

**Special Rapporteur in the field of cultural rights**

**Information provided by the Commissioner for Human Rights
on actions undertaken in the field of cultural rights**

**WARSAW, 21 SEPTEMBER 2018**

**1. Case of Jan Kapela: altering the lyrics of the national anthem**

The Commissioner for Human Rights filed a cassation appeal against the court’s final judgment which imposed on Jan Kapela, a poet, a fine of PLN 1,000 for altering the lyrics of the national anthem, singing it in the altered form and placing a movie with it on the Internet. The anthem was altered in such a way as to draw attention to the issue of non-admission of refugees by Poland.

The court considered the defendant’s action as intentional and provocative in nature, although the altered text of the anthem did not contain phrases which could be qualified as disparaging and the anthem was sang solemnly, with an image of the Presidential Palace in the background. The court pointed out that the defendant could have taken part in the public debate and drawn public attention to the issue of refugees by singing the anthem with its original lyrics, and by explaining its history and meaning in relation to the issue in question.

In the opinion of the Commissioner, the Regional Court’s interpretation according to which any alteration of the lyrics of the anthem, regardless of its form and purpose, violates the provisions of the relevant act of the Parliament and thus constitutes an offence, was incorrect. On the one hand, such interpretation fully disregards the necessity to establish the presence of social harm caused by the action, and of the guilt of the perpetrator. On the other hand, it constitutes a disproportionate interference with the freedom of expression and artistic freedom.

In the Commissioner’s opinion, the defendant’s action, although it may have formally violated the provisions applicable to the anthem, should not have been considered illegal because it was not socially harmful (offensive). On the contrary, the action was beneficial to the society. Referring to the extensive case law of the European Court of Human Rights relating to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Commissioner pointed out that the action of the defendant had the form of a political and artistic statement, that it concerned issues of importance for the society (the issue of non-admission of refugees by Poland), that it did not involve violence and was not intended to offend anyone.

**2. 2018 amendments to the Act on the Institute of National Remembrance**

The amendment adopted in January introduced a new type of offence into the Act on the Institute of National Remembrance. The Act provided for a fine, or imprisonment for up to 3 years, for anyone (including foreigners from countries other than Poland) who publicly, and contrary to the facts, ascribes to the Polish Nation or the Polish State the responsibility or co-responsibility for crimes committed by the Third German Reich or by “Ukrainian nationalists”. The penalty was to be imposed also for unintentional actions. Artistic or scientific activities were, however, to be not subject to criminal liability. The main objective of the amendment was to prevent the use of the phrase “Polish death camps” in the public debate. The said provisions raised serious doubts from the point of view of the freedom of speech and the freedom of scientific research, mainly due to the lack of precision of the terms used therein. In the opinion of the Commissioner, the application of the new regulations could have had the so-called freezing effect upon the public debate. After signing the amendment to the Act on the Institute of National Remembrance, the President of Poland challenged the new provisions before the Constitutional Tribunal, and paid particular attention to their imprecision. The Commissioner for Human Rights joined the proceedings before the Constitutional Tribunal and appealed for considering the challenged provisions inconsistent with the Constitution. In his procedural document, the Commissioner emphasized the need to respect the freedom of speech and the freedom of scientific research. After the entry into force of the Act, a significant increase in the number of anti-Semitic statements in the public debate was observed. The said criminal law provision was deleted from the Act on the Institute of National Remembrance by the subsequent amendment of June 2018. However, the civil law provisions which grant non-governmental organizations the right to file, under the Civil Code, a lawsuit regarding the protection of the good name of the Republic of Poland or the Polish Nation, remained in force. The provisions raise concern also with regard to fundamental rights and freedoms of individuals.

**3. Civil protest in defence of the Constitution: citizens persecuted because of putting t-shirts with the inscription “Constitution” on monuments**

The Commissioner for Human Rights started an ex officio examination of steps taken by law enforcement agencies in connection with the action of “dressing” monuments, including the ones of former Polish President Lech Kaczyński, in t-shirts with the inscription “Konstytucja” (Constitution).

