The ombudsman’s role in ensuring the protection of the rights of detainees in Poland

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The treatment of detainees

Basic problems relating to the treatment of people deprived of freedom focus on the situation of people sentenced to imprisonment and detainees awaiting trial. Poland has one of the highest imprisonment rates in Europe. On average, there are 237 prisoners per 100,000 inhabitants.

One of the characteristics of prisons is that out of 155 currently operating penal institutions and remand centres as much as 95 (60%) were constructed before the First World War. Only 37 of them were established after the end of World War II. In some penal institutions, especially the oldest ones, it is quite difficult to provide fair living conditions to people deprived of freedom. This situation is made even worse by the overpopulation of penal institutions and remand centres which was constant between 2001 and 2007 and which consisted in exceeding the national minimum cell space per prisoner, i.e. three square metres. Compared with 68,000-75,000 places available in that period, the annual average of detained people was 79,000-90,000. Their overpopulation represented 17-22%.

From complaints received by the Ombudsman and from inspections made by the employees of the Ombudsman’s Office it appears that the high overpopulation has a negative impact on both health, sanitary and living conditions of imprisonment and prevailing atmosphere among detainees. At the same time, the possibility of the convicts’ resocialisation by the Prison Service has been considerably reduced. The increase in the number of people deprived of freedom is not accompanied by the increased employment of prison officers and staff. This adversely affects the possibility of fulfilling basic tasks relating to the protection of the society against crime and exerting impact on convicted people by the Prison Service.
The fact that people have been crowded into small space for a longer period leads to rising stress and aggression and facilitates more frequent offences by inmates, such as participation in an affray, beating and rape. It is also an issue underlying collective hunger strikes.

Problems connected with the internal distribution of detainees have a negative impact on how to secure the right criminal procedures and how to implement objectives set, such as dealing with convicts on a more individual basis, preventing harmful influences and providing safety for detainees. In their complaints detainees point out that they feel humiliated or treated inhumanly by being put in an overcrowded cell for a long period of time. The constant lack of space for life results in recurring situations, such as difficulties to maintain personal hygiene and to relieve oneself, to have meals on a chair or bed due to the lack of sufficient space at the table for all, to sleep on mattresses unfolded on the floor at night-time, to move around the cell crammed with beds and other equipment where they have to stay for 23 hours a day (the prisoner’s walk takes one hour a day), or to share a cell as non-smoker with smokers.

The European Court of Human Rights received a considerable number of complaints lodged by citizens about the inhuman and degrading conditions of their imprisonment which are predominantly connected with the overpopulation of penitentiary institutions.

Another negative impact is exerted by the convicts’ inactivity which is connected with both the lack of their employment and limited access to cultural, educational as well as sports activities. In such conditions, it is difficult to prevent their corruption and to resocialise them. Despite a major increase in the employment of prisoners within the last two years, more than 40% of all convicts are as a rule unemployed, although their age and state of health or procedural reasons and the fact of ensuring public safety create no obstacles to take up a job.

In their requests prisoners point out the impact of remaining unemployed: the lack of a possibility to fulfill maintenance obligations, to pay fines, to restore damages and make sanctioned payments to the injured or to the treasury, to give assistance to their family, to buy everyday items or save money that will be necessary after release from the penal institution.

Inspections made by public prosecution authorities in institutions show that some of the investigations are carried out for too long. In consequence, the suspects are kept in isolation for too long, which is harmful to their private and professional life. The Ombudsman has realised many times that in the
law enforcement agencies’ and justice’s activities aimed at the successful completion of criminal proceedings humanitarian aspects and the necessity to respect the rights of suspects and people accused of crime is of secondary importance. Sometimes, the decision on pre-trial detention is made too easily, or the restrictions adopted during such detention are too far-reaching. Since it is necessary to secure the right criminal procedure, the sphere of contact of detainees awaiting trial with the external world may be seriously restricted. However, the Ombudsman’s Office observed that in many cases restrictions imposed on pre-trial detainees with regard to their contact (indirect, i.e. made through correspondence, or direct, i.e. through visits) are undue or do not comply with legal norms or the recommendations of international organisations.

The Ombudsman’s mandate to protect the rights of detainees

Since the beginning of the existence of this office, the Ombudsman has attached great importance to the protection of the rights of detainees. Imprisonment seriously restricts independent activities and at the same time exposes the detainee to other prisoners’ excesses or to improper treatment by the staff of the institution, or makes it difficult to satisfy his social and living needs, such as health care and contacts with family, friends and others.

