

## Executive Summary

### Country Report Poland 2008 on measures to combat discrimination

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#### 1. Introduction

After the Second World War Polish society became ethnically homogenous. According to the 2002 national census, 96.74 per cent of the population declared themselves as being of Polish nationality, 1.23 per cent stated that they were members of national and ethnic minorities, while the number of foreigners permanently resident in Poland was approximately 0.1 per cent. The vast majority of citizens declare belonging to the Roman Catholic Church. Against this background, it is no surprise that Poland does not have a long tradition and experience of combating discrimination. The process of implementing into the legal system EU anti-discrimination laws concerning race, ethnic origin, religion, age, disability or sexual orientation was initiated as a result of membership of the EU and the conditions of membership, and not in order to improve the existing laws or to ease social pressures.

The process is not free of tensions. Due to a number of factors, including a low level of legal awareness in Polish society, people's passivity in seeking to uphold their rights (fear sometimes), certain features of the judiciary system and a lack of systematic research, it is impossible to assess the real scale of discrimination in Poland. For this reason, raising the legal awareness of the public and improving access to justice in Poland seem to require systemic activities on a large scale. Currently, the burden of these activities rests to a large degree with NGOs. However, lessening the gap between legal regulations and reality requires greater involvement of government authorities.

Polish Government seems to lack any strategic approach to counteracting discrimination. Transposition of directives is very limited and works on the draft law on equal treatment last for number of years already without visible results. There is no equality body but there is number of institutions which play some role in the field but relations between them are not clear and competences overlap.

It is necessary to develop further forms of cooperation between the public administration and NGOs, going beyond the existing framework of dialogue, as well as involving social partners in debate on the topic. The situation in this respect gradually improves and NGOs play important role in number of governmental foras and activities. However there are still also problematic situations like lack of formal social consultations with NGOs on the draft law on equal treatment (the one which took place two years ago concerned completely different draft) or refusal of the Governmental Plenipotentiary for Equal Treatment to establish working team on problems of LGTB minority.

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In terms of problems of particular discriminated groups the situation is quite complex.

Discrimination because of age is the newest phenomenon in Polish context. In the last couple of years activities of the Ombudsperson as well as some court rulings prove that this new concept finds its place and that awareness of people of age grows, slowly but consequently.

Discrimination of people with disabilities is being tackled in numerous ways. Even till far extent they are still invisible in public due to different barriers their role increases and NGO movement became strong and influential. Its last initiative of preparation of draft of Polish Disability Discrimination Act being proceed by the Government proves it.

Sexual minorities are in a very difficult position in Poland since they are the group attacked most often. Many initiatives both national and international (for instance the new planned horizontal directive) are being presented by some politicians or publicists as promotion and attack of homosexuality. Even, the President uses discriminatory vocabulary, as in March 2008 when as footage to his speech on national TV the wedding ceremony of a gay couple (living in New York and getting married in Canada) was shown, in order to picture the danger stemming from the European Union and Charter of Fundamental Rights.

In general national and religious minorities are small in Poland. However new immigrants appear (like people from former Soviet Union countries or Vietnam). Anti-Semitism still remains a problem within part of the population. National and ethnic minorities as well as religious minorities are being supported by different positive action programs aiming at cultivating their culture, heritage and language. There are special programs of support for Roma population which remains the priority due to its difficult situation.

## **2. Main legislation**

The 1997 Polish Constitution contains general anti-discrimination clauses, according to which all people shall be equal before the law and 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. 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, people with disabilities and war invalids. Sexual minorities are not mentioned among these groups. The Constitution provides that its provisions are directly applicable unless the Constitution itself states otherwise. However, this remains to a great extent theoretical, because there is not much tradition in Poland of invoking constitutional provisions directly.

The Labour Code remains the second important element of Polish anti-discrimination legislation (it was amended in 2004 and lately in 2008 in order to transpose the Directives).

The Code includes definitions of direct and indirect discrimination, harassment, instruction to discriminate as well as victimisation and prohibits discrimination on the grounds of gender, race, ethnic origin, religion and belief, disability, age and sexual orientation, nationality, political opinion, membership of a trade union and part-time or full-time employment for a definite or indefinite period. The grounds are listed as examples only, the list remains open.

