

Universal Periodic Review of Poland
Submission by the Helsinki Foundation for Human Rights (Warsaw)
28 November 2011

1. Introduction

The Helsinki Foundation for Human Rights („HFHR“) is a leading mainstream human rights organization, based in Warsaw, Poland. It has a consultative status at ECOSOC. It is also a member of the Civil Society Platform of the EU Fundamental Rights Agency. The HFHR participated as stakeholder in the first cycle of the Universal Periodic Review in Poland. Accordingly, current submissions take into account our comments submitted at that time as well as recommendations given by the UN Human Rights Council.

2. CIA Rendition Program

Poland is still regarded as one of the states, which hosted CIA prisons. First, UPR recommendations called for the full explanation of this issue by Polish authorities (see Recommendation No. 20). Until now Poland did not explain fully this issue and did not hold anybody responsible for it. The investigation by the Appeal Prosecutor’s Office in Warsaw is still pending. Al-Nashiri and Abu Zubaydah, Guantanamo prisoners claiming to be former detainees of secret CIA facilities in Poland, were granted status of a victim in the pending investigation. Recently, in November 2011, the Prosecutor W. Tyl declared that it would end in 2012. However, the HFHR doubts whether this will take place, since the investigation has already been prolonged several times. Investigation, both by Prosecutor’s service and the Parliament is subject of concern of international bodies.¹

President of Poland B. Komorowski refused to lift the state secrecy from the former President A. Kwaśniewski regarding this case. It can make the explanation of the case more difficult. Secondly, except for the Prosecutor’s Office there is no institution in Poland, which would be officially concerned about this case. Despite numerous comments and requests by NGOs, Poland did not put any diplomatic pressure on the US authorities to provide prosecution with legal aid under the Mutual and Legal Assistance Treaty. This issue has not been raised when B. Obama visited Poland (May 2011). In consequence, the US Department of State does not cooperate on this matter.

Al-Nashiri has brought a case against Poland to the ECtHR (May 2011). The case has not been yet communicated to the Polish government.²

3. Situation in prisons and detention centers

Following judgments of the Polish Constitutional Court and the ECtHR, Poland attempted to resolve the problem of overcrowding in prisons and detention centers. On surface this problem has been resolved. The current level of population is 96,5 %. However, this figure does not show that:

¹ E.g. in the PACE resolution 1838 (2011), the Polish prosecuting authorities were urged to “persevere in seeking to establish the truth about the allegations of secret CIA detentions and urges the American authorities to co-operate with them. Furthermore, with respect to the parliamentary inquiry, the PACE deplored that Polish deplores that the Polish Parliament confined itself to “inquiries whose main purpose seems to have been to defend the official position of the national authorities”. In view of this resolution this issue needs still serious addressing.

² In the application Poland is accused of violating Art. 2 ECHR, notably that transfer of Al-Nashiri from Poland to US endangered his right to life, due to the possibility of enforcing the death penalty. Furthermore, he complains under Art. 3 ECHR, which concerns inflicting torture on the Polish territory and the lack of proper investigation into the case (breach of positive duties).

- there might be discrepancies between penitentiary units as regards number of inmates in a single cell. Statistically, problem of overcrowding may be resolved, but still some number of prisoners may live in smaller than required cells³;
- space traditionally used for recreation and resocialization, has been transformed into cells for prisons. In consequence, resocialization efforts suffer due to such policy;
- more than 44.000 persons wait for the enforcement of their imprisonment. Such a situation, when prison sentence is not implemented, puts into question the rule of law;
- Polish standard is lower (3 m² per inmate) than required by the CPT (4 m²).⁴

Health care in prisons is another problem. The health system in penitentiary units is of bad quality. In some cases the life of prisoner is in danger. In a couple of cases⁵ Poland was heavily criticized for the lack of proper treatment of prisoners. Another problem is the situation of so-called „dangerous“ prisoners and detainees. There is no procedure for periodical evaluation of their status. Some of them remain „dangerous“ even over the whole period of their term in prison, in much worse conditions than ordinary prisoners.⁶ The CPT stated the Polish regime for "N" status prisoners should be fundamentally reviewed. Solitary confinement or small-group isolation for extended periods is more likely to de-socialise than re-socialise people.

