. Ct. H.R. *Król v. Poland* of 28 September 2004, appl. No. 65017/01; Eur. Ct. H.R. *Zys-Kowalski and others v. Poland* of 28 September 2004, appl. No. 70213/01; Eur. Ct. H.R. *Jastrzebska v. Poland* of 28 September 2004, appl. No. 72048/01; Eur. Ct. H.R. *Izykowska v. Poland* of 28 September 2004, appl. No. 7530/02; Eur. Ct. H.R. *Durasik v. Poland* of 28 September 2004, appl. No. 6735/03; Eur. Ct. H.R. *Dojs v. Poland* of 2 November 2004, appl. No. 47402/99; Eur. Ct. H.R. *Kusmierek v. Poland* of 21 September 2004, appl. No. 10675/02; Eur. Cr. H.R. *Irena Pieniążek v. Poland* of 21 September 2004, appl. No. 62179/00; Eur. Ct. H.R. *Falecka v. Poland* of 5 October 2004, appl. No. 52524/99; Eur. Ct. H.R. *Malinowska – Biedrzycka v. Poland* of 5 October 2004, appl. No. 63390/00; Eur. Ct. H.R. *Kusmierkowski v. Poland* of 5 October 2004, appl. No. 63442/00; Eur. Ct. H.R. *Przygodzki v. Poland* of 5 October 2004, appl. No. 65719/01; Eur. Ct. H.R. *Kruk v. Poland* of 5 October 2004, appl. No. 67690/01; Eur. Ct. H.R. *Lizut – Skwarek v. Poland* of 5 October 2004, appl. No. 71652/01; Eur. Ct. H.R. *Dudek v. Poland* of 5 October 2004, appl. No. 2560/02; Eur. Ct. H.R. *Nowak v. Poland* of 5 October 2004, appl. No. 27833/02; Eur. Ct. H.R. *R.D.P. v. Poland* of 19 October 2004, appl. No. 77681/01; Eur. Ct. H.R. *Lipowicz v. Poland* of 19 October 2004, appl. No. 57467/00; Eur. Ct. H.R. *Mejer and Jaloszynska v. Poland* of 19 October 2004, appl. No. 62109/00; Eur. Ct. H.R. *Wiatrzyk v. Poland* of 26 October 2004, appl. No. 52074/99; Eur. Ct. H.R. *Dojs v. Poland* of 2 November 2004, appl. No. 47402/99; Eur. Ct. H.R. *Mlynarczyk v. Poland* of 14 December 2004, appl. No. 51768/99.

<sup>159</sup> Eur. Ct. H.R. *Sobczuk v. Poland* of 25 May 2004, appl. No. 51799/99; Eur. Ct. H.R. *Ostrowski v. Poland* of 28 September 2004, appl. No. 63391/00.

<sup>160</sup> Eur. Ct. H.R. *Listawska v. Poland* of 13 July 2004, appl. No. 37761/97; Eur. Ct. H.R. *Zynger v. Poland* of 13 July 2004, appl. No. 63389/00

In another case, the ECHR found a violation of Article 6 para. 1 of the Convention, because the Polish Teachers' Association was restricted from submitting a claim for damages for lost property. According to the ECHR's judgment the claimants had no procedural way to pursue their rights before the court of law<sup>161</sup>.

In its Concluding Observations, the HRC welcomed the recent passage of legislation making provision for complaints against the violation of the right of a party in judicial proceedings to have his or her case examined without undue delay<sup>162</sup>.

*National legislation, regulation and case law*

On 17 June 2004, acting upon the ECHR judgment in the case *Kudła v. Poland*<sup>163</sup>, the Sejm passed the Act on a complaint against infringement on a party's right to have its case examined by a court without undue delay<sup>164</sup>. The Act gives the parties involved in a proceeding the right to ask a higher court to declare that in the proceeding, about which the complaint is made, a violation of the right to examine the case without undue delay has occurred. Such a declaration is made if the proceedings last longer than it is necessary<sup>165</sup>.