The regular control covers the treatment of detained people in:
- remand centres and penal institutions;
- military detention centres, Police and Border Guard detention homes;
- guarded alien centres, detention centres for deportees;
- children and youth resocialisation institutions, such as houses of correction, homes for detained juveniles, juvenile education centres, police shelters for children as well as psychiatric hospitals for children, social assistance centres and therapy centres for alcohol and drug addicts; and
- institutions for mentally ill people who are detained on the basis of a protective measure decided by a criminal court.

The mandate for this control by the Ombudsman is provided by the Constitution and the 1987 Ombudsman Act. Article 210 of the Constitution guarantees the Ombudsman’s independence from other state authorities. He is responsible only to the Parliament in accordance with the principles specified in the Act. Everybody may apply to the Ombudsman for assistance in protecting their liberties or rights infringed by public authorities (art. 80).
The constitutional protection of the rights of detainees is predominantly based on the following principles:

- respect of human dignity (art. 30);
- legal protection of freedom of a human being and the possibility of restricting it only by the law (art. 31);
- all people’s equal rights (art. 32);
- prohibition of torture and cruel and inhuman or degrading treatment or punishment (art. 40);
- deprivation of freedom only in accordance with the principles of humane treatment and based on procedures set out in the law (art. 41).

The possibility to protect the rights of detainees is much stronger thanks to the fact that Poland has ratified all treaties of the United Nations Organisation and the Council of Europe which refer to human rights, such as the European Convention for the Prevention of Torture as well as the UN Convention against Torture and its Optional Protocol. Early 2008, based on this Optional Protocol the state assigned the Ombudsman the function of a national prevention mechanism. His tasks include regular preventive inspections of all locations of detainees.

At the same time, a court mechanism exists to examine complaints against torture and cruel and inhuman or degrading treatment and punishment. Those who commit such offences are punished by courts (art. 245-247 Penal Code).

Under the Ombudsman Act, a mechanism was provided for examining complaints lodged by detainees. The Ombudsman has access to information related to the infringement of rights, may examine complaints against the infringement of rights, may visit even unexpected locations in which citizens are isolated, may use opinions and reports prepared by other authorities and non-governmental organisations, may challenge acts and actions or call for the use of disciplinary or legislative measures or measures to change the social and living conditions of imprisonment.

The Ombudsman carries out regular inspections of penitentiary and other institutions in which people are deprived of freedom. He usually takes a decision to inspect a given facility (institution) when he receives information that the rights and freedoms of people might have been infringed. The decision is taken on his own initiative, on the motion of a person whose rights have been infringed or on the motion of a social organisation as well as on the basis of information published in the media or on the results of a survey conducted by other authorities or organisations. A high number of complaints received from a given institution may also provide a basis for inspection.
The conditions in which the Ombudsman operates allow him to make thorough and reliable inspections. His capabilities in this respect are much wider than those of e.g. non-governmental or social organisations. The Ombudsman is entitled to investigate each matter on the spot, even without any warning (art. 13 Ombudsman Act). Institutions or organisations which he asks for assistance are obliged to cooperate, and in particular to give him access to files and documents, give requested information and explanations with regard to the actual and legal grounds for their decisions and present their position on his assessments, comments and conclusions (art. 17 Ombudsman Act). While investigating the matters, the Ombudsman may commission expert (e.g. construction, medical, sanitary and legal) opinions. He is entitled to invite specialists, such as sanitary, labour or construction inspectors or medical doctors, to the inspection team and commission them to prepare their expert opinions. Thanks to this, the assessment of the extent to which certain rights of detainees are observed is more professional.

On the basis of his inspection results, the Ombudsman addresses the authorities or institutions in whose activities he has ascertained the infringement of the rights of people deprived of freedom, their supervisory authorities, including central and local authorities and administration.

The Ombudsman’s activities for detainees

Since the beginning of the overpopulation of the penal institutions and remand centres, in many cases the Ombudsman has been drawing the competent state authorities’ attention to the negative impact of this phenomenon and to the need to take actions to eliminate it.

The plan to improve the situation in penitentiary institutions prepared by the Ministry of Justice, provides for an extension of the accommodation base within the next four years by approximately 26,000 places. By the end of 2009 there shall be approximately 97,000 places meeting the three square metres cell-space-per-person standard in prisons.

Overpopulation in prisons is planned to be reduced also as a result of legislative measures. Laws on the implementation of prison sentences outside a penal institution by electronic monitoring or in a week-based system or at the convict’s expense have been adopted.