In the opinion of the Commissioner, the action of citizens should be considered an expression of their protest against the executive and legislative authorities’ failure to observe the Constitution’s provisions relating to the system of justice (see, e.g., the amendment to the Act on the Supreme Court Act; the Act on the National Council of the Judiciary, and the Act on the Constitutional Tribunal), caused by the adoption of regulations that were contrary to the constitutional principle of a democratic state ruled by law.

The action of “dressing” monuments was commenced in Szczecin at the end of July 2018. In that case, the police took steps and considered whether the “dressing” of monument was an offence consisting of defiling the monuments (Article 261 of the Penal Code). The materials gathered by the Police were sent to the prosecutor’s office which, however, refused to conduct a criminal proceeding because the action did not have features of a prohibited act. The next “monument dressing” act took place on 2 August 2018 in Biała Podlaska. The police, with the use of video surveillance recordings, established the identities of persons who “dressed” the statue of Lech Kaczyński on a monument representing him and his wife. The two persons were searched, and their camera and two telephones were taken away from them. The search was approved by a prosecutor. Both “perpetrators” faced charges of defiling the monument, and one of them was detained. The District Court in Biała Podlaska, having examined a complaint against the detention ruled that it had been ungrounded. The persons are currently awaiting the examination of their complaint against the prosecutor’s decision that approved their search and the taking away of their belongings. The related proceeding is still ongoing. The Commissioner for Human Rights is monitoring it in accordance with his powers.

**4. Adverse effects for the German minority as a result of the enlargement of Opole**

Representatives of national minorities, ethnic minorities and communities that use a regional language enjoy, under the Polish law, e.g. rights relating to the use of their language in public spaces. The rights include: the right to use additional official geographical names (of towns and facilities) in the minority language, and the right to use the minority language in official contacts with municipal authorities (e.g. to file applications or receive replies in the minority language). However, the rights, as a rule, depend on the percentage share (at least 20%) of minority residents in a given municipality. The Opolskie Voivodeship has the largest share of the German minority in Poland. Therefore, in over 20 of its municipalities, the minority’s representatives enjoy the said rights. Yet, as of 1 January 2017, the rights were lost by some persons. Three municipalities (Dobrzeń Wielki, Komprachcice and Prószków) with the minority’s share of 20% were connected to the city of Opole (the Voivodeship capital with the German minority share of less than 5%). The Commissioner had appealed to the government, unsuccessfully, for preventing the said effect of the administrative borders’ change, and stated that it was not consistent with the European Charter for Regional or Minority Languages. The government moved the borders despite the fact that the inhabitants of the three municipalities were strongly against it. The Constitutional Tribunal refused to examine the case (the ruling was issued with the participation of the so-called doubled judges).

**5. Case of Konrad Szołajski: refusal to admit the documentalist to the Polish Parliament**

The team of Konrad Szołajski making a documentary entitled “Dobra Zmiana” [The Good Change”] intended to take part in a session of one of the Parliamentary committees, in order to record it. The team members were not issued single-entry press cards and were not allowed to enter the Sejm building, which made it impossible for them to make the recording. The detailed procedure of issuing such press cards is laid down in a relevant regulation of the Speaker of the Sejm, according to which press cards are issued to journalists to make it possible for them to perform their professional work within the building of the Sejm of the Republic of Poland. The Commissioner requested the Chancellery of the Sejm to provide an explanation of the situation. In reply, the Chancellery stated that a team of filmmakers cannot be considered a team of journalists within the meaning of the above-mentioned regulation. He did not, however, indicate the reason for refusing access to the committee’s session. Thus, the Commissioner addressed the Speaker of the Sejm and indicated that the current regulations on access to the Sejm and on participation in sessions of Parliamentary committees do not fully guarantee the possibility to exercise constitutional rights and freedoms. However, the Speaker of the Sejm took no specific action concerning the matter.