4. Police brutality

The HFHR still observes cases of police brutality. One of the most important case, still unexplained, concerns the alleged killing by police officer of Maxwell Itoya, Nigerian citizen. The investigation is still pending. During recent demonstrations on 11 November 2011 in some cases police abused the force. Furthermore, the HFHR currently intervenes in a case, where the police was brutal and used offensive homophobic language. In our opinion, the level of police brutality is a result of inadequate training and methods of recruitment to police. Furthermore, cases of police brutality often go unpunished and are not properly investigated by police and prosecutor's office.

5. Effectiveness of courts

Length of court proceedings still constitutes one of the most important problems with respect to rights and freedoms⁷. It is a result of complex set of causes such as:

³ The detailed statistical data from November 2011 indicates that in 15 facilities the occupancy level exceeds 100 %, in some residential wards reaching the alarming level of 115 %. It should be mentioned that also the OPCAT National Preventive Mechanism revealed that the officially declared general capacity of penal institutions is often increased by providing additional space such as sick bays, units for mothers with children, as well as, isolated cells.

⁴ In its last report the CPT reiterated its recommendation that the Polish authorities revise norms fixed by legislation, ensuring that they provide for at least 4 m² per inmate in multi-occupancy cells.

⁵ *Wierzbicki v. Poland*, Appl. No. 48/03, judgment of 19 April 2010; *Iwańczuk v. Poland*, Appl. No. 25196/94, judgment of 15 November 2001; *Kaprykowski v. Poland*, Appl. No. 23052/05, 3 February 2009; *Kupczak v. Poland*, Appl. No. 2627/09, judgment of 25 January 2011; *Jasińska v. Poland*, Appl. No. 28326/05, judgment of 1 June 2010; *Orchowski v. Poland*, Appl. No. 17885/04, judgment of 22 October 2011; *Wenerski v. Poland*, Appl. No. 44369/02, judgment of 20 January 2009.

⁶ In 2007 Mirosław Piechowicz brought a case against Poland to the ECtHR (Appl. No. 20071/07) related to the status of dangerous prisoner. Relying on Article 3 and Article 8 of the Convention, the applicant alleges that the continued application of the dangerous detainee regime to him, in particular his solitary confinement, has been in breach of these provisions. In this regard, he stresses his prolonged and excessive isolation from his family, the outside world and other detainees.

⁷ *Kudła v. Poland*, Appl. No. 30210/96, judgment of 26 October 2000; *Hołowczak v. Poland*, Appl. No. 25413/04, judgment of 4 March 2008; *Żelazko v. Poland*, Appl. No. 9382/05, judgment 4 March 2008.

- wrong administration of judiciary, lack of professional system of personal management in judiciary;
- burdensome court procedures in certain types of cases;
- underdeveloped ADR methods (such as mediation);
- slow process of IT development;
- growing number of matters delegated for court's resolution;
- difficulty in obtaining expert opinions;
- in criminal matters – possibility to remand the case for a new adjudication.⁸

Also prosecutorial proceedings or enforcement of court's judgments suffer due to protractedness. There is an instrument that allows for complaining on the length of proceedings. Under the Law of 17 May 2004, victim of such abuse may complain to the court and obtain compensation. The law in general operates properly and has certain impact on increasing the speed of court proceedings. Nevertheless, the problem is still substantial and needs addressing with complex reform of judiciary.⁹

6. Right to fair trial and right to defend yourself in court

Excessive length of the court proceedings has a significant impact on the right to a fair trial. It is also combined with the problem of the length of pretrial detention that affect the right to defense.¹⁰ In many cases the gravity of the charges is recognised by the courts as the only justification for long periods of pretrial detention. The right to fair trial in Polish procedure is also affected by the limited access to a lawyer. The CPT emphasized that without a fully-fledged legal aid system, the right of access to a lawyer will remain purely theoretical. Properly funded system of legal aid for persons in police custody who are not in a position to pay for a lawyer should be developed as a matter of urgency and be applicable from the very outset of police custody. The ECtHR claimed that the applicants were undoubtedly directly affected by the lack of access to a lawyer during their questioning by the police.¹¹

Another problem is the degree of access to the case-file by the lawyer and detainee.¹² In practice the detainee in some cases did not have the opportunity of effectively challenging the evidence on which his detention was based. Recent changes adopted by the Parliament¹³ address this problem only partially. According to the ECtHR an important issue is the nonfulfillment of informative obligation of the courts that affects the fairness of the proceedings.¹⁴

7. Privacy and data protection

⁸ The HFHR monitors cases that were four or five times remitted for new adjudication by courts of second instance.