In 2007, however, the overpopulation of penal institutions and remand centres was not reduced. Therefore, the Ombudsman joined the constitutional complaint that the provision of article 248 § 1 Executive Penal Code should be declared unconstitutional. This provision allows putting people in penal institutions and remand centres in conditions where the cell space per person
is less than the minimal three square metres standard for an indefinite period. The Constitutional Court will decide whether this provision infringes the right to be treated in a humane way during imprisonment and pre-trial detention and is in conformity with the provision that prohibits to punish detainees in a cruel, inhuman or degrading manner.

Between 2006 and 2007, the Ombudsman focused on the assessment of the application and execution of pre-trial detention which resulted in a comprehensive report entitled “The institution of pre-trial detention: application and execution as assessed by the Ombudsman”.

The document was addressed to all competent state authorities, such as the Minister of Justice, the Chairman of the National Judiciary Council, the Chairman of the Parliamentary Committee on Justice and Human Rights, the Chairman of the Senate Committee on Human Rights and Law and Order and the General Manager of the Prison Service.

The report showed all the basic problems, such as lengthy criminal proceedings, long-lasting detention and execution defects.

Despite the falling trend between 2001 and 2006, the share of pre-trial detainees in the prison population is still high (in 2001: 28.5% and in 2006: 16.7%).

The Ombudsman expressed critics on the practice of allowing pre-trial detainees to be visited by their family members and friends. In his opinion, the right to such visits is not respected properly due to the defective legal construction of article 217 § 1 Executive Penal Code, which provides that the pre-trial detainee may be visited upon approval from the authority at whose disposal he remains. The provision does not specify the conditions on which the authority may refuse to give its approval for such visit. Thus, the legislator has given the authority a free hand in deciding whether to give such approval or not. Therefore, the authority’s approval (refusal) fully depends on its discretion.

Such legal construction infringes the constitutional right to the protection of private and family life and allows the authority to decide about contact with family and friends at its full discretion. It is also contrary to article 37 letter c Convention on the Rights of the Child in cases when pre-trial detention applies to people who are under the age of eighteen. Moreover, the lack of a possibility to appeal against the negative decision infringes upon the constitutional right to a court. Therefore, the Ombudsman challenged the constitutionality of this provision.

Humanitarian reasons and the necessity to observe the rights of suspects and the accused are reflected well by the case of Maria S examined by the Om-
budsman’s Office. Maria S was suspected of committing an offence against company assets and she was subject to pre-trial detention following a 1.5-year bail period.

As a result of the assessment, it was ascertained that some acts of legal procedure with regard to Maria S had a form of inhuman and cruel treatment. The decision on her pre-trial detention and long-lasting escort was taken in a period immediately preceding her childbirth. The pregnant woman’s escort, which was carried out at night, on a long route of 300 km, was not preceded by medical examination to confirm its admissibility. No medical examination was made immediately after her admission to the hospital ward. The decision to interrogate the detainee was taken in the last week preceding the childbirth and it was not abandoned in the following days when she was in hospital. Due to such important and difficult life situation in which Maria S found herself, serious doubts were also raised about her – more than two months – total isolation from her husband and other family members who were applying for a visit. No approval was given for such visit, even in the presence of a Prison Service or Police officer.

The pre-trial detention of Maria S was quashed following the Ombudsman’s intervention and the National Public Prosecutor’s decision that its application in that case was an inhumane act.

In the Ombudsman’s opinion, putting a pregnant woman in prison a few weeks before her childbirth may adversely affect the future mother’s and her baby’s state of health. It also has a nature of stigmatising the newly born. Therefore, the Ombudsman asked the Minister of Justice to amend the provisions of law in such a way as to fully eliminate the possibility of admitting women who are 28 weeks pregnant to penal institutions and remand centres. Such women may be subject to other criminal law institutions. In the case of persons suspected of committing an offence, preventive measures other than pre-trial detention may be taken.

Correspondence carried out by remand detainees is subject to far-reaching restrictions such as the possibility of its retention, censorship or supervision by an authority at whose disposal the detainee is placed, or, if that authority abandons it, by the remand centre’s administration (art. 217a Executive Penal Code). In practice, such checks are carried out by public prosecutor’s offices and courts and may entail the infringement of the rights of remand detainees.

Articles 217a and 217b on the censorship of correspondence carried out by pre-trial detainees are imprecise and may result in misinterpretation by public prosecutor’s offices and courts. Therefore, the Ombudsman demands that the Minister of Justice takes an initiative to amend the provisions and to
clearly define that the correspondence of a remand detainee with the Ombudsman, authorities established under international agreements relating to the protection of human rights which are ratified by Poland as well as with law enforcement, justice and other national and local agencies is not subject to retention, censorship or supervision by an authority at whose disposal such detainee is placed. Such correspondence should be sent directly to the addressee. This position is strongly justified by the judicial decisions of the European Court of Human Rights.

In December 2007, the Ombudsman asked the Minister of Justice to take a position on the findings of the Ombudsman’s assessment of the application and execution of pre-trial detention. The Ombudsman is also interested in measures taken by the department of justice in connection with:

– recommendations included in the Provisional Resolution KM/ResDH (2007) 75 adopted on 6 June 2007 by the Committee of Ministers with regard to the judgements of the European Court of Human Rights in 44 cases against Poland ascertaining the excessive length of remand detention;

– signal from the European Court of Human Rights received in December 2007 with regard to the “structural” problem with the application of provisional remand in Poland.

These issues will be monitored by the Ombudsman on a regular basis.

Following mass media reports containing suggestions of the detention and improper treatment of al-Qaeda members in Poland, in December 2005 the Ombudsman took measures to clarify this issue.

To this end, the Ombudsman asked the Minister – Coordinator of Special Services several times to specify whether the national and foreign media reports on the alleged transport of al-Qaeda members through the territory and their detention in Poland had been verified. The government strongly denied the media speculations about the existence of secret prisons in which aliens suspected of terrorism were supposed to be kept.

This issue was touched on in the international forum in the context of respecting human and citizen rights and freedoms by the Polish authorities. It was the subject of discussions and questions addressed to the Ombudsman by some of the participants of the 4th Round Table of European National Institutions for the Promotion and Protection of Human Rights which was held in Athens on 27-28 September 2006.

The participants received a paper by Gavin Simpson, adviser to Dick Marty, a Swiss senator holding the function of the Council of Europe Parliamentary Assembly’s Legal Affairs and Human Rights Committee Rapporteur. The
paper was drawn up, to a large extent, on the basis of Dick Marty’s report on secret prisons and abductions, which was published in 2006. The report mentions Poland and Romania as the likely locations of secret detention facilities for people suspected of acting or merely sympathising with terrorist organisations. Moreover, in his paper Gavin Simpson mentioned the main propositions of Resolution 1507 of the Council of Europe Parliamentary Assembly dated 27 June 2006. It is stated in them that it has been demonstrated undeniably, through numerous well-documented and convergent facts, that secret detentions and unlawful inter-state transfers involving European countries have taken place, such as to require in-depth inquiries and urgent responses by the executive and legislative branches of all the countries concerned.

However, during the meeting in Athens, no direct convincing evidence of the detentions of al-Qaeda members, their transfer through the Polish territory and the relating improper treatment of those or other persons suspected of terrorism was submitted to the Ombudsman. No new data which in any way would be different from the explanations made in this respect have been produced since then. In his letters to the Ombudsman, the Minister stressed that from the beginning of the emergence of that issue the Polish side had been declaring its full readiness to cooperate with institutions appointed by both the Council of Europe and the European Parliament to clarify it. He also pointed out that it did not appear from the findings of those institutions that any detention facilities used by US special services existed in Poland. Moreover, the Minister pointed out that similar conclusions had also been drawn as a result of the investigation carried out by Amnesty International, all accusations regarding that issue were based on circumstantial evidence and, until then, no concrete evidence had been produced to confirm them.

The Ombudsman was assured once again that the Government observed all the international agreements regulating the issues of the protection of human rights and fundamental freedoms and prohibiting the use of torture and other inhuman treatment of people.

On 6 December 2006, the Ombudsman applied to Terry Davis, the Council of Europe Secretary General, presenting activities conducted so far with regard to the issue concerned and asking him to give information about the results of the work of the Council of Europe Committee which examines and verifies (also in Poland) information about the possible detention and improper treatment of al-Qaeda members in Poland.

Furthermore, in May 2007, the Ombudsman’s representatives visited the army unit in Stare Kiejkuty and the airport in Szymany. Their actions did not confirm the reports and suggestions of detaining al-Qaeda members, or any other aliens suspected of terrorism. Thanks to this it can be stated that the explanations given so far by the authorities with regard to this subject are clear
and full, and any new circumstances that may arise in future will be verified on a day-to-day basis, also by the Ombudsman.

This review of the Ombudsman’s activities for people deprived of freedom in penal institutions and remand centres clearly shows that this institution is not replaceable, mainly because of its especially strong position in the system of legal protection agencies in the broadest meaning of that term, the fact of being rooted in the Constitution, as well as because of huge commitment of successive Ombudsmen and their partners to these exceptionally difficult issues which are so important from the point of view of the principles of functioning of a democratic state of law.