IHF FOCUS: Elections; freedom of the media; independence of the judiciary; fair trial and detainees' rights; sentencing policy; security services; intolerance, xenophobia and racial discrimination.

In 2000, the European Court of Human Rights ruled in favour of Polish citizens who had been awaiting a court decision in their civil cases for years. The European Court rulings again initiated discussion about the inefficient operation of the Polish courts and the individual's right to a fair trial within a reasonable time.

The draft Penal Code provided for more stringent penalties. It was strongly criticized by experts for raising unrealistic hopes and ignoring the real causes of the growth of criminality.

Elections

Presidential elections were held in in Poland in September. Aleksander Kwasniewski, who had already served five years as President, won the first round with 53.92 percent of the vote, while Andrzej Olechowski received 17.28 percent and Marian Krzaklewski (representative of the Solidarity Election Alliance in power) 15.56 percent.

The elections were fair and free. However, during the campaign, two issues raised negative coverage. Candidate Marian Krzaklewski used in his television campaign spot a film which showed the head of the presidential National Security Office, at the behest of incumbent President Aleksander Kwasniewski, kissing the soil upon his arrival at Kalisz in 1997. The allusion to the similar act of Pope John Paul II during his pastoral visits was most explicit. Some political circles and Roman Catholic bishops considered the President's conduct shameful, and some right-wingers demanded that Kwasniewski be brought before the Tribunal of State. Both Kwasniewski and Minister Siwiec publicly regretted the Kalisz incident.[2]

Freedom of the Media

In May the District Court in Warsaw passed a judgement in the defamation case of the Zycie daily.

◆ In August 1997 *Zycie* had published an article entitled "Holidays with a Spy"in which it claimed that in 1994 President Aleksander Kwasniewski had spent his holidays at a seaside holiday resort where a Russian secret agent Vladimir Alganov had been staying. The President denied the allegation and demanded an apology and compensation of PLN 2.5 million (U.S.$ 580,000) to be paid to a relief fund for flood victims. The same text was published in the Gdansk-based *Dziennik Baltycki*, but upon the intervention of its German publisher the newspaper apologized to the President. The court stated that "there are no grounds to conclude" that Kwasniewski was spending his holidays in the hotel during the said period. However, the court did not award any compensation from *Zycie* or the authors of the article; it only ordered them to publish a relevant apology. The President declared that he would not appeal against the sentence.

The court did not question the professional diligence of the authors in their quest for materials. It resolved, though, that the form of publication in *Zycie* had violated the principle of liability for one's words. According to the court, the title "Holidays with a Spy," the caption "Friends from the beach" beneath the photographs of Alganov and Kwasniewski, as well as the accompanying text were all intended to create an impression that Kwasniewski had had some relations with a foreign secret agent. The court further stated that Kwasniewski, as a public official, should be prepared to face critical opinions. In addition, according to the court, he had contributed to the situation himself since he had not replied to *Zycie*'s request for an interview. The basis for the court's sentence was evidence such as stamps in the President's passport, plane tickets, and bills which proved that he had been elsewhere at the time in question.[3]

The court's judgment provoked various reactions. Many criticized the court for mistakenly assuming that the President's "innocence" rather than professionalism of the journalists was the subject matter of the case. Others, again, supported the judgment for defending the office of the President against defamation.

Independence of the Judiciary

Controversies triggered by the coming into force of the Classified Information Act of March 1999 were settled by the Supreme Court in September. The act regulated the procedures for access to State secrets. It required security clearance proceedings before a person could gain access to classified information. Before a person could get security clearance, he/she had to fill out a special questionnaire, subsequently checked by the UOP. In practice, the act gave rise to various concerns, e.g. regarding the independence of the judiciary should they undergo security checks.

The Supreme Court ruled that the act did not apply to judges who therefore could gain access to classified information without a certification. As soon as the act came into force, there was a conflict between the UOP and the judges after the Ministry of Justice had ordered that the presidents of courts should apply for the certificate. Those who followed the instructions were checked by the UOP. In some cases, neighbours were asked about the judges' conduct at home, possible drug consumption, and psychiatric treatment, etc.