⁹ Recent changes adopted by the Parliament (reform of the system of courts, introduction of special e-court dealing with petty financial claims) address this problem only partially. There is a need for complex reform of the court system, but it is not undertaken due to complexity of a problem.

¹⁰ *Czarnecki v. Poland*, Appl. No. 75112/01, judgment of 28 July 2005; *Telecki v. Poland*, Appl. No. 56552/00, judgment of 8 January 2008, *Wojciechowski v. Poland*, Appl. No. 5422/04, judgment of 3 February 2009.

¹¹ *Plonka v. Poland*, Appl. No. 20310/02, judgment of 31 March 2009, *Adamkiewicz v. Poland*, Appl. No. 54729/00, judgment of 2 March 2010.

¹² *Migoń v. Poland*, Appl. No. 24244/94, judgment of 25 June 2002; *Chruściński v. Poland*, Appl. No. 22755/04, 6 November 2007; *Łaskiewicz v. Poland*, Appl. No. 28481/03, judgment of 15 January 2008.

¹³ It is the consequence of the judgment of the Polish Constitutional Court in case No. K 42/07, judgment of 3 June 2008.

¹⁴ *Kulikowski v. Poland*, Appl. No. 18353/03, judgment of 19 May 2009; *Antonicelli v. Poland*, Appl. No. 2815/05, judgment of 19 May 2009.

The most important problems with the privacy and data protection issues concern secret services:

- insufficient regulation of retention of telecommunications data. Under current provisions police, courts, prosecutors and secret services may request phone record information and logging into BTSs data without court authorization. As a result in 2010, such data was requested in 1.4 mln cases, which is the highest number in the European Union. Furthermore, data has to be retained by the mobile telecoms for two years. The Ombudsman challenges such regulation before the Constitutional Court. There are some legislative attempts to change it, but they are still in the phase of drafting;

- secret services have extensive powers as regards the use of surveillance and operational techniques due to insufficient regulation. For example, different laws do not list the types of operational techniques that may be used by secret services and only use general authorization. It may concern such techniques as GPS, „trojan horses“ installed in monitored computers or long distance microphones. As a result the Ombudsman challenged the current regulation before the Constitutional Court. The case is pending;

- individuals who were the subject of surveillance and operational techniques are neither informed about such activities nor they have the power to review the collected materials and ask for it to be destroyed. Only persons who were subsequently criminally charged have such a possibility, due to the fact that they have the access to the case file. Despite many calls by different bodies¹⁵, the Government did not undertake to create an appropriate procedure.

In general, problems mentioned above as well as problems with the explanation of numerous abuses by the secret services (including CIA prisons case) suggest that there is an insufficient parliamentary control over secret services and there is an urgent need for change in methods of supervision or in existing supervision structures.

8. Freedom of speech

Poland still has extensive criminal provisions that affect the freedom of speech and have “chilling effect” in this area. In particular:

- Article 212 of the Criminal Code (defamation). Despite many attempts and social campaigns, defamation is still punishable with imprisonment. The HFHR's monitoring experience¹⁶ shows that defamation is often used to block the debate on matters of the public interest rather than to genuinely protect the legitimate aims. The number of defamation cases in Poland has increased significantly over that last decade and it continues to grow¹⁷;

- Article 135 para. 2 of the Criminal Code (insult of the President). The Constitutional Court in a controversial judgment declared this provision as in compliance with the Constitution¹⁸;

¹⁵ Including signal decision of the Constitutional Court in the case S 2/06 from 25 January 2006.

