



Executive Summary

Poland country report on measures to combat discrimination

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1. Introduction

After the World War II the Polish society became ethnically homogenous. According to the 2002 national census 96.74 % of inhabitants declared Polish nationality, 1.23 % stated that they are members of national and ethnic minorities, whereas the number of foreigners permanently resident in Poland is at the level of app. 0.1 %. Vast majority of citizens belong to the Roman Catholic Church. From this background it is not a surprise that Poland has no longer tradition and experiences in counteracting discrimination. The process of implementation into the legal system EU anti-discrimination laws based on race, ethnic origin, religion, age, disability or sexual orientation was initiated due to a membership in the EU and its conditions, and not in order to improve the existing laws or to ease social pressures.

Nevertheless the current practice shows that there has been made use of the new provisions introduced to the Polish law like e.g. shifting of the burden of proof or ban of discrimination on the ground of sexual orientation. The process is not free of tensions. Due to several factors such as: a low legal awareness of Polish society, as well as passiveness in seeking their rights, some special features of the judiciary system and a lack of systematic research it is impossible to assess the real scale of discrimination in Poland. That is why raising the legal awareness of society and improving access to justice in Poland seem to require systemic activities on a large scale. Currently the burden of these activities rests with NGOs. However, lessening the gap between legal regulations and reality requires the greater involvement of government authorities. It makes necessary to develop further forms of cooperation between the public administration and NGOs going beyond the existing framework of the dialogue as well as involving social partners to the debate on the topic.

In this context it should be noted that for several reasons counteracting discrimination in Poland has become more difficult after the conservative government consisting of Law and Justice Party (and later together with the Self-defence and League of Polish Families) came into power. Firstly, it decided to abolish the Government Plenipotentiary for Equal Status of Women and Men. Secondly, in practice the freedom of assembly and expression of homosexuals was limited by bans of demonstrations. Thirdly, in the framework of a public discussion on the rights of homosexuals many homophobic statements were made by politicians of the ruling coalition, which might be classified as hate speech.

2. Main legislation

The 1997 Polish Constitution contains a general anti-discrimination clauses, according to which all persons shall: be equal before the law, have the right to equal treatment by public authorities and no one shall be discriminated against in political, social or economic life for any reason whatsoever. This principle does not specify the criteria for the prohibited forms of discrimination. Thus, the constitutional provision is more general than the Directives, since it does not mention expressly any grounds but prohibits any discrimination. Apart from these general anti-discrimination clauses, the Constitution contains specific equal-treatment provisions regarding women and men, religious associations, national and ethnic minorities, children, consumers and war veterans and invalids. Sexual minorities are not mentioned among these groups. The Constitution provides that its provisions are directly applicable unless the Constitution itself does not state otherwise. This however, to large extent, remains

as a theory only, because in Poland there is not much tradition to invoke constitutional provisions directly.

The Labour Code remains the second important element of the Polish anti-discrimination legislation. The Code includes definition of direct and indirect discrimination, prohibiting discrimination on the grounds of gender, race, ethnic origin, religion and belief, disability, age and sexual orientation, nationality, political opinion, membership in a trade union and employment for specified or unspecified period of time, employment part-time or full-time. The grounds are listed as examples only, the list remains open.

The Penal Code entails a series of articles relevant for counteracting discrimination penalizing: the crime of genocide and its preparation; use of violence or unlawful threat towards a group of people or an individual person on account of his/her national, ethnic, racial, political or religious affiliation or because of his/her irreligious attitude, or exhorting in public to commit these offences; restricting an individual in his/her rights on account of his/her religious affiliation or irreligious attitude; malicious or persistent violation of employee's rights resulting from an employment relationships or social security; refusal to re-employ a person whose reinstatement was decided by the appropriate institution; public propagation of fascism or other totalitarian regime or exhorting to hatred based on national, ethnic, racial or religious differences or on irreligious attitude; public insulting of a group of people or an individual person on account of his/her national, ethnic, racial, or religious affiliation or because of his or her irreligious attitude, or infringement of physical integrity of another person on these grounds. The provisions of civil and administrative law do not contain special anti-discrimination clauses.

