

COMMENTAIRES DU GOUVERNEMENT CONCERNANT LE RAPPORT SUR LA POLOGNE

ANNEXE : POINT DE VUE DU GOUVERNEMENT

L'annexe qui suit ne fait pas partie de l'analyse et des propositions de l'ECRI concernant la situation en Pologne.

Conformément à la procédure pays-par-pays, l'ECRI a ouvert un dialogue confidentiel avec les autorités de la Pologne sur une première version du rapport. Un certain nombre des remarques des autorités ont été prises en compte et ont été intégrées à la version finale du rapport (qui selon la pratique habituelle de l'ECRI ne pouvait tenir compte que de développements jusqu'au 18 décembre 2009, date de l'examen de la première version).

Les autorités ont demandé à ce que le point de vue suivant soit reproduit en annexe du rapport de l'ECRI.

Comments by Polish authorities concerning the “Draft Fourth Report on Poland” of the European Commission Against Racism and Intolerance (ECRI)

The Republic of Poland appreciates constructive dialog with ECRI, as well as experience and professional knowledge of its experts who visited Poland in September 2009. The visit of ECRI rapporteurs was a significant contribution to the process of application of measures aimed at combating racism, racial discrimination and intolerance in Poland. Polish authorities are devoted to meet the recommendations of ECRI and fulfill the objectives to which Council of Europe attaches its long-term attention while combating racism and intolerance. Those are also values shared by the Republic of Poland.

These are the comments of Polish authorities to particular parts of the ECRI's Report:

Re. Summary

According to Polish authorities, the 2nd paragraph on page 7 should include information that the Joint Commission of the Government and National and Ethnic Minorities started its operations on 21 September 2005.

The information in the same paragraph that separate classes for Roma children are being phased out should take into account the fact that the final phasing out is expected to take place in the school year 2010/2011.

Polish authorities wish to point out that the statement included in the 3rd sentence of the 6th paragraph on page 7 concerning the influential media group owned by a certain Catholic organization is extremely general and not supported by any evidence. Taking into account the fact that the principle of freedom of speech is legally recognized in Poland, it should be emphasized that it is impossible to apply preventive censorship with respect to programmes of any broadcasting entity. At the same time, persons who feel harmed or hurt by the content of a given programme may either lodge a complaint with a relevant public administration body or take legal action. In case the prosecutor's office receives an information about an offence of the so-called hate speech, appropriate *ex officio* proceedings are launched.

Likewise, the information on page 7 in the 6th paragraph is imprecise. According to Polish authorities, information that the number of complaints submitted to the Ombudsman and the National Broadcasting Council is “disproportionately low” which, according to the authors of the Report, seems to prove that persons affected by the manifestation of racism and xenophobia are unwilling to report the circumstances of that kind to the relevant authorities, is not supported by any evidence. Argumentation concerning the low number of complaints may just as well imply that incidents of racist and xenophobic nature were simply infrequent.

According to Polish authorities, the statement included in the last but one sentence of the 6th paragraph on page 7 that the activities of the extreme rightist organizations continue unabated does not reflect last developments on the domestic level. On the 12th October 2009, the District Court in Opole delegatized a right wing organization - the Radical National Camp – Brzeg. In the justification of the sentence, it was stated that the freedom to establish associations is not unlimited and establishing groups voicing racial hatred is prohibited. The judgment became final on 3 November 2009.

According to Polish authorities, the 1st paragraph on page 8 should read in a way suggesting that a lower rate of attendance of Roma children in compulsory-schooling facilities in comparison to the attendance of non-Roma children is disturbing.

The claim included in the 1st paragraph on page 8 stating that complaints are also lodged by other historical minorities should also include information concerning the type of complaints and which minorities have lodged them.