On 1 January 2004 the reform of administrative courts came into effect. The most important change is the establishment of a two-instance system of administrative courts. The Voivodship Administrative Courts has now become the courts of first instance and the Supreme Administrative Court makes rulings in the second instance. The reform also introduced mediation proceedings<sup>166</sup>.

On 2 July 2004 the Sejm passed an amendment of the Code of Civil Procedure, which *inter alia* has deteriorated the rights of a weaker party ( that is not represented by a lawyer), at the same time making the procedure more adversary<sup>167</sup>. Currently, the court will be able to give a party to the proceedings the necessary advice only if there is a justified need. The amendment struck down a provision that barred the court from making judgments outside of the scope of the claim and from awarding damages above the original claim in cases regarding claims for alimony and redressing damages stemming from illicit acts.

Controversies were raised by Article 45 of the amended Act on court enforcement officers and judicial enforcement. The Act makes it mandatory to make a 2% prepayment to court enforcement officers in order for the enforcement to begin<sup>168</sup>.

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<sup>161</sup> Eur. Ct. H.R. *Związek Nauczycielstwa Polskiego v. Poland* of 21 September 2004, appl. No. 42049/98

<sup>162</sup> Concluding Observations of the HRC: Poland of 5 November 2004 CCPR/CO/82/POL/Rev. 1. para. 4

<sup>163</sup> Eur. Ct. H.R. *Kudła v. Poland* of 26 October 2000, appl. No. 30210/96, ECHR 510

<sup>164</sup> Act of 17 June 2004 on a complaint against infringement on a party's right to have its case heard by a court without undue delay (The Official Journal of 2004, No. 179, item 1843)

<sup>165</sup> Article 2. and 4 of the Act, (The Official Journal of 2004, No. 179, item 1843)

<sup>166</sup> The Act of 25 July 2002 on the Structure of Administrative Courts (The Official Journal of 2002, No. 153, item 1269) and The Act of 30 August 2002 on Administrative Court Proceedings (The Official Journal of 2002, No. 153, item 1270)

<sup>167</sup> Article 1 p. 2 of the Act of 2 July 2004 amending the Code of Civil Procedure and some other Acts

<sup>168</sup> The Act amending the Act about court enforcement officers and enforcement and amending the Code of Civil Procedure of 24 September 2004 (The Official Journal of 2004, No. 236, item 2356)

Backlog of cases in courts*Practice of national authorities*

There is a slight improvement in the length of the proceedings before the Polish courts. The nationwide average length of proceedings in criminal cases at the first instance is approximately 4.9 months in district courts and 4.5 months in regional courts. According to the statistics for the first half of 2004 in commercial cases this figure was at the level of 5.1 months in district courts and 7.4 months in regional courts. In civil matters the average length of proceedings was approximately 5.4 months in district courts and 8.6 months in regional courts.

The worst situation is in the Warsaw area, where over 10% of all cases in Poland are heard. In criminal matters the average length of proceedings in the District Court for the city of Warsaw is 19 months and in the District Court for Warszawa Praga 14 months. The average length of proceedings in commercial cases is also very long. It averages 12.2 months in the courts of the Warsaw region. In civil cases the average length of the procedure in the first instance amounts to 13 months<sup>169</sup>.

Another problem lies in the slow enforcement of the CT judgments – almost half of the judgments of the Tribunal, which were to be enforced within a certain amount of time, were enforced too late<sup>170</sup>.

The budget of the judiciary for 2005 should once again positively influence the law enforcement situation. The expenditures on common courts are supposed to increase by 14.4%. The Minister of Justice is planning to create 2,000 new posts, among them 70 for judges and for 1,150 administrative posts, as well as refurbish buildings and purchase computers<sup>171</sup>.

The improvement also comes from the work of court assistants and judicial officers (referendarz s'ldowy) whose job is to substitute for judges in administrative duties and record entries in the land and mortgage register. Currently there are 778 judicial officers<sup>172</sup>. In 2004 courts added about 200 posts for these officers.