Apart from the Protocol No. 12 to the European Convention of Human Rights, Poland is a party to all the most important international agreements relevant for counteracting discrimination such as: International Covenant on Civil and Political Rights, the Optional Protocol to the Covenant; the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Framework Convention on the Protection of National Minorities and the Convention of the Rights of the Child. The Polish Government also recognized the competence of the Committee on the Elimination of Racial Discrimination. The above-mentioned instruments constitute part of the domestic legal order after they have been promulgated in the official Journal of Laws and can be applied directly by domestic courts, unless its application depends on the enactment of a statute.

3. Main principles and definitions

In the field of employment and occupation Polish legislation introduced legal definition of both direct and indirect discrimination on 01.01.2004. They are included in the Labour Code and were incorporated due to the process of implementation of EU Directives. Outside the field of employment and occupation there are not any separate definitions of discrimination.

Direct discrimination occurs when an employee, on account of one or more grounds has been, is or would be treated less favourably than other employees in a comparable situation.

Indirect discrimination occurs when – due to an apparently neutral provision, applied criterion or undertaken action – there are disproportions in respect of terms of employment to the detriment of all or the significant number of employees belonging to a group distinguished on account of one or more grounds listed, if those disproportions cannot be justified by other objective reasons. *Harassment* is any behaviour that aims or results in injury to dignity, humiliation or abasement of an employee. Additionally, Labour Code describes

sexual harassment as any unaccepted behaviour of sexual character or behaviour related to employee's gender, whose aim or result is injury to dignity, humiliation or abasement of an employee. As for *reasonable accommodations*, the Labour Code specifies only that an employer is obliged to counteract discrimination in employment on the ground, among others, of sex, age, disability, political opinions, belief and sexual orientation. The Labour Code states also, that the rule of equal treatment is not infringed by actions aimed at differing legal status of an employee in view of protecting parenthood, age or disability. Those provisions are too general to infer specific reasonable accommodation duties. That is why the employer is not obliged to provide appropriate accommodation for a specific, individual disabled person. A definition of *victimisation* does not exist in Polish legal system and there is no general legal protection of victims against the risk of retaliation as a result of claiming his or her right not to be discriminated. Nevertheless, the Labour Code prohibits renunciation and dissolution of a labour contract as a result of an employee having used his rights to defend against unequal treatment. This provision refers to complainants only, does not cover witnesses or other people and does not prohibit other possible measures that can be implemented by the employer, like down-grading, imposing a fine, etc. The Labour Code prohibits any action consisting in inciting other persons to violate the principle of equal treatment in employment. By referral to "incitements" Polish legislation goes beyond what is required by the Equality Directive, since the notion of "incitements" appears to be broader than the notion of "instructions". If *instructions to discriminate* lead a person to commit a criminal offence or crime, the person who issued such instructions is held criminally responsible for directing or instructing to perpetrate, or aiding or instigating the crime. A person publicly inciting to commit a crime is held responsible for its perpetration.

As a rule, everyone should be treated equally in the matters of employment and access to labour market. There are, however, some exceptions laid down in the Labour Code, according to which there is a possibility of differentiation among the employees, if it is justified on account of the type of work, working conditions, or occupational requirements laid down for employees. Provision of Polish law does not transpose the requirements of the directive in the exact manner. This refers especially to the criteria of difference in treatment – 'the objective is legitimate and the requirement is proportionate'. Polish Labour Code speaks only of 'justifiability'. Furthermore, the additional qualifiers referring to occupational requirements – 'genuine and determining' – were not introduced in the respective provision of the Labour Code. Instead, the legislator introduced a more general concept of 'occupational requirements' without any further specification. This is clearly less favourable and thus less protective for an allegedly discriminated employee.

It remains unclear whether the Polish anti-discrimination law covers discrimination by association, because there are no provisions regulating the issue and there were no cases yet. Similarly there are neither any provisions and clear rules how to deal with situations of multiple discrimination nor any plans to fill this gap.