Accordimg to the Supreme Court Press Spokesman, Judge Piotr Hofmanski, the Classified Information Act did not explicitely state whether or not it should be applied to judges. Therefore the court had ruled on the basis of the the Act on the Structure of Common Courts and the Civil and Criminal Procedure Codes which granted judges access to state secrets. In Hofmanski's opinion, a different interpretation would divide judges into inferior and superior ones, the latter being those with the certificate. In response to the Supreme Court's ruling, the head of the UOP ordered the that the screening of judges be stopped.[4]

Fair Trial and Detainees' Rights

The judicial system in Poland remained inefficient, a fact that could largely be attributed to considerable delays in court proceedings. In January, a case related to the burning of the files of the former secret police in 1989/1990 drew attention to the large number of cases pending in courts.

◆ The documents in question included about 13,000 files on secret informants and microfilms from the Ministry of Interior's departments III and IV that were responsible for surveillance of the opposition and churches. The documents were found half burnt at a landfill site in 1992. Upon press inquiries, in April 2000 the Ministry of Justice stated that 713 cases had been lodged with courts. However, the ministry assumed that the 713 cases were "an incidental problem" since they accounted for a mere 0.005 percent of all the cases pending resolution by the courts.[5]

In 2000, the European Court of Human Rights in Strasbourg ruled on two cases involving the right to a fair trial within reasonable time (Article 6 of the ECHR).

◆ In 1991, the Polish state-owned telecom company (TPSA) refused to install a telephone line into the home of 89-years-old Janina Dewicka. Civil courts of the first and second instance took three years and five months, respectively, to examine the case and to order the company to install the telephone line. It took a further eleven months to obtain the enforcement clause from the court that should, by law, have released it within three days after an application had been submitted. Thus, Janina Dewicka waited for a total of four and a half years for her case to be decided by the courts. The European Court ruled that Poland had violated Article 6 of the ECHR and awarded PLN 15,000 (approximately U.S.$ 3,500) as compensation to the plaintiff.

◆ In September the European Court of Human Rights ruled that Poland had violated Article 6 of the ECHR in the case of Wojnowicz v. Poland. Since 1987, Krzysztof Wojnowicz could not get a valid decision on the division of his company. The case was decided in the first instance more than five years after his filing the case. The main reason for lengthy proceedings was repeated adjournments, usually due to non-appearance of a party. The court awarded compensation of PLN 25,000 (U.S.$ 5,500) to the plaintiff for moral injury.[6]

◆ In its ruling in the case of Kudla v. Poland, the European Court of Human Rights set a precedent by deviating from the general rule that an applicant should exhaust all domestic legal remedies before the Court would deal with a complaint.

On 1 June 1995 the Krakow Regional Court convicted Andrzej Kudla of fraud and forgery and sentenced him to six years' imprisonment and a fine of PLN 5,000 (U.S.$ 1,100). On 22 February 1996 the Krakow Court of Appeal quashed this judgment on the ground that the court had been incorrectly composed and that there had been serious breaches of procedure. The case was remitted to the Regional Court on 11 April. On 29 October 1996 the applicant was released on bail. On 4 December 1998 the Krakow Regional Court convicted the applicant as charged and sentenced him as before. On 27 October 1999, on his appeal, the Krakow Court of Appeal reduced his sentence to five years' imprisonment. The proceedings were pending before the Supreme Court following his cassation appeal at the time when the European Court of Human Rights delivered its judgment.

The European Court of Human Rights made a precedental decision concerning the interpretation of the Article 13 of the Convention. It found that there was no overlap where the alleged Convention violation that the individual wished to bring before a "national authority" was a violation of the right to trial within a reasonable time, contrary to Article 6 (1). In the Court's view, the time had come *to review its case-law* also in the light of the continuing accumulation of applications before it in which the only, or principal, allegation was, or had been, that of a failure to ensure a hearing within a reasonable time in breach of Article 6 (1). *The growing frequency* with which violations in this regard were, and had been, found had already led the Court to draw attention to "the important danger that exists for the rule of law" within national legal orders when "excessive delays in the administration of justice" occur "in respect of which litigants have no domestic remedy". Against this background, in such cases the Court now perceived the need to examine the complaints about lack of an effective remedy against excessive length of the proceedings under Article 13 taken separately, despite its earlier finding of a violation of Article 6 (1) for failure to ensure an individual trial within a reasonable time.