¹⁶ The HFHR observes and monitors numerous trials relating to the use of this provision, e.g. *Z. S. v. Łukasz Kasprówicz* (case no. IV Ka 266/11), *W.S. v. Grajana Chojnacka* (case no. II K 1253/10), *P.W. v. Wojciech Cieśla and Tomasz Butkiewicz* (case no. III K 1295/09), *Jan Kobylański v. 19 journalists* (case no. VIII K 248/08). Furthermore, the HFHR is engaged in litigation of cases before the ECtHR, notably *Maciejewski v. Poland* (Appl. No. 34447/05, communicated on 10 May 2010), *Łozowska v. Poland* (Appl. No. 62716/09), *Lewandowska - Malec v. Poland* (Appl. No. 39660/07, communicated on 3 September 2009). Only in 2011 the ECtHR communicated to the Polish Government 4 cases relating to criminal responsibility for defamation.

¹⁷ According to the Ministry of Justice in 2010 the number of convictions and the application of the probationary measures for defamation amounted to 246, among which 30 people were sentenced to imprisonment and additional 18 were sentenced to the public service works.

¹⁸ Judgment of the Polish Constitutional Court of 6 July 2011, No. P 12/09.

- Article 196 of the Criminal Code (criminal responsibility for offending religious feelings). This provision constitutes a basis for proceedings restricting from time to time artistic freedom;

- Article 49 of the Press Law. It provides a responsibility for publishing of an interview without authorization. In *Wizerkaniuk*¹⁹ Poland was criticized for criminal responsibility associated with authorization and the judgment should be implemented by Polish authorities;

- refusal to publish correction or counter-statement. This institution was challenged by the Constitutional Court²⁰. However, the judgment has to be implemented until June 2012. It is not yet clear how it will be implemented.²¹

In 2010, Poland was shocked by the discovery that 10 journalists were subject to the monitoring by secret services. In particular, services collected information from phone records of their mobile phones (as well as data on their location – from so called Base Transceiver Stations). The case has been highly commented in media as a threat to freedom of speech, because on the basis of such data services could easily establish sources of journalists' information. Authorities did not explain the case properly until now. One of the journalists decided to sue the Polish Central Anti-Corruption Office for the violation of his personal rights due to the collection of such data.

Another problematic issue are the standards of the freedom of expression on the Internet, concerning questions such as the ISPs' liability for the unlawful content on the web, a definition of an 'on-line press' and the obligations related to it (for example the obligation to register the web site as press), the Net neutrality or implementing restrictive measures to fight the cybercrime such as filtering and blocking of the on-line content. The biggest challenge is to review the existing legal provisions (such as the current press law designed to regulate the traditional media) and the practice of the domestic courts, in order to adjust it to the characteristics of the Internet and the 'new media'.

9. Freedom of assembly

Poland has a substantial problem with laws regulating the organization of assemblies and the behavior of police as regards protection of assemblies. Poland still did not implement the judgment in the *Bączkowski* case²². It required amendments to the procedure for organization of assemblies. Currently, organizers may receive a decision banning an assembly even one day before the assembly and they cannot appeal (and get a final decision or the court's judgments) before the planned date. Therefore, the procedure requires changes. The Ministry of Interior prepared draft changes, but they were not adopted by the Council of Ministers. Similarly, despite many practical problems, Polish law does not regulate so-called spontaneous assemblies. Any assembly must be notified at least 3 days in advance. In all other cases, any spontaneous gathering of people is considered illegal. There are cases pending before Polish courts for organizing such assemblies.

On 11 November 2011, the National Day of Poland, a series of demonstrations took place in Poland. Some of them resulted in the necessity of using force by the police. According to the report prepared by the HFHR, the police sometimes used force excessively and sometimes was not present in especially dangerous places. Events on 11 November 2011 provoked the

¹⁹ *Wizerkaniuk v. Poland*, Appl. No. 18990/05, the judgment of 5 July 2011.

²⁰ Judgment of the Polish Constitutional Court of December 1, 2010, No. K 41/07.

²¹ See for example the case: *P. K. v. Robert Krasowski*, case no III K 341/10. The HFHR conducts also several cases before the ECtHR concerning the criminal responsibility for refusing the publication of the correction, eg.: *Sroka v. Poland* (Appl. No. 42801/07) and *Kaperzyński v. Poland* (Appl. No. 43206/07).

²² *Bączkowski and others v. Poland*, Appl. No. 1543/06, judgment of 3 May 2007.