**6. World War II Museum in Gdańsk**

The plans of the World War II Museum in Gdańsk were criticized by politicians of the ruling party from the very beginning because of insufficient emphasis on the role and history of Poland. In 2016, the Minister of Culture and National Heritage announced that the Museum would be combined with the newly established Westerplatte Museum. As a result, a new cultural institution would be established with new managers, also of the World War II Museum. The Office of the Commissioner received many complaints from persons who had already donated some exhibits to the Museum. In their complaints, the citizens stated they decided to donate the exhibits as they expected a permanent exhibition. The Commissioner for Human Rights filed a complaint to an administrative court against the minister’s regulation joining the two museums, and claimed that this would restrict the right of access cultural assets. Finally, however, the Supreme Administrative Court considered the regulation to be an internal management regulation not subject to review by administrative courts. The two museums were finally merged and their new managers were appointed in 2017. The museum’s former director, Paweł Machcewicz, complaint against it to the European Court of Human Rights.

**7. Protests against the play “Klątwa”**

On 18 February 2017, at Teatr Powszechny in Warsaw, the premiere performance of “Klątwa” (The Curse) directed by Oliver Frljic took place. After the related documentary broadcast on the public television, there were strong protests against the play that was said to insult religious beliefs. The main theme of the play is the relations between the Catholic Church and the state. The play includes controversial scenes such as cutting down the cross with a chainsaw, or sexual activities with a statute of the Pope. Politicians, including the Minister of Culture and National Heritage, publicly criticized the play and the Mayor of Warsaw as Teatr Powszechny’s governing authority; this intensified the conflict related to “The Curse”. In the following months, there were large demonstrations held in front of the theatre. The demonstrations made both the audience and the actors feel at risk as the shouted slogans had features of hatred. In December 2017, in front of the theatre a toxic substance was spilled during one of the performances. The Office of the Commissioner for Human Rights also received numerous complaints from persons stating that the play insulted their religious feelings. In his replies, the Commissioner indicated that the decision as to whether an offence has been committed should be taken by courts. He also drew the complainants’ attention to the fact that the matter was highly sensitive and related to the freedom of speech, provided for under Article 54 of the Constitution of the Republic of Poland, the freedom of artistic expression provided for under Article 73 thereof, and every individual’s right to respect for his or her personal values, including religious feelings whose protection has its source in the freedom of conscience and religion, provided for under Article 53 of the Constitution of the Republic of Poland.

**8. Refusal by the Ministry of Culture and National Heritage to subsidize Malta Festival**

In 2016, the Malta Foundation, as the organizer of one of the largest theatre festivals in Poland, concluded a three-year agreement for holding the Malta Festival in Poznań. Under the agreement, the Ministry of Culture and National Heritage undertook to pay a targeted subsidy to the organizer every year. However, in 2017, the subsidy was not paid because among the expected curators of the festival was Olivier Frljić, the author of “The Curse”. There were public statements made in advance by the Minister who announced that the funds would be withdrawn if the curator is not changed. The press release of the Ministry of Culture and National Heritage of 9 June 2017 stated that Olivier Frljić “fails to guarantee that the audience members will be engaged in the dialogue and artistic experience, but rather he will cause a conflict between the audience and theatre as such, thus discouraging people from taking part in the event”. It should be noted that the curator's name was known to the Ministry before the premiere performance of “The Curse” at Teatr Powszechny. Frljić’s play was not performed during the festival. The Commissioner addressed the Ministry several times, inquiring about the legal basis for refusing the funding of the festival. The ministry's explanations turned out insufficient as they were limited to stating that the assignment of the role of the curator to Frljić, with his controversial approaches, had violated the provisions of the agreement. The Ministry did not relate in any way to the programme of the event. The festival was held and the lacking funds were finally collected in a crowdfunding campaign. In June 2018, the Malta Foundation filed a lawsuit against the Ministry concerning the payment of outstanding subsidy.

**9. Police control during the conference on Karl Marks**

As a result of media reports, the Commissioner received information about the police intervention during a scientific conference entitled “Karl Marx: 2018” that was held in Pobierowo. The police officers were said to inform the event participants that the presence of the police at the conference was caused by the need to verify whether it was not anti-national in terms of content and did not propagate totalitarian practices. During the intervention, the police officers photographed copies of scientific magazines, asked the participants about the course of the conference and registered the data of one of the event’s organizers. The police activities raised the Commissioner’s doubts as to their compliance with the law and with the principle of autonomy of universities. With regard to the matter, the Commissioner wrote to the prosecutor’s office and the Minister of the Interior and Administration.