The Act on promotion of employment and the institutions of labour market was the second piece of legislation implementing Directives. The Act regulates the activities of private employment agencies and employment services as well as public institutions assisting unemployed and employed and providing employment counselling and training. The Act includes a number of provisions of anti-discrimination character. It introduces general prohibition of using discriminating criteria related inter alia to race and ethnic origin in all matters regulated by the Act.

In order to implement Directives the Code of Civil Procedure was amended in 2004 (Article 61 § 4). It gave legal standing to NGOs providing that organisations whose statutory objectives include equality protection and counteracting discrimination in the form of unfounded, direct or indirect distinctions between the rights and duties of citizens may, in the cases of claims in this field and with the consent of the citizens, institute actions on behalf of the citizens and, with the consent of the plaintiff, may join the proceedings at any stage thereof.

The last relevant and important piece of legislation was Act on national and ethnic minorities and regional language (2005). Act introduces prohibition of discrimination which however has quite general character and basically repeats already existing national laws and provisions of the Framework Convention for the Protection of National Minorities. During the Parliamentary discussions the legislator was urged to use this occasion to fully implement Directives but it did not so. but legislator did not decide to do so. As a result this Act only partially (in general terms) implements Directive and lacks detailed provisions. It additionally established some organs which have some competences of the non-existing “equality body”.

There are other national laws relevant to discrimination issues however they were not enacted as a result of transposition of Directives. In fact Directives were not transposed fully and the usage of other laws resembles rather attempts to fill the gap.

The situation in terms of legislation may change due to current intensive work on the draft Act on Equal Treatment. The law aims to implement four directives: 2000/43; 2000/78; 2004/113 and 2006/54. Over the last three years there have already been several versions of the draft law. Other source of hope is the draft Polish Disability Discrimination Act which was prepared by group of NGOs with the assistance of British Embassy and was accepted by the Government as an initial draft for Governmental work.

Generally speaking implemented law is enforced even if this is slow process mainly due to the lack of awareness among people – victims of discrimination. The body of cases being brought to courts grows and numerous activities aiming at raising awareness bring the change.

### 3. Main principles and definitions

In the field of employment and occupation Polish legislation introduced legal definitions of both direct and indirect discrimination on 1 January 2004 (and improved them in 2008). They are included in the Labour Code and were incorporated due to the process of implementation of EU Directives. Outside the field of employment there are no 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* takes place when, due to an apparently neutral provision, criterion used or practise/action taken unfavourable disproportions or particular disadvantage occur or could occur in terms of establishing and termination of employment, conditions of employment, promotion, and access to training for raising professional qualifications, for all or large number of employees being members of the group distinguished due to one or more of the grounds covered, unless that decision, criterion or action is objectively justified by a legitimate aim and when the means of achieving that aim are appropriate and necessary. *Harassment* is defined as unwanted conduct with the purpose or effect of violating the dignity of an employee and of creating intimidating, hostile, degrading, humiliating or offensive environment.

*Instruction to discriminate* is covering both encouraging and ordering infringement of the principle of equal treatment against other person.

*Prohibition of victimisation* covers any adverse treatment, any other negative consequences. It relates to complainants but is also extended to employees who in any way support the victim of discrimination.

*Discrimination by association* is not regulated and remains still rather unknown concept (it did not appear in any out of several version of draft law on equal treatment). Generally speaking national legislation does not implement the duty to provide *reasonable accommodation* however some elements of the politics towards people with disabilities are of the similar character. Labour Code specifies that an employer is obliged to combat discrimination in employment on the ground, among others, of disability. This provision is too general to infer specific reasonable accommodation duties. However, if the employer already employs people with disabilities, appropriate measures should be undertaken. General provisions on health and safety at work provide that workstations shall be organised according to the psychological and physical features of employees as well as require that the employer who employs people with disabilities shall ensure the adjustment of workstations and routes to them in accordance with the needs and abilities of disabled employees, resulting from their lower proficiency/mobility. Improvement of the employment and working conditions of disabled persons is also promoted through economic incentives under the so-called system of quotas and penalties.