The Court further stressed that Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, *established an additional guarantee* for an individual in order to ensure that he/she effectively enjoyed those rights. It said, among other things, that the object of Article 13 "is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6(1), rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings." The Court emphasised that a remedy for complaining about unreasonable length of proceedings did not as such involve an appeal against

the "determination" of any criminal charge or of civil rights and obligations and that requiring a remedy under Article 13 was not tantamount to the "right of appeal", guaranteed only in criminal matters under Article 2 of Protocol No. 7 to the Convention.

In the Kudla case the Court noted that the Government had not claimed that there had been any specific legal avenue whereby the applicant could complain of the length of the proceedings but had submitted that the aggregate of several remedies – notably, applications for release, appeals against decisions prolonging detention and complaints to the President of the relevant court and the Minister of Justice – had satisfied the Article 13 requirements. They had not, however, indicated whether and, if so, how the applicant could have obtained relief – either preventive or compensatory – by having recourse to those measures. It had not been suggested that any of the single remedies invoked, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. Nor had the Government supplied any example from domestic practice showing that, by using the means in question, it had been possible for the applicant to obtain such relief. Accordingly, the European Court held that there had been a violation of Article 13 in that the applicant had had no domestic remedy whereby he could have enforced his right to a "hearing within a reasonable time" as guaranteed by Article 6 (1)[7]

Detainees' Rights

In another important ruling regarding Poland, the European Court of Human Rights in April passed a judgment on the so-called sobering-up centres.

◆ In 1994, 54-year-old Witold Litwa made a scene at a post office upon finding his post office box open. Assuming that he was drung, the police took him to a sobering-up centre where he underwent medical examination. A physician determined that Litwa was "moderately" drunk. He was released six hours later. Litwa claimed consequently that he had been sober and complained to the Public Prosecutor's Office about the police's conduct. However, the office did not consider the case to be a breach of the law. In addition, Litwa lost a case for compensation for illegal deprivation of liberty before a civil court. The European Court ruled that although the detention of a the drunken man could be considered a detention of an "alcoholic" covered by Article 5 of the ECHR, in Witold Litwa's case the convention was violated because the means used by the police were excessive. The police could have simply driven the man home instead of placing him in a sobering-up centre as he was a threat neither to himself nor to anyone else. Litwa was awarded PLN 8,000 (approximately U.S.$1,900) in compensation from the Polish Government for moral injury.[8]

The Act on the Promotion of Sobriety was passed in 1982. Its Article 40 provided that "a person in a state of drunkenness, who by his/her behaviour causes a scandal in a public place or a workplace, or is in a situation in which his/her life or health is threatened, or constitutes a threat to other people's lives or health, may be brought to a sobering-up centre or a public health care institution or a place of permanent or temporary residence." The decision to act upon the article was up to the police and the personnel of the sobering-up centre. Such a decision – the only of its kind provided by the Polish legal system – was not subject to court supervision or review: one could not appeal against confinement in a sobering-up centre even *post factum.*

In the last few years, the press has reported several deaths in sobering-up centres in Poland as well as cases of degrading treatment by the personnel of such centres.[9]

Nazi and Communist Crimes

In June, the Polish *Seym* and Senate elected Leon Kieres, an MP of the Solidarity

Election Alliance and an Administrative Law Professor, the President of the National Commemoration Institute - the Commission for Prosecution of Crimes against the Polish Nation. The Institute was to provide access to the Secret Service files for people who were under surveillance from 1944 - 1990 (as well as scientists and journalists) and to collect documents related to Nazi and Communist crimes and political repression. In addition, the institute was to investigate such cases. A relevant law was passed in December 1998. However, several previous candidates for presidency of the Institute did not meet the requirements or failed to gather the necessary majority in the *Seym*. Not having a President, the institute could not commence its activities earlier.[10]