According to Polish authorities, the claim included in the 5th paragraph on page 8 requires some explanation. In view of the historical context, the phrase that “the question of illegal Roma settlements should be solved in [an efficient and] durable manner” may be inappropriately interpreted by the readers. It is the intention of Polish authorities to effectively and durably support the activities of local self-governments aimed at regulating the legal status of land on which Roma settlements are located, as well as the activities aimed at improving the housing situation of the Roma living in these settlements. Such an attitude of the authorities stems from the legal status of land on which Roma settlements are located in Poland. Most frequently, the land is not owned by the Roma. The plots of land on which the settlements are located are owned, among others, by their non-Roma neighbours and very often the owners are unknown. Such a situation makes it impossible to legally start construction work financed from the State budget. That is why procedures aimed at regulating the legal status of the land on which the Roma houses are situated are financed under the *Programme for the Benefit of the Roma Community in Poland*. In view of the exceptional housing situation of the Roma who live in the settlements in the Małopolska region, housing containers (temporary housing units) for which building permits are not required were also purchased under the *Programme*. That is why the authorities wish to demonstrate that “solving the question of illegal Roma settlements” in Poland is a matter of dual action: first, the problem of regulating the legal status of the land and second, the construction of new houses or the renovation of the existing ones, depending on the needs. The postulate of the Commission included in the 2nd paragraph on page 8 suggesting that the Voivodship authorities should follow closely the number and nature of projects submitted by the mayors under the *Programme for the Benefit of the Roma Community in Poland* which should be properly explained to all segments of the Polish society is impossible to implement, because territorial self-government units are not controlled by the State administration. Therefore, in the opinion of Polish authorities, what is only possible is to recommend that the Voivodes who play an important role in the process of assessing and implementing tasks under the *Programme for the Benefit of the Roma Community in Poland* pay attention to the necessity of providing society at large with extensive information on the activities and results of the *Programme*.

Also the statement included in the 2nd sentence of the 6th paragraph on page 8 that the National Broadcasting Council should show increased vigilance concerning racism is not convincing for the Polish authorities. The increasing number of complaints lodged with the National Broadcasting Council (999 complaints in 2007, 1132 complaints in 2008, 1591 complaints in 2009) is a proof that it is a body

enjoying social confidence and is perceived by the citizens as an appropriate body for examining controversial issues, also those relating to national minorities.

Re. item 13 and 14

According to Polish authorities, the recommendation relating to the introduction of a rule rendering the racial motivation of the offence an aggravating circumstance under the criminal law does not seem to be justified. Creating a case-law list of aggravating circumstances (what would logically follow is a creation of a similar list of mitigating circumstances) is contrary to the Polish legislative practice which assumes that the criminal law norms be construed in a general and abstract manner. Bearing in mind the multiplicity and diversity of factual circumstances covered by the criminal law norms, as well as the multiplicity and diversity of potential motivation of perpetrators of offensive actions, one can hardly imagine the possibility of creating an exhaustive or even approximately exhaustive list of such circumstances.

Under the Polish criminal law, the court not only may, but is obliged to take into account racist motivation of the perpetrated offence, following the detailed sentencing directives referred to in Article 53 § 2 of the Criminal Code. Sentencing directives render expressly the motivation of perpetrators' actions or omissions as one of the circumstances affecting the severity of the sentence. The aggravating nature of such a motivation is evidenced by the fact that racist motivation of an offence constitutes a distinguishing feature of certain types of offences defined in the specific section of the Criminal Code [CC] – Article 119 § 1 and 2 CC and Article 257 CC.¹

The Report's argument in favour of introducing racist motivation of the perpetrated offence as an aggravating circumstance, related to a claim that the provision of Article 53 § 2 CC does include one specific directive concerning the sentence, namely joint perpetration of an offence with a juvenile, should be deemed incorrect, because the circumstance is not related to the realm of motivation and therefore it does not affect the extent of the perpetrator's guilt, but it is related to the social harmfulness of the act, the inevitable consequence of which (apart from other negative consequences) is also the demoralization of the juvenile.

Re. item 47.

Attention should be drawn to an excessively far-reaching claim “that de facto discrimination has been reported to exist in Polish schools affecting mostly Roma [...] pupils” which should be clarified in a more precise way by ECRI – an example of improper treatment of a pupil by a teacher need not have been ethnically motivated; what is more, even if it did happen, the fact that the teacher was dismissed from his job is an evidence of an outright reaction to an instance of discrimination, i.e. it contradicts the general argument included in the first sentence.

¹ Article 119 § 1. *Whoever uses violence or makes unlawful threats toward a group of persons or a particular individual because of their national, ethnic, racial, political, or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.*

§ 2. *The same penalty applies to whoever publicly instigates the perpetration of the offence specified in § 1.*

Article 257. *Whoever publicly insults a group of people or an individual person because of their national, ethnic, racial or religious affiliation or because of the lack of religious beliefs or for these reasons violates bodily integrity of another person shall be subject to the penalty of the deprivation of liberty for a term up to 3 years.*

Re. item 48.

According to the authorities, the paragraph should include an information that currently the so-called “Roma classes” are to be found only in two schools in Poland and they are attended by children who, as the authorities claim, due to their age should be taught at a higher level of education. It should be stressed that the classes shall be ultimately phased out in the school year 2010/2011.

Re. item 50.

According to the authorities, the information that in Nowy Sącz it is reputedly difficult to encounter any person of Roma nationality who would have completed the second or third grade of primary school is not based on reliable data. An opposite conclusion is supported, among others, by data from Nowy Sącz City Hall. (see attach. 1)

Re. item 70.

Comments by Polish authorities relating to paragraph 5 on page 8 of the Summary remain in force.

Re. item 72.

Comments by Polish authorities relating to paragraph 5 on page 8 of the Summary remain in force. In that context, Polish authorities interpret the Commission’s recommendation as asking them to take advantage of the opportunity offered by the *Programme for the Benefit of the Roma Community in Poland*, in order to find a durable solution of the question of Roma settlements with non-regulated legal status of the land on which they are located.

Re. items 85 and 86.

Arguments included in items 85 and 86 were not supported by ECRI with any concrete evidence or references to source materials. Polish authorities have no information about the existence of any independent studies that might have formed the basis for ECRI’s claims.

Re. item 94.

The prosecutor’s offices take steps towards prosecuting perpetrators of the so-called hate speech offences (Article 256 CC and Article 257 CC)² in print (books, newspapers) and electronic media (radio, television) in each case they are informed about such incidents. In view of the freedom of expression, it is impossible to control each publication in terms of the compliance of its content with the existing law in Poland. Yet in the case the prosecutor’s office is informed of such facts, the relevant measures are undertaken.

Re. 96-97

According to the authorities, the claim that a small number of complaints lodged at the National Broadcasting Council [KRRiTV] reflects a low degree of social confidence in the complaint and appeal mechanism or the lack of awareness of its existence is not convincing for the Polish authorities. The experience of the National Broadcasting Council indicates the opposite situation is true, the Council

² Article 256. One who openly propagates fascist or other totalitarian political system or incites to hate based on nationality, ethnic background, race, belief or because of lack of belief, is to be fined, restrained or imprisoned up to 2 years.

Art. 257. Whoever publicly insults a group of people or an individual person because of their national, ethnic, racial or religious affiliation or because of the lack of religious beliefs or for these reasons violates bodily integrity of another person shall be subject to the penalty of the deprivation of liberty for a term up to 3 years.

receives an increasing number of complaints each year (999 complaints in 2007, 1132 complaints in 2008, 1591 complaints in 2009).

Re. item 109

Polish authorities wish to draw attention to the fact that the Polish Football Association reacts to all cases of racism in the stadiums by, for instance, imposing fines on clubs whose fans show racist behaviour towards black players. Pseudo-fans may also be brought to justice for behaviour inciting racial hatred.

Re. item 110

Polish authorities wish to say that among other initiatives aimed at combating racism in sport in which the Government Plenipotentiary for Equal Status is involved, the “Let’s kick racism out of stadiums” campaign and the “Red Card to Racism” charity initiative have been launched.

Re. 114

The case of assault and battery, in July 2006, of a citizen of Morocco ended with an indictment against the perpetrators and with respect to one of the perpetrators it was determined that his action was motivated by the racial affiliation of the victim. The perpetrator was accused of an act under Article 159 CC and Article 119 § 1 CC in relation to Article 11 §2 CC³, and afterwards convicted by the court. It should be noted that in the course of the proceedings, one of its goals is to determine the motives and motivation of the perpetrator’s actions. In order to reach such a conclusion, a series of legal procedures has to be followed. Only the result of such legal procedures may demonstrate a specific motive of the perpetrator’s action. This was also the case in these proceedings. The legal procedures proved that the perpetrator was motivated by the racial affiliation of the victim. The circumstance was reflected in the qualification of the act for which he was accused and for which he was subsequently convicted (Article 119 § 1 CC).

As regards cases of assault on black students in Warsaw and Białystok, one should point out that those incidents were reported to the prosecuting authorities only after they had been publicized by the media. Earlier, the prosecuting authorities were not informed by the victims about such incidents and therefore the authorities could not have reacted with “adequate” speed and identified the perpetrators of those acts.

Re. item 119.

The argument raised in the item that the distinction between national and ethnic minorities which was applied in the *Act on national and ethnic minorities and on a regional language* might be the source of problems is erroneous and unsupported by any specific examples. One should remember that, pursuant to the provision of the above mentioned Act, all regulations included in it are applicable equally to national minorities and to ethnic minorities. The distinction relating to the protection of minorities and protection of a regional language referred to in the Act are a natural result of a difference in the scope of issues under protection in each case. Protection of cultural identity of representatives of the minorities is a different matter than the need to protect the language of people whose cultural identity does not differ from the identity of the majority of citizens of the Republic of Poland.

³ Art. 159. Whoever, taking part in a scuffle or a battery, uses a firearm, a knife or any other dangerous object, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months to 8 years.

Art. 119. § 1. Whoever uses violence or makes unlawful threats toward a group of persons or a particular individual because of their national, ethnic, racial, political, or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

Art. 11. § 2. If an act bears all attributes specified in two or more provisions of the penal law, the court shall issue a sentence for one offence on the basis of all concurrent provisions.

Re. item 120 and 123.

According to Polish authorities a joint analysis of problematic issues relating to national and ethnic minorities and of issues concerning the members of specific religious communities is inappropriate. Moreover, referring to the reciprocity rule raised in this item which is supposedly applied by the Polish authorities with respect to national minorities, one should explicitly emphasize that the existing Polish law concerning national and ethnic minorities and day-to-day practice of institutions and offices dealing with them have not referred to and do not refer to the reciprocity rule in the treatment of national minorities in Poland and Polish minorities in the neighbouring countries or in the treatment of minorities as depending on the political relations with other countries. Any actions of that type would be inconsistent with the existing law and the policy of the Polish government. As regards the issue of controversial provisions of the Act dated 21 of April 1936 on *the attitude of the State towards the Muslim Religious Association in the Republic of Poland* (Journal of Laws No. 30, item 240, as amended), the authorities wish to inform that a joint team appointed by the Polish government and the authorities of the Muslim Religious Association has been working on a new bill addressing the relations between the State and this Association.

Re. item 139.

Taking into account the organizational structure of local authorities in Poland, the authorities cannot possibly implement ECRI's recommendation that Voivodship authorities should follow closely the number and nature of projects submitted by mayors. However, in view of the Voivodes' competences with respect to the *Programme for the Benefit of the Roma Community in Poland*, it is possible to interpret the recommendation as an obligation of the Voivodes to monitor the quality and nature of the projects from the territories under their control.

Re. item 154.

The information contained in this item is imprecise. Currently, changes of legal regulations relating to the status of foreigners in Poland are being developed. The question of a prospective "abolition" is one of the many solutions under analysis.

Re. item 165.

The status of implementation of the action plan for the 2011 census of population and housing has been regularly reported to and discussed by the Joint Commission of the Government and National and Ethnic Minorities. Issues related to the census were discussed so far during the 11th and 17th meeting of the Commission.

Number of Roma pupils in two elementary schools in Nowy Sącz⁴

	2000/2001	2001/2002	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010
classes	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils	number of pupils
0	10	8	4	5	8	9	9	8	5	8
I	7	1	9	1	2	6	2	3	0	3
II	6	7	4	9	1	2	7	2	4	4
III	3	4	3	2	8	4	3	6	3	5
IV	4	5	6	9	6	4	4	3	2	3
V	2	4	5	3	3	2	2	4	1	2
VI	4	1	0	4	3	3	2	2	4	2

⁴ Data based on information from self government body.