**10. Calling off the screening of the movie about LGBTQ right to marry**

Commissioner for Human Rights received a complaint by representatives of a non-governmental organization, regarding the cancellation of a screening of a movie entitled “Article 18”. The movie is about same-sex relationships and was planned to be shown at Mała Galeria in Nowy Sącz (a cultural institution run by the local government). The reason for the cancellation of the event, indicated by the facility’s director, was a failure of the water piping installation in the building. However, according to media reports, it was the mayor of the town who decided to cancel the event. A representative of the City Hall emphasized in his public statements that in his opinion, such events as the screening of the film entitled “Article 18” should not be held in municipal cultural institutions.

Commissioner for Human Rights requested the mayor of the town for explanation. At the same time, he indicated that cancellation, without any objective reason, of the screening of a documentary on the situation of same-sex couples constitutes a blatant manifestation of restricting artistic freedom and freedom of expression, as well as of discrimination on the grounds of sexual orientation. In the opinion of the Commissioner, the cancellation of the screening violated the constitutional principles of: freedom of artistic creation (Article 73 of the Constitution), freedom of expression (Article 54 of the Constitution) and equal access to cultural assets (Article 6(1) of the Constitution). In reply, the mayor of the town stated, among others, that “municipal cultural institutions seek to organize events for everyone, which also means that on the initiative of municipal authorities, no events will be held that promote the rights of persons with any specific sexual orientation, including LGBT. It is the duty of municipal authorities to raise the awareness of the rights and obligations of all citizens, and not to promote a single type of sexual orientation.”

**11. Public television since 2015**

Since 2015, the Commissioner has been concerned with the changes taking place in the public television. After the change of the president of the organisation, many well-known journalists were dismissed. Note should be taken of one-sidedness of the formulated messages, as well as the broadcasting of discriminatory materials e.g. in the context of the migration crisis. In 2016, the Commissioner unsuccessfully intervened with regard to the issue of a negative approach taken when presenting activities of non-governmental organizations that perform the so-called watchdog role. The public television also provided only limited coverage of the Great Orchestra for Christmas Charity, one of the largest charity campaigns in Poland. The reason for it has been the negative perception, by the ruling party’s politicians, of Jerzy Owsiak, the chief organizer of the action. In 2018, based on media reports, the Commissioner for Human Rights received information about the possibility of the existence of a “black list” of journalists, experts and politicians who may not be invited to the public-sector’s media. The matter began with a message posted on social media by a popular Polish journalist and writer who referred to a conversation with an employee of the Public Television. As a result, the Commissioner submitted an intervention letter to the President of TVP and drew attention to the international standards in the area of freedom of speech and freedom of the media.

Additionally, in a case initiated by the Commissioner for Human Rights, the Constitutional Tribunal found that some provisions of the media law of 20 December 2015 were unconstitutional (judgement of 13 December 2016, case No. K 13/16). The unconstitutionality was found in particular in reference to the provisions excluding the National Broadcasting Council from the appointment process of the management of public television and radio. The judgement has not been enforced, to the detriment of freedom of speech and media freedom.

**12. Hate speech in public debate**

Commissioner for Human Rights acknowledges that the language of the public debate is getting increasingly radical. The process has been described by Kultura Liberalna’s Public Debate Observatory, in the context of the so-called migration crisis of 2015 and 2016. It was described in a report entitled “Negative portrayal of Muslims in the Polish press”, drawn up and published in 2017 for the Office of Commissioner for Human Rights[[1]](#footnote-1). The researchers pointed out that in the media coverage, in articles concerning the situation in Europe during the migration crisis, the dominant contexts were those of inundation, invasion, clash of civilizations or even alternative war involving methods such as terrorism and social jihad. Over time, neutral terminology was replaced with increasingly negative one, for example the term influx (used in relation to migrants or refugees) was gradually replaced by words such as wave, flood, tsunami, inundation and invasion.