The major reason for the failure to appoint a President for the institute was the fierce opposition of the post-communist Left Democratic Alliance. Its MPs strongly objected to one the provision of the law on the institute, which provided that access to the files be granted to the victims only, rather than all citizens. In a subsequent statement, Leon Kieres suggested that the victims of the Communist regime's Security Services or courts would only gain access to their files once the institute took over the whole archives. This is likely to happen in mid-2001.[11]

◆ In November, the institute's investigation department accused Henryk M. (77) of having assisted genocide in the years 1941-1943 in in Chelmno on the Ner, the first Nazi extermination camp in Poland. M. allegedly battered and ill-treated the prisoners, brought them to gas chamber vans, and robbed them of their belongings. The number of victims of the Chelmno camp was estimated at about 300,000. As few as four Jews survived the confinement. This was the first charge of participation in Nazi crimes since 1973. The charges based mainly on the testimonies of witnesses, inhabitants of Chelmno, who recognized Henryk M. The charges carry a life sentence.[12]

Sentencing Policy

Minister of Justice Lech Kaczynski submitted to Parliament the preliminary draft for toughening up the criminal law. Under the draft, nine offences which are now misdemeanours would be considered crimes for which the Code would provide for at least three years in prison. The list of offences for which a 15-year-old would be brought before a court like an adult would be extended. In addition, the possibility of imposing extraordinary stringent penalties would be expanded, and the conditional stay of prison sentences imposed on recidivists would be abolished. The new criminal policy has resulted, among other things, in a considerable growth of the prison and remand prison population (up to the total of 70,218 persons of of 4 November), the formal maximum capacity being about 63,000.

The minister already issued an ordinance permitting the reduction in the requirement of the standard of 3 square metres per inmate, and the wardens were ordered to adapt additional housing space where new inmates might be placed. In an interview, Minister Kaczynski argued that human rights have been interpreted one-sidedly in favour of offenders and aggressors only and to protect "degenerate criminals."[13]

Forty-two law professors and lawyers protested against the planned toughening up of the criminal law. In their view Minister Kaczynski's plans raised unrealistic hopes that stiffening up of punishments might improve general safety and, at the same time, they divert attention from major problems of Polish courts and prosecution agencies and from the real causes of the growth in crime.[14] Minister Kaczynski replied claiming the law professors and lawyers were liberals who had spoken out of professional and material interests and he cited false data regarding prisoner figures.[15]

Security Services and Lustration Law

In September the District Court in Warsaw quashed a decision of the Prosecutor's

Office to discontinue proceedings in the case of surveillance of right wing politicians. In July 1997, during the parliamentary elections campaign, it was revealed that the UOP had carried out surveillance on right wing politicians in 1992-1993 when Hanna Suchocka had been Prime Minister. The Prosecutor's Office instituted an inquiry into the UOP's illegal actions. It appeared that the UOP had also carried out similar activities on the left wing parties. In August 1999 the Prosecutor's Office had discontinued the proceedings stating that the UOP officers had been guilty of misdemeanours only, not of offences.[16] The Appellate Prosecutor's Office upheld that decision. Following the September court decision, though, the Prosecutor's inquiry was to be resumed.[17]

A number of the Lustration Court's decisions to discontinue proceedings if, in the light of the evidence submitted, the court could not find out whether a persons had lied in his statement or not, resulted in criticism of the Lustration Law. It was frequently proposed that the lustration proceedings should not be discontinued in any case – a practice that in the experts' opinion would violate the principle of the presumption of innocence as the person subject to screening would continue to be under suspicion of collaboration. It was also suggested that the secrecy clause be lifted with respect to documents submitted by the UOP to the Lustration Prosecutor[18]; that the order in which persons falling under the lustration act be defined to prevent, for example, the screening of the President during the electoral campaign; and that the Prosecutor should, by law, refer a case to the court if there is justified suspicion that a person might be a lustration liar.[19]