President of Poland to propose amendments to the Law on Assemblies (the project was submitted to the Parliament on 24 November 2011). In particular they provided for the prohibition of using masques during demonstration as well as an increase of responsibility for organizers of assemblies. In the opinion of the HFHR those amendments are not in accordance with the Constitution. They also ignore *Bączkowski* standard and need to regulate spontaneous assemblies.

10. Anti-Discrimination laws

On 3 December 2010 the Polish Parliament adopted the Law on Implementation of Certain Provisions of the EU on Counteracting Discrimination. The Law has been long awaited. However, it has been met with disappointment. The scope of the Law is only restricted to the implementation of the EU anti-discrimination directives. The Government did not try to adopt a comprehensive anti-discrimination law covering all major discrimination grounds and including different areas of social life, where discrimination may happen. Under the Law of 3 December 2010, the Ombudsman is regarded as an „equality body“. However, the Parliament did not provide additional money in the budget that would cover the costs of additional staff required to perform new functions.

Currently, there is no effort by the Government to expand the scope of the anti-discrimination law. Furthermore, there is a lack of comprehensive policy of the Government in this regard. HFHR would like to indicate that:

- Poland still did not ratify the UN Convention on Rights of Persons with Disabilities,
- Poland did not ratify the Protocol No. 12 to the European Convention on Human Rights, - there were many concerns regarding the activities of the Polish Plenipotentiary for Equal Status Ms. Elżbieta Radziszewska;
- the Government ignores major discussions on anti-discrimination policies, such as those on LGBT rights. For example, during the last term of the Polish Parliament, draft law on same-sex partnerships, modelled on French PACS, was submitted to the Parliament and supported by left-wing party. However, the ruling party in general ignored the topic and did not want to make a proper review of this law.

11. Women's rights

Access to reproductive rights is still a significant problem in Poland. Poland did not implement properly *Tysiąc* case²³, which concerned access to therapeutic abortion. Procedure of reviewing the decision of doctor refusing an abortion is too long and ineffective. The Committee of Ministers of the Council of Europe still examines the case. Furthermore, in new case – *R.R. v. Poland*²⁴ the ECtHR found that refusal to provide a woman with appropriate diagnostic services and lack of information on status of foetus, constitutes a violation of prohibition of inhuman and degrading treatment. There are two other important cases communicated to the Government that concern the same problem. *P. and S. v. Poland*²⁵ concerns serious difficulties in obtaining abortion by a 14-year old girl, who was raped. This case is additionally significant, due to the fact that a Catholic priest visited the girl in hospital and attempted to discourage her from having an abortion. Another communicated case - *Z. v. Poland*²⁶ - concerns the death of a woman, which resulted from the lack of proper medical treatment. Allegedly, doctors were afraid of the status of the foetus and failed to undertake

²³ *Alicja Tysiąc v. Poland*, Appl. No. 5410/03, judgment of 20 March 2007.

²⁴ *R.R. v. Poland*, Appl. No.27617/04, judgment of 26 May 2011.

²⁵ *P. and S. v. Poland*, Appl. No. 57375/08.

²⁶ *Z. v. Poland*, Application No. 46132/08.

treatment. The above cases, coupled with statistical information, confirm that there is a serious problem with availability of abortion in situations, when law allows it.

12. Lack of education on ethics in schools

Under Polish law pupils should have a choice as regards attending classes on religion or ethics. However, in practice ethics is rarely taught and there is a predominance of religious education. In *Grzelak*²⁷ case the ECtHR found that the lack of any grade in the place reserved for religion / ethics course, violates freedom of conscience and belief and is discriminatory. Proper implementation of this judgment would require full introduction of ethics classes in schools. However, the Government did not undertake any serious attempt to resolve this problem and the judgment in *Grzelak* has not been implemented. Furthermore, provision from religion / ethics is included into the GPA. The Polish Constitutional Court in a controversial judgment found that it does not violate the law. However, one of the judges - Ewa Łętowska - submitted a dissenting opinion.²⁸

²⁷ *Grzelak v. Poland*, Appl. No. 7710/02, judgment of 15 June 2010.

²⁸ Judgment of the Polish Constitutional Court of 2 December 2009, No. U 10/07.