As a rule, all people should be treated equally in matters of employment and access to the labour market and all grounds of discrimination are covered.

The 2008<sup>1</sup> amendment to the labour code puts national legislation in line with the Directives in terms of *genuine and determining occupational requirements* as an exception to the prohibition of discrimination. According to the Labour Code one may refuse to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the type of work, or working conditions cause that the reason or reasons of different treatment are genuine and determining occupational requirements. The test of the proportionality of measures and legitimate aim was also introduced. Polish anti-discrimination law does cover discrimination by association, there are no provisions regulating the issue and there have not yet been any cases raising this issue. Similarly, there are no provisions or clear rules on how to deal with situations of multiple discrimination nor any plans to fill this gap.

#### 4. Material scope

In the field of *employment* any discrimination is forbidden, in particular with regard to concluding and terminating an employment relationship and the terms of employment, promotion and access to vocational training aimed at upgrading professional qualifications. The prohibition of discrimination also applies to all the institutions of the labour market, such as employment agencies and employment counselling as well as training courses for the unemployed. The rules apply equally to the public and private sectors however do not apply to independent professions (regulated till large extend also by their self-regulatory bodies, like for instance advocates, legal advisors) or selfemployment.

The Directives were not transposed in any other field outside employment. There is however national law that could be used in some instances and partially contains antidiscrimination provisions.

With regard to *social security, social assistance or health care* there are no specific provisions in Poland that would lead to restrictions of people's rights on the grounds covered by Directives. The Constitution stipulates that every citizen has the right to social security in the event of incapacity to work due to illness or disability, as well as on reaching the age of retirement. A citizen who remains 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 Social Security System limits the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status. In the field of social assistance a caseworker fulfilling his or her duties is obliged to combat inhumane or discriminatory practices aimed at an individual, family or group, but there is no mention of grounds of discrimination. There are 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 to access to health protection and health care services financed from public funds and guaranteed by the public authorities to citizens, as well as access to specialist health care for children, pregnant women, disabled people and older people.

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 children and young people with behavioural problems have the possibility of receiving education in all types of schools, in accordance with their individual developmental and educational needs and predispositions. In addition, care must be provided 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 a discriminatory character in respect of *access to and supply of goods and services available to the public*. However, there is no legislation 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 hand, according to the Constitution, public authorities are obliged to establish 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 for combating discrimination in housing.

## 5. Enforcing the law

Claims stemming from an employment relationship can be determined either by a labour court or by a conciliation committee. The possibility of making a claim for compensation was introduced into the Labour Code and came into force on 1 January 2004.

Anyone who suffers from an infringement of the principle of equality in employment is entitled to start judicial proceedings and to seek compensation not lower than the minimum monthly salary. Since the Polish legal system is furnished with this anti-discrimination compensation provision, there is no longer any need to use more general legal remedies, such as Article 415 of the Civil Code (general compensation clause), although their use is not ruled out. In some cases discriminatory treatment can be prosecuted under the Penal Code and then criminal proceedings can be instituted by a public prosecutor *ex officio* or, sometimes, by the victim himself or herself. There are no administrative remedies laid down specifically to deal with discrimination issues. In terms of non-judicial measures, a complaint to the Commissioner for Civil Rights Protection may prove to be an effective tool (see below).

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 also stand in for a legal representative for an employee. Furthermore, due to the mentioned changes of the Code of Civil Procedure organisations whose statutory objectives include equality protection and counteracting discrimination may institute actions on behalf of the citizens and join the proceedings. Shortly after this provision was introduced, the Helsinki Foundation for Human Rights made use of it and engaged in a number of discrimination cases.

Similarly, social organisations are entitled to institute or join an administrative proceeding and representatives of social organisations may also be admitted to criminal proceedings.