In connection with the security services' repeated involvement in political intrigues, the Freedom Union submitted a draft Security Services Act in October because, as the the Union's Secretary General, MP Miroslaw Czech stated, it had proved impossible to avoid politically motivated use of the lustration procedure, a fact that might result in the destabilization of the State and impair the country's international image. Under the draft act the office of the Minister-Coordinator of the Security Services (appointed by the political party currently in power) would become apolitical: the coordinator would be an official appointed for six years by the President from among the candidates nominated by the Prime Minister, and he/she would not be removed with a change of Government. The only grounds for his/her removal would include illness, perpetration of an offence, or a valid court conviction.

Another novelty in the draft was the establishment of the Committee for the Coordination of Security Services, composed of representatives of the Ministries of National Defence, Foreign Affairs, Internal Affairs and Administration, as well as the Heads of the UOP and Military Intelligence. The committee will initiate and plan the activities of security services and supervise their execution.[20]

In September the UOP withdrew its previously announced intention to notify workplaces and schools about employees or students caught in the act of proclaiming neo-Fascist views. The idea had first been mentioned by the spokesman of the UOP Olsztyn branch in connection with a meeting planned by the neo-Fascists. Several days later the spokesman took back the statement and announced that, in view of criticism in the media and lawyers' objections, the planned notification would not take place.[21]

Intolerance, Xenophobia, Racial Discrimination and Hate Speech

Poland refrained from ratifying the 12th Protocol of the ECHR, which bans discrimination on any grounds, because the Government believed that if it were to ratify the protocol, Poland would have to pay damages for violations of that provision: some governmmental departments (among them the Ministry of Finance and

of Labour) argued that Polish law included discriminatory provisions, for example, against foreigners in the labour market, and that the Government would have to pay compensation after losing cases before the European Court of Human Rights. However, Poland had ratified the ICCPR that contains a highly similar provision banning discrimination.[21]

On 15-18 November, prior to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (to be held in South Africa in 2001), the Helsinki Foundation for Human Rights at for the request of the UNHCR organized a regional meeting for 115 NGOs from Eastern and Central Europe. The participants adopted a statement addressed to the World Conference Against Racism (WCAR) in which, among other things, they encouraged the WCAR to include in the programme of the World Conference the issues of aggressive nationalism, ethnocentrism and discrimination. The participants also strongly opposed any tendencies to limit the scope of authority and competence of the UN Committee on the Elimination of Racial Discrimination (CERD), and they urged the WCAR to recommend that the CERD consider interpreting racial discrimination to cover also "degrading treatment" within the meaning Article 3 of the ECHR. The statement also touched upon a number of other issues of importance, such as compensation for deportation of nationals, in particular the Crimean Tartars and Meskhetian Turks in the former USSR, the problem of religious discrimination, and that of anti-Semitism.[23]

Endnotes

1 Based on the report *Human Rights in Poland (January-November 2000), Report of the Helsinki Foundation for Human Rights and the Helsinki Committee in Poland for the International Helsinki Federation for Human Rights*, prepared by Andrzej Kremplewski.

2 M. Skoworonska, "Nie bede sie spieszyl z ta decyzja" (I Will Take My Time Deciding), *Gazeta Wyborcza* (GW), No. 225, 26 September 2000, p. 4; M. Kursa, "Przeprosiny za Kalisz" (Apologies for Kalisz), *GW*, No. 226, 27 September 2000, p. 4.

3 E. Siedlecka, "*Zycie*" po wyroku" (*Zycie* After the Judgment), *GW*, No. 119, 23 May 2000, pp. 1, 8.

4 ES, "Sady bez certyfikatow. Konflikt sadow i UOP" (Courts Without Certificates: the Conflict Between Courts and UOP), *GW*, No. 228, 29 September 2000, p. 6.

[5] B. Wroblewski, "Sadzenie przez przedawnienie" (Trial by Prescription), *GW,* No. 5, 7 January 2000, p. 4; "713 nadzorow" (713 Supervised Cases), *GW*, No. 87, 12 April 2000, p. 4.