Access to legal assistance*Practice of national authorities*

The conclusion of the report about the access to free legal assistance published by the Helsinki Foundation for Human Rights is that the right to legal assistance is not assured properly. In Poland no institution gathers information about the number of accused who were not represented by a lawyer. According to the studies of the Helsinki Foundation for Human Rights about 30% of those interviewed were not represented by a lawyer<sup>173</sup>. 80% did not try to receive free legal aid<sup>174</sup>. The study also concluded that most people who are served by a

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<sup>169</sup> Data received from the Common Courts Department in the Ministry of Justice for the period from January to June 2004.

<sup>170</sup> Daily "Rzeczpospolita" of 20 February 2004, p. C3

<sup>171</sup> Daily "Rzeczpospolita" of 6 September 2004, p. C1

<sup>172</sup> Daily "Rzeczpospolita" of 23 February 2004, p. C1

<sup>173</sup> 72 people out of 198 interviewed. Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 140

<sup>174</sup> Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 142

lawyer do not know that there is regress in a case when the lawyers do not fulfil their duties properly<sup>175</sup>. The cause of this is *inter alia* the lack of adequate legal framework and improper implementation of the law. The problem is also the lack of reliable information about the possibility of getting legal aid.

Each year there is an increase in the number of complaints of clients about their lawyers. The internal investigations within the Bar Association are conducted without a proper control by the general public. As a result there are no enough guarantees that perpetrators of disciplinary offences are held responsible for their actions.

The Government is planning to reform the system of free legal aid for poor people. In order to do so, a draft bill on legal advice for poor people is being prepared. It envisions the creation of legal advice offices at district courts. Legal advice in these offices is going to be given by advocates and legal counsels.

The problem of the lack of appropriate legal advice for poor people has been raised many times by the Ombudsman and non-governmental organisations<sup>176</sup>. In almost half of 40,000 cases brought to the Office of the Ombudsman the applicants were directed to legal remedies, which they should use before coming to the Ombudsman<sup>177</sup>.

However, the Ombudsman and non-governmental organisations representatives are critical of the government proposal – they prefer to co-operate with local authorities and to form together with them legal aid centres<sup>178</sup>. The Ombudsman propose to create offices of public defenders, which would hire full-time lawyers or contract services in law firms.

### Access to the legal profession

#### *National legislation, regulation and case law*

The CT ruled that provisions that regulate the entry exams for notary public internships<sup>179</sup> and for candidates for patent agents<sup>180</sup> violate the constitution, because they introduce illegal access restrictions.

As a result of a legal question lodged by the Supreme Administrative Court with the CT on 18

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<sup>175</sup> Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 202-204

<sup>176</sup> General Approach to the Minister of Justice - General Prosecutor of 21 June 2004, No. RPO/472486/04/VI, Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 11-15

<sup>177</sup> General Approach to the Minister of Justice - General Prosecutor of 3 August 2004, No. RPO/481256/04/IV

<sup>178</sup> Daily "Rzeczpospolita" of 7 October 2004

<sup>179</sup> Artykuł 6 par. 2, ust. 4 Rozporządzenia Ministra Sprawiedliwości z 11 kwietnia 2003 r. w sprawie szczegółowego przeprowadzania konkursu dla kandydatów na aplikantów notarialnych (Dz.U. z 2003 nr 67, poz. 629) [Article 6 para. 2 item. 4 of regulation of Justice Minister regarding the detailed method of conducting a selection of candidates for notary public trainees of 11 April 2003 (The Official Journal of 2003, No. 67, item 629)]

<sup>180</sup> Rozporządzenie Prezesa Rady Ministrów z 9 maja 2002 w sprawie przeprowadzania konkursu o wpis na listę, organizacji szkolenia, wzoru listy i legitymacji aplikantów rzecznikowskich (Dz.U. z 2002 nr 56, poz. 505) [Regulation of Prime Minister regarding the method of conducting a competition for entering in a register of patent agents, organization of training, specimen of a list and identification card of trainee patent agents of 9 May 2002 of 9 May 2002 (The Official Journal of 2002, No. 56, item 505)]



February 2004<sup>181</sup> the Tribunal ruled that the regulations for applying for legal counsel and attorney internships set by the their respective professional associations should be changed, because they are based on provisions violating the constitution. According to the Tribunal they limit the right to freely chose and perform professions by persons not belonging to these associations. The professional associations cannot by themselves set the criteria and requirements that the candidates for legal internships have to meet. They must be set by an Act.