In Polish anti-discrimination law there is no explicit mention of the use of statistical evidence or of ‘situational testing’. This does not mean that their use is theoretically excluded. In both cases it can be presumed that statistical evidence or evidence collected in the course of situational testing could be admitted by a court in civil law, administrative or criminal proceedings. However this is not evident and risky strategy (there are also theoretical arguments against accepting evidence from situational testing) therefore in reality persons who bring cases which are in fact based on situational testing do not admit it in the court – do not admit that situational testing took place, rather pretend that they were simply discriminated against.

Since the amendment of the Labour Code, the burden of proof has shifted from the complainant to the respondent however only in employment cases. It is the employer who must 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.

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

## 6. Equality bodies

No institution or body has been officially designated to be the specialised body as required by Directive 2000/43. There is no single “specialised body” which would be able to fulfil all three functions in the sense of Article 13.2 of the Racial Equality Directive. Nevertheless there are institutions in Poland which are of relevance in this context. The first, the *Commissioner for Civil Rights Protection* (Ombudsperson), is the institution which 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 of the state administration and which performs its duties independently. The Commissioner is responsible for safeguarding the rights and freedoms of people and citizens which are laid down in the Constitution. Everyone has the right to apply to the Ombudsperson for assistance in protecting his/her freedoms or rights infringed by public authority bodies. Disputes between natural persons do not belong to the Commissioner’s scope of competences. The Ombudsperson may provide legal assistance to individuals as follows: by indicating possible legal measures; by investigating the case; and by asking appropriate institutions to institute proceedings or joining pending cases. The Ombudsperson may also commission expertise and opinions as well as publish information about cases the office deals with, including recommendations.

The Ombudsperson's decision as to whether to provide assistance to an individual is discretionary.

After the abolition of the Government Plenipotentiary for the Equal Status of Men and Women in 2005, the competences of this office were taken over by the Department for Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy.

Sometimes the government claims that this new Department is the Polish equality body, however, this is a very controversial issue.

It is formulated only in the Organisational Regulations of the Ministry of Labour and Social Policy which are frequently amended. According to the regulations, the Department is responsible for activities to “counteract all forms of discrimination within the Minister's ‘competences’” (§ 19.1). No grounds are explicitly mentioned. The Department's competences include: conducting analyses and issuing opinions regarding the legal situation of people who experience discrimination; coordination of activities which aim to ensure equal treatment; preparing draft policies and laws which aim to combat discrimination and commenting on laws being prepared by other bodies; preparation of materials and reports on the execution of relevant international conventions; and other competences regarding cooperation with government and social partners, initiating government activities, educational and information activities. It even possesses competence in relation to legal assistance: “conducts tasks in terms of providing independent help to the victims of discrimination in pursuing their rights”.

Even though these competences seem to be broad, the reality is different. The Ministry does perform a number of positive activities, but it would be difficult to argue that they fulfil the requirements of Article 13 of the Race Directive (independent assistance to victims, independent surveys, reports and recommendations).

Recently, the picture has become even more complicated. The latest development in 2008 (April) was the creation of a new post within the Cabinet of the Prime Minister – the Government Plenipotentiary for Equal Treatment. Although it possesses a number of competences in the sphere of combating discrimination on all grounds (no exhaustive list, includes: “gender, race, ethnic origin, nationality, religion or belief, political opinion, age, sexual orientation, marital and family status”, disability is not mentioned, § 2) they are mainly of a research, analysis and monitoring character.

In addition, the Plenipotentiary does not have its own office but uses the office of the Prime Minister, it has limited staff of five employees and its position is very unclear, even to government agencies – especially in terms of the division of tasks between the two offices or their relationship with each other. In fact, a comparison of the relevant documents reveals that their competences overlap.



As far as the rights of national and ethnic minorities are concerned, the Act on National and Ethnic Minorities and on Regional Language of 2005 created a *Joint Committee of the Government and Ethnic and National Minorities*. It is composed of representatives of selected ministers and minorities and its remit includes issuing opinions regarding the rights and needs of minorities, programmes and draft laws in the field, the principles of allocation and levels of resources from the state budget directed to preserving the cultural identity of minorities and it is also tasked with taking action in the field of combating discrimination. In 2008 Special Team on Roma Issues was created within the Committee.

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