4. Material scope

In the field of *employment and occupation* any discrimination is forbidden, in particular with regard to concluding and terminating employment relation, the terms of employment, promotion, and access to vocational training aimed at upgrading their professional qualifications. Ban of discrimination applies also to all the institutions of the labour market such as employment agencies and employment counselling as well as trainings for the unemployed. Furthermore any unfavourable treatment on account of membership or non-membership establishing in any trade union is prohibited irrespective of the type of their employment relations. The rules apply equally to public and private sectors.

With regard to *social security, social assistance or health care* there are no specific provisions in Poland that would lead to restrictions of person's rights on the grounds of religion or belief, age, disability or sexual orientation. The Constitution lays down that every citizen has the right to social security in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement. A citizen remaining without employment against his/her will and without other means of support has the right to social security. The anti-discrimination clause included in the Act on the System of Social Security limits the principle of equal treatment of all socially insured to the grounds of sex, marital status, and family status. In the field of social assistance a caseworker meeting his or her duties is obliged to counteract inhumane or discriminatory practices aimed at person, family or group, but it does not mention grounds of discrimination. There are however no specific provisions that would lead to restrictions on the grounds of gender, religion or belief, or sexual orientation. Concerning access to health care the Polish Constitution contains an equal treatment clause with regard of access to health protection, to health care services, financed from public funds and ensured by public authorities to citizens as well as to special health care to children, pregnant women, handicapped people and persons of advanced age. The State is also obliged to protect mental health.

In the field of *education*, schools must ensure that each pupil has the conditions necessary for his/her development, and prepare him/her to fulfil family and civic responsibilities based on the principles of solidarity, democracy, tolerance, justice and freedom. The duties of schools and public facilities include enabling pupils to uphold a sense of national, ethnic, linguistic and religious identity, especially learning their own language, history and culture. The education system must ensure that disabled or socially maladjusted children and young people have the possibility of receiving an education in all types of schools, in accordance with their individual developmental and educational needs and predispositions, as well as care for pupils with significant or complex disorders through the possibility of creating an individually-tailored learning process, methods and programmes of teaching, and rehabilitation activities.

There seem not to be any legal provisions of discriminatory character in respect of *access to and supply of goods and services available to the public*. It does not mean that everyone in all circumstance can have access to them – this can be limited by e.g. financial capacity to pay for certain goods or services. In the same way, there appear not to be any legislation that would be specifically aimed at counteracting any possible discriminatory conduct as far as access to goods and services is concerned.

Discrimination in access to *housing* is not prohibited explicitly. On the one side according to the Constitution, public authorities are obliged to create policies enabling them to meet the housing needs of citizens, and in particular to counteract homelessness, support the development of social building projects, and support the efforts of citizens to secure their own housing. On the other hand, Polish domestic legislation seems not to have any particular mechanisms of combating discrimination in housing.

5. Enforcing the law

Claims stemming from an employment relation can be determined either by a labour court or by a conciliation committee. Compensation claim possibility is introduced to the Labour Code and effective as of 01.01.2004 (Art. 18^{3d}). Everyone who suffers from infringement of the principle of equality in employment is entitled to start a judicial proceeding and seek compensation not lower than the minimum monthly salary. Since the Polish legal system is furnished with this anti-discrimination compensation complaint, there is no need any longer

to use more general legal remedies, like Art. 415 Civil Code (general compensation clause), their use is not excluded though. In some cases discriminatory treatment can be prosecuted under Penal Code and then a criminal proceeding can be instituted by a public prosecutor *ex officio*, or sometimes, by a victim himself or herself. There are no administrative remedies laid down specifically to deal with discrimination issues. Apart from these forms of redress in a discrimination case one can bring an individual complaint before the European Court of Human Rights on the basis of an alleged violation of any rights or freedoms guaranteed by the European Convention or use a non-judicial measure which is a complaint to the Commissioner for Civil Rights Protection (*Rzecznik Praw Obywatelskich* (see the section 6).