Commissioner for Human Rights intervened with regard to specific publications and broadcasted items. An example of such intervention can be the CHR’ reaction to one of TVP Info spots that was broadcasted before a movie in November 2016 and was clearly anti-immigrant in character. The spot included a series of context-free images of aggressive men of various national and ethnic origins. The images were accompanied by tension-building music and then by words quoted after the mayor of Gdańsk, relating to the appointment of the Immigrants Board within the Gdańsk municipal office. It could be understood that the goal of the spot was to show a negative image of the migrants’ community; as well as to cause fear of and aversion towards migrants among the audience, and indirectly also towards the initiative of the mayor of Gdańsk. Commissioner for Human Rights informed the president of the National Council for Radio and Television **B**roadcasting about the Commissioner’s objections to the spot content. Commissioner also reminded, among others, that according to Article 18(1) of the Act on Radio and Television Broadcasting, programmes and other broadcasted content may not contain elements that incite hatred or discrimination on the grounds of race, nationality or religion. Commissioner for Human Rights requested the president of the Council to assess the content in question from the point of view of potential violation of the abovementioned provision. In reply, the Commissioner for Human Rights was informed that although TVP Info disagreed with the allegation that the broadcasted content was discriminatory in nature, the author and the publisher of that content were sanctioned (suspended) and the content was removed from social media.

In the public debate, there is also an increase in number of statements that are discriminatory or stigmatizing for other minority groups, in particular LGBT. Among others, Commissioner issued a statement concerning the words of the Minister of the Interior and Administration who, when referring to the Equality March in Poznań, used the term "a parade of sodomites". During the protest of persons with disabilities and their families, that took place in the Sejm building, one of the deputies spoke about “a smell that was hard to live with”, relating directly to the people who were staying there.

**13. Rights of ethnical and national minorities to take part in culture**

Article 35 of the Constitution of the Republic of Poland grants to Polish citizens - members of national or ethnic minorities, and to communities using a regional language, the right to establish their own educational, cultural and other institutions that serve the purpose of engagement in resolving issues that concern the maintenance of cultural identity. The rules of establishment and operation of such institutions are laid down in commonly binding regulations on activities of social organizations (associations, foundations, trade unions, etc.). The said right may be exercised by all minorities, without any exceptions. Thus, they establish numerous social and cultural organizations, both at the national and local levels. Such organizations receive financial support in the form of subsidies from the state budget (its part managed by the Ministry of the Interior and Administration). The obligation for public authorities to provide support to activities aimed at developing and maintaining the cultural identity of minorities arises directly from Article 18 of the Act on National and Ethnic Minorities and on Regional Languages. The approximate annual state budget allocation for such activities amounts to PLN 15 million. Additional financial support for the Roma minority is guaranteed by the resolution of the Council of Ministers establishing the Programme for the Integration of the Roma Community in Poland in 2014-2020. The programme is also financed from the state budget and its value is, approximately, PLN 10 million per year.

In March 2017, the Commissioner was informed by Ukrainian and Slovak minority organizations of serious difficulties faced by them in fulfilling their tasks aimed at protecting, preserving and developing the cultural identities and regional languages of their national and ethnic minorities. Representatives of both minorities filed complaints with the CHR. They stated that despite the successful completion of the procedure of applying for subsidies for the said tasks in 2017, and the received funding for over ten projects in total for that year, they could not sign contracts and spend funds allocated to them. According to the complainants’ information, after completing the above-mentioned procedure the Ministry of the Interior and Administration questioned the contract templates used before, and replaced them with new framework contracts. The contracts, in the opinion of the minorities, contained provisions that were not used before and that were disadvantageous for the parties.

Commissioner for Human Rights requested the Ministry of the Interior and Administration to provide explanations. In reply, the ministry confirmed the delays in signing contracts with the organizations that received subsidies for tasks implementation in 2017. The delays were indeed caused by the necessity to modify the contract templates used before. According to the explanations received by the Commissioner, also the published template contract for co-funding activities aimed at protecting, preserving and developing the cultural identity of national and ethnic minorities, considered by the minorities as binding, was only a framework contract. Therefore, the Ministry of the Interior had the right to modify or supplement it at any time before signing the final contract with the beneficiary. It was also stated that as of the date of the reply i.e. 17 August 2017, of 451 contracts that were to be concluded that year upon receiving the subsidy, 428 contracts had already been signed.

The delays caused by the modification of the template contracts were not the only problem reported to the Commissioner for Human Rights by the minority communities. In fact, every year the Office of the Commissioner receives information confirming that the procedures of beneficiary selection and subsidy award to minority organizations for their activities are ineffective. It is frequently noted that the deadline for submitting relevant applications is too short and that organizations do not have enough time to fill in the applications and submit their projects. The requirement to apply for the subsidies under the state budget system (i.e. annually) makes it difficult for organizations to implement cyclical or multiannual projects.

**14.** **Problems regarding the retirement system of artists**

The fact that the social insurance system is not adjusted to the specific needs of the creative industry and artists has been mentioned by their representatives for years. Only a small number of artists and creators work under employment contracts or are self-employed (as sole traders) in a way ensuring regular monthly income. A vast majority of creators and artists earn their income without any regularity.

However, the social insurance system that has covered creators and artists since early 1999 requires regular monthly payments of lump-sum social insurance contributions. The contribution value is no less than 60% of the average monthly salary expected for a given year. Thus, the system is the same as for persons who run any sole trader business other than farming.

Therefore, for several years the Commissioner has been calling on the government to annul the requirement for creators and artists to pay equal monthly social insurance contributions (independent of the actual income). Commissioner for Human Rights has been postulating the possibility to continue the insurance coverage even in periods when temporarily lower contributions are paid (when waiting for a new contract). The Commissioner also pointed to the need for the state to participate in the costs of social insurance of creators and artists, and to permit the insurance contribution payments by entities that benefit from the work of artists and creators. In the opinion of the Commissioner, the current system fails to guarantee adequate retirement and disability pensions for creators and artists.

According to the recent reply of the Minister of Culture and National Heritage, dated 11 May 2018, in the near future a set of proposed changes to the system, developed in cooperation with representatives of the creative professions, will be presented to the Minister of Family, Labour and Social Policy.

**15**. **Logging and wood extraction** **in Białowieża, Europe’s primeval forest and the UNESCO World Heritage Site**

The Białowieża Forest includes some of few existing, and Europe’s largest, areas of primeval forest that once grew in the European lowlands. The Białowieża forest is subject to UNESCO protection (it was placed on the list of World Heritage Sites in 1979). In 2015, the Minister of the Environment approved the plans to increase tree logging in the Forest by several times, which was motivated by the need to deter beetle infestation. The decision was taken despite strong opposition on the side of most experts and environmental organizations. According to them, the increased logging posed a serious risk to the forest. The Commissioner challenged the Minister’ decision before the administrative court which, however, concluded that under the country’s laws the Commissioner’s action is inadmissible (although the provisions of the Aarhus Convention that is binding on Poland clearly provide for the possibility to challenge such decisions). The logging was discontinued only after the judgment of the Court of Justice of the European Union, issued on 17 April 2018 and considering the increased tree logging to be a violation of the EU law.

1. The report is available on the website of the Office of CHR: [www.rpo.gov.pl/sites/default/files/Raport%20Negatywny%20obraz%20muzu%C5%82man%C3%B3w%20w%20polskiej%20prasie.%20Analiza%20wybranych%20przyk%C5%82ad%C3%B3w%20z%20lat%202015-2016.pdf](http://www.rpo.gov.pl/sites/default/files/Raport%20Negatywny%20obraz%20muzu%C5%82man%C3%B3w%20w%20polskiej%20prasie.%20Analiza%20wybranych%20przyk%C5%82ad%C3%B3w%20z%20lat%202015-2016.pdf)

English version of the report: https://www.rpo.gov.pl/sites/default/files/The\_Negative\_Portrayal\_of\_Muslims\_in\_the\_Polish\_Press.pdf [↑](#footnote-ref-1)