On 22 September 2004 two draft bills amending the Law on Advocates and Law of Legal Counsels were brought to the Sejm.

### Independence and impartiality of judges

#### *National legislation, regulation and case law*

The amendment of the Act on common courts structure came into effect on 1 September 2004. Its goal is to centralise and improve the quality of education of candidates for judges<sup>182</sup>.

According to the information from the Ministry of Justice in 2003, 54 disciplinary procedures were initiated against judges. In 14 disciplinary procedures a decision was delivered. The judges were punished for flagrant and gross offences against the law and transgressions against dignity of the office held, allowing flagrant delay of proceedings, refusal to submit to breathalyser tests after driving under the influence of alcohol, coming to work and conducting court proceedings while drunk<sup>183</sup>. In one of the cases a judge was reassigned because of nepotism<sup>184</sup>.

On 20 July 2004 the CT declared unconstitutional the provision of the Code of Civil Procedure limiting the exclusion of judges *ex officio* only in the cases where they adjudicated in the court one instance lower. This provision violates Article 45 para. 1 of the constitution. According to the Tribunal the possibility of a judge to control the judgments delivered by himself in lower instances violates the impartiality of the court and its independence<sup>185</sup>.

#### *Positive developments*

Entry into force of the Act on complaint against infringement on a party's right to have its case heard by a court without undue delay;

Introduction of two-instance administrative courts.

#### *Reasons for concern*

Length of judicial proceedings;

Limited access to legal aid;

Lack of publicity in disciplinary proceedings within the professional associations of

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<sup>181</sup> Judgment of the CT of 18 February 2004, No. P. 21/02

<sup>182</sup> Ustawa z 19 września 2003 r. o zmianie ustawy o ustroju sądów powszechnych (Dz.U. z 2003 r. nr 188, poz. 1838) [Act about the amendment of the Act on common courts structure of 19 September 2003 (The Official Journal of 2003, No. 188, item 1838)]

<sup>183</sup> Information from the Ministry of Justice, letter dated 12 March 2004, No. DK.I.1260/206/2003

<sup>184</sup> Daily "Rzeczpospolita", 29 September 2004, p. C1

<sup>185</sup> Judgment of the CT of 20 July 2004, SK 19/02

advocates and legal counsels;

Limited access of young lawyers to the legal profession.

#### **Article 48. Presumption of innocence and right to defence**

##### *International case law and concluding observations of international organs*

In its Concluding Observations the HRC issued its regrets that a detained person cannot currently enjoy their right to legal aid from the beginning of their detention and recommended that Poland should undertake measures to ensure that all persons, including those in detention, have access to legal aid at all times<sup>186</sup>.

##### *National legislation, regulation and case law*

The CT passed a judgment on the issue of communication between the detainee and his/ her lawyer. The Tribunal ruled that the limitation of the right to communicate by the detainee and the lawyer without the presence of third parties, by requiring that the conversation be held in the presence of a person selected by the prosecutor - limited to fourteen days and allowed only in special circumstances – is not an excessive infringement of the defence rights <sup>187</sup>.

##### *Practice of national authorities*

In Poland the number of lawyers is still insufficient. The number of cases referred to the courts has grown during 10 years (1991-2001) from 2.7 million do 8.4 million (a growth of over 300%), and the number of lawyers has grown during this period only by 5%<sup>188</sup>. It is possible to be sentenced to a long imprisonment in a proceeding in which the accused was not assisted by a lawyer<sup>189</sup>. The suspects in the pre – trial phase of the criminal proceedings usually do not have access to free legal counsel<sup>190</sup>. In many cases the first contact of the suspect with his/her lawyer takes place when the lawyer gets acquainted with the records that were produced at the end of the investigation.

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<sup>186</sup> Concluding Observations of HRC: Poland, of 5 November 2004, No. CCPR/CO/82/POL/Rev. 1, para. 14

<sup>187</sup> Judgment of the CT of 18 February 2004, No. SK 39/02

<sup>188</sup> General Approach to the Minister of Justice - General Prosecutor of 21 June 2004, No. RPO/472486/04/VI, Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 63

<sup>189</sup> General Approach to the Minister of Justice - General Prosecutor of 21 June 2004, No. RPO/472486/04/VI, Łukasz Bojarski, Report, access to legal aid in Poland, Helsinki Foundation for Human Rights, Warsaw 2003, p. 134

<sup>190</sup> Information from letters received by the Helsinki Foundation for Human Rights in 2004.

*Reasons for concern*

Lack of access to a defence lawyer for many persons accused in criminal proceedings.

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

No significant issues to be reported.

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

No significant issues to be reported.



**ANNEXE: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION  
(O.J. C-364 of 18.12.2000)**

## CHAPTER I: DIGNITY

### Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

### Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

### Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
  - a) the free and informed consent of the person concerned, according to the procedures laid down by law,
  - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
  - c) the prohibition on making the human body and its parts as such a source of financial gain,
  - d) the prohibition of the reproductive cloning of human beings.

### Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

## CHAPTER II: FREEDOMS

### Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

### Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

### Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

### Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

### Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

### Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

### Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

**Article 13: Freedom of the arts and sciences**

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

**Article 14: Right to education**

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

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

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

**Article 16: Freedom to conduct a business**

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

**Article 17: Right to property**

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

**Article 18: Right to asylum**

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

**CHAPTER III: EQUALITY****Article 20: Equality before the law**

Everyone is equal before the law.

**Article 21: Non-discrimination**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

**Article 22: Cultural, religious and linguistic diversity**

The Union shall respect cultural, religious and linguistic diversity.

**Article 23: Equality between men and women**

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

**Article 24: The rights of the child**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views

freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

#### **Article 25: The rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

#### **Article 26: Integration of persons with disabilities**

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

### **CHAPTER IV : SOLIDARITY**

#### **Article 27: Workers' right to information and consultation within the undertaking**

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

#### **Article 28: Right of collective bargaining and action**

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

#### **Article 29: Right of access to placement services**

Everyone has the right of access to a free placement service.

#### **Article 30: Protection in the event of unjustified dismissal**

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

#### **Article 31: Fair and just working conditions**

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

#### **Article 32: Prohibition of child labour and protection of young people at work**

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

#### **Article 33: Family and professional life**

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

#### **Article 34: Social security and social assistance**

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.



3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient

resources, in accordance with the rules laid down by Community law and national laws and practices.

#### **Article 35: Health care**

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

#### **Article 36: Access to services of general economic interest**

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

#### **Article 37: Environmental protection**

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

#### **Article 38: Consumer protection**

Union policies shall ensure a high level of consumer protection.

### **CHAPTER V: CITIZENS' RIGHTS**

#### **Article 39: Right to vote and to stand as a candidate at elections to the European Parliament**

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

#### **Article 40: Right to vote and to stand as a candidate at municipal elections**

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

#### **Article 41: Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her

adversely is taken;

b) the right of every person to have access to his or her file, while respecting the legitimate interests of

confidentiality and of professional and business secrecy;

c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

#### **Article 42: Right of access to documents**

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

#### **Article 43: Ombudsman**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

#### **Article 44: Right to petition**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to

petition the European Parliament.

#### **Article 45**

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

#### **Article 46: Diplomatic and consular protection**

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

### **CHAPTER VI : JUSTICE**

#### **Article 47 : Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

#### **Article 48: Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

#### **Article 49: Principles of legality and proportionality of criminal offences and penalties**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence

under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission

which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

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

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

### **CHAPTER VII: GENERAL PROVISIONS**

#### **Article 51: Scope**

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

#### **Article 52: Scope of guaranteed rights**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by

those Treaties.

3. In so far as this Charter contains rights Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

**Article 53: Level of protection**

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the

which correspond to rights guaranteed by the

Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

**Article 54: Prohibition of abuse of rights**

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.