In Poland, in principle, legal representation may be provided only by an advocate (attorney-at-law) or legal counsellor. In labour cases a representative of a trade union, a labour inspector or other employee of the enterprise may equally stand for a legal representative for an employee. Furthermore due to the changes of the Law on Code of Civil Procedure in 2004 (art. 61 § 4) organisations whose statutory objectives include equality protection and counteracting discrimination in form of unfounded, direct or indirect differentiation of rights and duties of citizens may, in the cases of claims in this field with the consent of the citizens, institute actions on behalf of the citizens and with the consent of the plaintiff may join the proceedings in each stage thereof. In a short period of time after introducing this solution the Helsinki Foundation for Human Rights made use of this provision and in 2005 engaged in some discrimination cases. Similarly, social organisations are allowed to start or join an administrative proceeding and representatives of social organisations may also be admitted to criminal proceedings.

In the Polish anti-discrimination law there is neither an explicit mention of use of statistical evidence nor of 'situational testing'. It does not mean that the use of them is theoretically excluded. In both cases it can be presumed that statistical evidences or evidences collected in course of situational testing could be admitted by a court in the civil law, administrative or criminal proceedings.

Since the amendment of the Labour Code the burden of proof is partially shifted from the complainant to the respondent. It is the employer who should prove that there were objective reasons to employ discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred. This solution is used in respect of any kind of discrimination, but only under the Labour Code.

Regarding sanctions under the Polish anti-discrimination law there is no specific system of sanctions, but only penalties and punishments set out by the Penal Code and the Code of Minor Offences. Moreover on the basis of the Civil Code and Labour Code it is possible to claim compensation for material and immaterial damages. It is questionable whether this sanction meets the directives' criteria (effective, proportionate and dissuasive), because this system redresses only the damage and does not include a sanctioning element. It is also possible to seek compensation on the basis of the general compensation clause (Art. 415 Civil Code).

6. Equality bodies

There is no single "specialised body" in the sense of the art. 13.2 of the Directive 2000/43/EC which would be able to fulfil all the three functions. Nevertheless there are in Poland institutions that are of relevance in this context. The first one, a *Commissioner for Civil Rights Protection* (Ombudsperson), is the institution that possesses the strongest non-judicial instruments to intervene in cases of discrimination, although it has no power to issue any

binding decision. It is an office which is independent from the state administration and which performs its duties in an independent way. The Commissioner is responsible for safeguarding the rights and freedoms of persons and citizens provided for in the Constitution. Everyone has the right to apply to the Ombudsperson for assistance in protection of his/her freedoms or rights infringed by organs of public authority. Disputes between natural persons do not belong to the Commissioner's scope of competences. The Ombudsperson may provide legal assistance to individuals but only by indicating possible legal measures and not by acting directly on behalf of the complainant. Apart from examining individual cases, the Commissioner can carry out independent, general surveys, publish reports and make recommendations.

As far as rights of national and ethnic minorities are concerned there are two advisory bodies to the Prime Minister. The first one, a *Team for National Minorities* consists of representatives of ministries. It is responsible for drafting projects for government actions; coordinating activities of various governmental agencies; making assessments and formulating proposals as to the enjoyment of rights of national minorities' and their needs; preventing violations of national minorities' rights; initiating surveys and raising awareness on national minorities. The second one, established on the basis of the Act on National and Ethnic Minorities and on Regional Language of 2005 is a *Joint Committee of the Government and Ethnic and National Minorities*. It is composed of representatives of selected ministers and minorities, which have the task to express its opinions regarding rights and needs of minorities; programmes and draft laws in the field; principles of allocation and amount of money from the state budget directed to preserving of cultural identity of minorities as well as taking actions in the field of counteracting discrimination.

Within the Ministry of Interior and Administration there is a Team for Monitoring Racism and Xenophobia, which is responsible for monitoring of these phenomena, analyzing them and preparing a data base as well as preparing materials for government administration, police and border guard.

The body responsible for dealing with discrimination based on disability is a *Plenipotentiary for the Disabled*. The Plenipotentiary, formally a part of the Ministry of Labour and Social Policy is primarily responsible for implementing the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons.

The National Labour Inspectorate supervises and controls the implementation of labour law in Poland. Although the body deals with a whole variety of labour law issues and could have a significant role to play in promotion and implementation of equal treatment, in practice the task do not seem to be its priority.

Although the Polish government is going to designate the Department for Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy as the specialized body responsible for counteracting discrimination in Poland. It remains to be seen whether this entity will fulfil the mandate according to the Art. 13 of the Directive 2000/43/