[6] ES, "Sad przegral w sadzie. Odszkodowanie za przewleklosc sadowa" (Compensation for Lengthy Proceedings), *GW* No. 222 (22 September 2000), p. 6.

[7] European Court of Human Rights, press release issued by the Registrar, Judgment in the Case of Kudla v. Poland, 26 October 2000.

[8] E. Siedlecka, "Trzezwiec po europejsku" (European Sobering), *GW*, No. 81, 5 April 2000, p. 8.

[9] J. Hugo-Bader, "Smierc w zlobku" (Death in the Drunks' Nursery), *GW*, No. 146, 24-25 June 2000, p. 24-25.

[10] See: IHF, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America, Report 2000,* p. 290.

[11] EM: "Teczki edukacyjne. Plany Instytutu Pamieci Narodowej" (The Educational Files: Plans of the Institute for National Remembrance), *GW* No. 267, 16 September 2000, p. 5.

[12] P. Zablocki, "Na volksliste za zabijanie. Pomagal w ludobojstwie?" (Included in the 'Volksliste' for Killing: Did the Man Assist Genocide?), *GW* No. 258, 4-5 November 2000, p. 3.

[13] "Chce byc kreatorem nowej mody. Z Lechem Kaczynskim rozmawia Jaroslaw Kurski" (I Want to Create a New Style: Lech Kaczynski Interviewed by Jaroslaw Kurski), *GW*, No. 264, 13 November 2000, p. 17; E. Siedlecka, "Sprawiedliwy to surowy. Ministerstwo Sprawiedliwosci chce surowszych wyrokow" (Just Means Severe: The Ministry of Justice Wants Longer Sentences), *GW*, No. 187, 11 August 2000, p. 4.

[14] "Kaczynskiemu nie. Oswiadczenie" (No to Kaczynski: Statement), *GW*, No. 257, 3 November 2000, p. 2.

[15] "Chce wiecej sprawiedliwosci. Z Lechem Kaczynskim, ministrem sprawiedliwosci rozmawia L. Warzecha" (I want More Justice. Minister of Justice Lech Kaczynski Interviewed by L. Warzecha), *Zycie*, No. 280, 1 December 2000, p. 15.

[16] See IHF, *Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia, and North America, Report 2000 (Events of 1999),* pp. 291-292.

[17] "Inwigilacja prawicy. Decyzja warszawskiego sadu" (Surveillance of the Right Wing. Decision of the Warsaw Court), *GW*, No. 210, 8 September 2000, p. 8; "Kogo inwigilowal UOP (list A. Kapkowskiego, b. szefa UOP do Gazety Wyborczej)" (Who Was Under UOP surveillance?: Letter of Former Head of UOP, A. Kapkowski to Gazeta Wyborcza), *GW*, No. 226, 27 September 2000, p. 20.

[18] When dealing with documents that contain State secret, the court was obliged to make the whole of proceeding secret.

[19] "Co z tym zrobic? Prawnicy proponuja zmiany w ustawie lustracyjnej" (What Can Be Done About It? Lawyers Suggest Amendments of the Lustration Act), *GW*, No. 183, 7 August 2000, p. 21. See also: Security Services.

[20] J. Jachowicz, "Nie dla partii UOP" (UOP Is Not for Political Parties), *GW,* No. 245, 19 October 2000, p. 1, 3.

[21] K. Olszewski, "UOP: doniesiemy do pracodawcy" (UOP Announces: We Will Inform the Employee), *GW*, No. 257, 3 November 2000, p. 5.

[22] E. Siedlecka, "Drogi Protokol. Dlaczego Polska nie chce zobowiazac sie do niedyskryminacji?" (The Rich Protocol: Why Won't Poland Commit Itself to Non-Discrimination?), *GW*, No. 258, 4-5 November 2000. p. 4.

[23] Appeal by the Warsaw Meeting of NGOs from Eastern and Central Europe of 15-181 November 2000 within the framework of preparation for the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance.