



Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Decision adopted by the Committee under articles 2 and 4 (1) of the Optional Protocol, concerning communication No. 136/2018^{*,**}

<i>Communication submitted by:</i>	Polish Society of Anti-Discrimination Law (represented by counsel, Krzysztof Smiszek and Karolina Kędziora)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Poland
<i>Date of communication:</i>	13 September 2018 (initial submission)
<i>References:</i>	Decision taken pursuant to rule 69 (3) of the Committee's rules of procedure, transmitted to the State party on 27 November 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	19 July 2019

* Adopted by Committee at its seventy-third session (1–19 July 2019).

** The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Naéla Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Aruna Devi Narain, Ana Peláez Narváez, Bandana Rana, Elgun Safarov, Wenyan Song and Aicha Vall Verges.



Background

1.1 The author is the Polish Society of Anti-Discrimination Law, a non-governmental organization submitting the communication in its own name. The author claims that Poland violated its rights under articles 2 (c), (e) and (f), 5 (a) and 10 (c) of the Convention when its courts ruled that the author did not have standing to submit a “notification of crime” regarding a book that contained language expressing approval of the crime of rape. The Optional Protocol to the Convention entered into force for Poland on 22 March 2004. The author is represented by counsel, its President, Krzysztof Smiszek, and its Deputy President, Karolina Kędziora.

1.2 On 27 November 2018, the communication was registered. On 5 April 2019, the Committee, acting through its Working Group on Communications under the Optional Protocol, granted the State party’s request to split the consideration of the admissibility and merits of the communication.

Facts as submitted by the author

2.1 On 17 July 2012, the author lodged a notification of crime with the District Prosecutor’s Office for Warsaw, which covers Ochota. The crime consisted of “praise for the crime of rape through content”, as contained in an English-language course book entitled *Angielskie czasy: już prościej się nie da* (English tenses: it can’t get any simpler), by the company that had published the book. According to the author, praise involves undertaking a behaviour, whether verbal or non-verbal, indicating that the perpetrator expresses approval of a particular type of crime, regardless of whether such a crime has already been committed. The book in question contained several harmful passages trivializing and promoting the act of rape.

2.2 According to the author’s notification of crime, the aforementioned phrases and sentences represented a crime, as defined in article 255 (3) of the Penal Code of Poland, in connection with article 197 thereof, in which rape is penalized. Article 255 (3) provides that whoever publicly praises the commission of a crime will be subject to a fine of up to 180 times the daily rate, the penalty of restriction of liberty or the penalty of deprivation of liberty.

2.3 On 31 July, the District Prosecutor’s Office for Warsaw issued a decision refusing to initiate an investigation under article 17 (1) (2) of the Code of Criminal Procedure of Poland. The decision was based on the grounds that there was no direct intent on the part of the perpetrators and that the selection of examples explaining tense structures in the English language was, at most, unfortunate.

2.4 On 7 August, the author lodged an appeal against the decision, arguing that praise for a crime had been committed because the book had used the verb “to rape” in a particular context that both highlighted the raped person’s enjoyment and trivialized the crime of rape by indicating that it was a good and desirable phenomenon.

2.5 On 14 December, the Third Criminal Division of the District Court for Warsaw issued a decision revoking the prosecutor's decision and forwarding the case for re-examination.¹

2.6 On 3 April 2013, after the prosecutor had re-examined the case, the author was notified by the District Prosecutor's Office for Warsaw that the investigation had been discontinued and that no violation of article 17 (1) (2) of the Code of Criminal Procedure had been found. However, the decision on the matter, issued on 29 March, was not served to the author because it was deemed that an organization could not be an injured party in the case concerned.

2.7 On 12 April, the author lodged an appeal against the decision indicating that the subject of protection in cases involving praise for a crime was a matter of public order, rather than a matter of the personal interests of any specific person. Pursuant to article 49 (1) of the Code of Criminal Procedure, in order to obtain the status of injured party, a direct connection must exist between the crime and the violation of a person's legal interest or a threat to such an interest.

2.8 On 18 April, the District Prosecutor's Office for Warsaw issued an order refusing to accept the appeal, because it had been lodged by an unauthorized person, given that the author could not hold the status of injured party.

2.9 On 30 April, the author lodged an appeal against the refusal of the District Prosecutor's Office for Warsaw to accept the original appeal, challenging the refusal to grant injured party status. On 15 May, the District Prosecutor's Office decided not to recognize the appeal and forwarded it to the Third Criminal Division of the District Court for Warsaw.

2.10 On 9 July, the Third Criminal Division of the District Court for Warsaw issued a decision not to recognize the appeal of 30 April 2013 and to uphold the order of the District Prosecutor's Office for Warsaw refusing to accept it. The court found that the Polish Society of Anti-Discrimination Law could not be considered as holding the status of an injured party under article 49 of the Code of Criminal Procedure, given that the Society's rights were not directly violated by the act of public praise for the crime of rape. With that, the Society exhausted all domestic remedies.

2.11 The author contends that the matter was not submitted for examination under another procedure of international investigation or settlement.

Complaint

3.1 By finding that the author, which was acting in the public interest, was not an injured party, as defined in article 49 (1) of the Code of Criminal Procedure, and was therefore not permitted to submit a complaint against an educational book publisher for praising the crime of rape, the State party violated the author's rights under articles 2 (c), (e) and (f), 5 (a) and 10 (c) of the Convention.

3.2 Specifically, the State party: failed to ensure, through proceedings before competent domestic State courts and other public bodies, effective protection against any acts of discrimination against women, in violation of article 2 (c) of the

¹ The court indicated that article 255 (3) of the Penal Code provided for the protection of public order and that, therefore, any content encouraging people to neglect the norms that ensured protection of specific interests under criminal law should be eliminated from the public sphere. Meanwhile, the content contained in the course book did not explain grammatical rules in an impartial manner but, rather, expressed approval of forcing people to engage in certain sexual acts and of non-prevention of rape. Moreover, the widespread availability of the course book and of the views expressed in it could contribute to shaping negative social attitudes and to reinforcing harmful stereotypes about sexual violence, such as the victim as the person who provoked the act and rape as a source of sexual satisfaction for the victim.

Convention; failed to take all adequate steps to eliminate discrimination against women by any persons, organizations or enterprises, in violation of article 2 (e); failed to take adequate legislative steps and other actions, including, when necessary, sanctions and prohibition of any discrimination against women, in violation of article 2 (f); failed to take adequate steps to change the social and cultural behavioural patterns of men and women in order to eradicate prejudice and habits or other practices based on stereotyped roles for men and women, in violation of article 5 (a); and failed to take all adequate steps to eliminate stereotype concepts of the roles of men and women in the area of education, in particular by the revision of textbooks, in violation of article 10 (c). In order to fulfil its obligations under those provisions, the State party should introduce changes into its criminal procedure to recognize the status of an injured party in the case of an organization acting in the legitimate public interest with regard to crimes against public order.

3.3 Under current law, it is impossible to obtain criminal justice for offenders who praise crimes against women in general, as opposed to crimes against specific persons. Criminal procedure allows individuals to bring an indictment only if someone praises, for instance, the rape of an individually specified person, but not when someone publicly expresses approval of raping women in general. Article 255 (3) of the Penal Code, which is intended to protect public order, is therefore ineffective, because it is not possible to prosecute generalized incitement to violence against women or generalized negative stereotyping that reinforces the image of a woman as a victim. The function of criminal law is to protect the rule of law and to stigmatize its violations. However, the function of criminal procedure is to deliver an effective means of protection. The praise of violence against women undoubtedly requires an adequate response from the legal system.

3.4 In the State party, public tolerance of sexual violence against women is a very serious problem. According to police statistics, each year an estimated 2,500 crimes of rape are detected, while, according to the author, it is estimated that only 1 in 10 victims reports such a crime. Statistics published by the Ministry of Labour and Social Policy in 2010 indicated that as much as 19 per cent of the population of Poland believed that marital rape did not exist. For those reasons, the State party should be actively fighting stereotypes concerning sexual violence, including by clearly stigmatizing and criminalizing any acts of praise for rape.

3.5 The book in question is not a course book that has been approved by the Government for curricular use; it is a learning aid available to all learners of English. English is the foreign language that has the highest percentage of learners in Poland, which means that the potential reach of the publication is extremely broad, especially considering that the first edition was published in 1993 and the book continues to be available for purchase. As such, it may be used, for instance, as a supplementary learning aid at school, disseminated as photocopies. It remains in circulation and its publishers have not been punished.

3.6 The author submits the complaint in its own name and asserts that it has victim status for purposes of admissibility under the Optional Protocol, because it constitutes a group of individuals. The author is an injured party because its members suffered harm as a result of the relevant domestic decisions. Specifically, the author's members were deprived of the opportunity to claim effective protection against praise for gender-based violence and legal remedies that could prevent praise for crimes affecting women. The persistence of the legal status quo personally affects the author's members, because the lack of protection against the reinforcement of negative stereotyping concerning, inter alia, sexual violence has significant consequences for the public, including the trivialization of rape. Such shaping of public awareness increases the risk of crime, given the sense of impunity it implies.

Moreover, the term “victim” is interpreted broadly under the Optional Protocol and under other United Nations human rights treaties.

State party’s observations on admissibility

4.1 In its observations dated 25 January and 28 February 2019, the State party submitted that it considers the communication to be inadmissible under articles 2, 4 (1) and (2) (d) and (e) of the Optional Protocol.

4.2 The communication is inadmissible *ratione temporis* under article 4 (2) (e) of the Optional Protocol, because the first and most recent editions of the book in question were issued in 1991 and 2003, respectively. The State party ratified the Optional Protocol after this date, on 22 December 2003, and it entered into force for the State party on 22 March 2004. The information regarding the date of the most recent publication of the book, in 2003, was provided on 6 February 2019 by the District Prosecutor’s Office for Warsaw, which had conducted a witness examination of the co-owner of Naja Press publishing house. As evidence, the witness presented a copy of the invoice for the book’s most recent print run.

4.3 The communication is also inadmissible under article 2 of the Optional Protocol, because the author lacks victim status. It is unclear in which capacity the author submitted the communication. The author’s statements on this issue are unclear. In its communication dated 17 October 2014, the author indicated that the complaint was submitted by the author in its own name. However, during domestic proceedings, the author acted in the public interest, and no evidence gathered during the course of those proceedings indicated that the author itself or any of its individual members were subject to discrimination based on sex in connection with the book’s contents or the subsequent refusal to investigate the case. The Committee has considered in its jurisprudence that *actio popularis* complaints are inadmissible. While the author aims to combat discrimination and may provide victims of discrimination with legal aid or representation, it cannot assume victim status and submit complaints in its own name.

4.4 Moreover, in its submission dated 12 January 2015, the author presented itself as the victim of the alleged violation, claiming that it was acting not only in the public interest, but also on behalf of its members and employees, who had been directly affected by the lack of protection from gender-based violence. This is impermissible, because, under article 2 of the Optional Protocol and rule 68 of the Committee’s rules of procedure the author is required to obtain the consent of all victims to a communication. In the present case, the author did not include a list of all the alleged victims and did not provide authorization forms indicating that it may act on their behalf.

4.5 The communication is also inadmissible under article 4 (1) of the Optional Protocol, because the alleged victims did not exhaust all domestic remedies. Had the individual members or employees who had been directly affected by the book’s content filed the notification of an offence themselves, the outcome of the proceedings might have been different. They would have been able to claim that their rights had been violated by the author or publisher of the book and would have had the status of an injured party. Since no women actually lodged such a notification or undertook any legal action in relation to sex-based discrimination against them, the domestic authorities have not had the opportunity to analyse the case and issue a decision. Moreover, if the author’s members and employees believed that they were victims of sex-based discrimination, they could have filed a civil lawsuit in court, on the basis of laws regulating the protection of personal rights, such as article 23 of the Civil Code, setting forth the personal rights of individuals, including the right to liberty, health, dignity and freedom of conscience. Furthermore, they could have sought an injunction under article 24 of the Civil Code to prevent the risk of

infringement of their personal rights and seek monetary compensation, remedies which were not exhausted.

4.6 The communication is inadmissible under article 4 (2) (d) of the Optional Protocol, because it constitutes an abuse of submission. It was submitted 27 years after the book was written and first published, in 1991. The book has never been an official learning aid or a course book approved by the authorities for formal school or university education. Nor has the Ministry of Education or any education offices ever received complaints concerning the use of the book for learning purposes. Moreover, the author of the book died in 1997, and his legal successor informed the authorities that the book had not been published for many years. The successor committed to deleting the criticized portions of the book if the publishing house ever considered issuing a new edition. While use of the book was marginal in the past, its accessibility is currently even more limited.

Author's comments on the State party's observations on admissibility

5.1 In comments dated 29 March 2019, the author reiterates that it has victim status. Specifically, it argues that article 2 of the Optional Protocol allows those who wish to act on behalf of victims to submit a communication in order to protect the victims' dignity and rights. Moreover, by dint of *a maiore ad minus* reasoning, if it is possible for an entity to submit a communication with the consent of the victims, "it should be all the more possible to do so with no statement whatsoever regarding the state of the possible victims' livelihood".

5.2 The author's victim status is clear, given that it is a non-governmental organization promoting the fulfilment of the equality and non-discrimination standards set forth in the Convention. By failing to introduce much-needed changes to its criminal code regarding praise for a crime, the State party has failed to prevent discrimination against women and to ensure an effective remedy in that regard. In addition, because the State party authorities narrowly interpreted the law on praise for a crime to require a directly affected and identifiable victim, the provision does not effectively protect victims of discrimination.

5.3 In its jurisprudence, the Committee on the Elimination of Racial Discrimination has considered that non-governmental organizations may have locus standi to submit communications. Specifically, the author cites the Committee's opinion in *The Jewish community of Oslo v. Norway* (CERD/C/67/D/30/2003) and its opinion in *Zentralrat Deutscher Sinti und Roma et al. v. Germany* (CERD/C/72/D/38/2006).

5.4 The communication is also admissible *ratione temporis*, because the violation continues: the book in question is still accessible to the public online and remains available for purchase.

5.5 The author asserts that it has exhausted all domestic remedies. It cannot be known what would have happened if the individual victims had submitted complaints to domestic bodies in their own names. Had they done so, they would have been thwarted by the burden of having to prove that their personal rights had been violated. The author notes that personal rights in their civil law sense were not raised during domestic proceedings. Rather, the author raised the issue of public order and the State's obligation to fulfil and implement international and national standards of anti-discrimination.

Issues and proceedings before the Committee

6.1 In accordance with rule 64 of its rules of procedure, the Committee on the Elimination of Discrimination against Women must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 66 of its

rules of procedure, the Committee may decide to examine the admissibility of the communication together with its merits. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

6.2 In accordance with article 4 (2) of the Optional Protocol, the Committee has ascertained that the matter has not already been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the communication is inadmissible under article 2 of the Optional Protocol because, inter alia, the author's members, who are not named, did not provide authorization forms indicating their consent to be represented by the author. The Committee also notes the author's assertion that such consent statements are not necessary. It further notes that, under article 2 of the Optional Protocol, communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State party. The Committee considers that the sole fact that the author is an organization does not constitute an obstacle to admissibility. However, the Committee recalls its jurisprudence, in which it noted that the Optional Protocol excluded communications on behalf of groups of individuals without the individuals' prior consent, unless the absence of consent could be justified.² In the present case, the Committee notes that the author's individual members, who are alleged to be affected parties, are not named in the communication and did not provide authorization forms indicating their consent to be represented by the author. To the extent that the communication is submitted on behalf of the author's members, the communication is therefore inadmissible because the requirements of article 2 of the Optional Protocol have not been met.

6.4 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted or that the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.³ The Committee recalls its jurisprudence to the effect that authors must avail themselves of all available domestic remedies and must have raised in substance at the domestic level the claim before the Committee, so as to provide the domestic authorities and/or courts with an opportunity to address the claim.⁴

6.5 To the extent that the communication is submitted in the author's own name, as an organization combating discrimination, the Committee notes the author's report that, during domestic proceedings, it did not act in its own name but on behalf of the public interest and did not allege that it had been a victim of a violation of the Convention. Rather, the issue that the author raised during domestic proceedings was the protection of public order and the State party's obligation to fulfil its obligations under the Convention. The Committee recalls its jurisprudence establishing that the Optional Protocol excludes *actio popularis* claims and that an author of a communication is a victim within the meaning of article 2 of the Optional Protocol, if the author is personally and adversely affected by an act or omission of the State party.⁵ Because the author did not act in its own name, as a legal person, before the domestic authorities, the Committee considers that it did not exhaust all domestic remedies and that that aspect of the communication also renders it inadmissible under articles 2 and 4 (1) of the Optional Protocol.

² *M.K.D.A.-A. v. Denmark* (CEDAW/C/56/D/44/2012, para. 6.5).

³ *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013, para. 6.3) and *L.R. v. Republic of Moldova* (CEDAW/C/66/D/58/2013, para. 12.2).

⁴ *N. v. Netherlands* (CEDAW/C/57/D/39/2012, para. 6.3).

⁵ *M.K.D.A.-A. v. Denmark*, para. 6.5.

7. The Committee therefore decides that:
- (a) The communication is inadmissible under articles 2 and 4 (1) of the Optional Protocol;
 - (b) The present decision shall be communicated to the State party and to the author.
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