



Executive Summary

Polish Country Report on measures to combat discrimination

by Łukasz Bojarski¹, 2007

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 belong 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 based on 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.

Nevertheless, current practice shows that use has been made of the new provisions introduced into Polish law, such as shifting the burden of proof and the prohibition of discrimination on the ground of sexual orientation. 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, 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 with NGOs. However, lessening the gap between legal regulations and reality requires greater involvement of government authorities. It makes it 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.

In this context it should be noted that, for several reasons, combating discrimination in Poland has become more difficult since the conservative government, consisting of the Law and Justice Party (and later together with Self-defence and the League of Polish Families²), came into power in late 2005. First, it decided to abolish the Government Plenipotentiary for the Equal Status of Women and Men. Secondly, freedom of assembly and expression for homosexuals was limited in practice by bans on 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.

1 The 2006 Polish executive summary and country report were written by Monika Mazur Rafal.

2 Conservative and nationalist.



However, the situation changed significantly in late 2007 when new parliamentary elections took place and the political scene changed completely. The League of Polish Families and Self-Defence (two of the three parties which made up the government in 2005-2007) did not achieve representation in Parliament. Law and Justice, which previously had the majority, is now the opposition party. This has altered the situation in terms of hate speech uttered by officials which was a common issue in the years 2005-2007.

However, the President still 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. Nevertheless, in terms of public statements by politicians and government, the situation is gradually improving, even though the current government is also conservative in nature.

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, 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, 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. The Code includes definitions 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 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 Penal Code entails a series of articles relevant to combating discrimination and penalising the following: 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 lack of religious belief, or incitement in public to commit these offences; restricting an individual in his/her rights on account of his/her religious affiliation or lack of religious belief; malicious or persistent violation of an employee's rights in an employment relationship or social security; refusal to re-employ a person whose reinstatement was decided by the appropriate institution; the public propagation of fascism or other totalitarian regime or incitement to hatred based on national, ethnic, racial or religious differences or on lack of religious belief;



public insult 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 lack of religious belief; or the infringement of the 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 on Human Rights, Poland is a party to all the most important international agreements relevant for counteracting discrimination: International Covenant on Civil and Political Rights, the Optional Protocol to the Covenant; the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Framework Convention for the Protection of National Minorities and the Convention on the Rights of the Child. The Polish government has also recognised 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 their application depends on the enactment of a statute.

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 two years there have already been several versions of the draft law.

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. 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 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* occurs when – due to an apparently neutral provision, applied criterion or action undertaken – there are disproportions in respect of terms of employment to the detriment of all or a 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, the aim or result of which is injury to dignity, humiliation or abasement of an employee. In addition, the Labour Code describes *sexual harassment* as any unwanted behaviour of a sexual nature or behaviour related to an employee's gender, the aim or result of which is injury to dignity, humiliation or the abasement of an employee.

As for *reasonable accommodation*, the Labour Code specifies only that an employer is obliged to combat discrimination in employment on the grounds, among others, of sex, age, disability, political opinions, belief and sexual orientation. The Labour Code also states that the rule of equal treatment is not infringed by actions aimed at making distinctions in the legal status of an employee with the aim of protecting parenthood, age or disability. These provisions are too general to infer specific reasonable accommodation duties.



As a result, the employer is not obliged to provide appropriate accommodation when employing a specific, individual disabled person. A definition of *victimisation* does not exist in the Polish legal system and there is no general legal protection for victims against the risk of retaliation as a result of them claiming their right not to be discriminated against. Nevertheless, the Labour Code prohibits termination of a labour contract as a result of an employee having used their rights to defend themselves against unequal treatment. This provision refers to complainants only, it does not cover witnesses or other people and does not prohibit other possible measures that can be implemented by the employer, such as downgrading, imposing a fine, etc.

The Labour Code prohibits any action consisting of inciting (encouraging) other people to violate the principle of equal treatment in employment. By referral to “incitement” Polish legislation goes beyond what is required by the Equality Directive, since the notion of “incitement” appears to be broader than the notion of “instruction”. 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 the committal of a crime is held responsible for its perpetration.

As a rule, all people should be treated equally in matters of employment and access to the labour market. There are, however, some exceptions laid down in the Labour Code, according to which there is the possibility of distinction among employees, if it is justified on account of the type of work, working conditions or occupational requirements laid down for employees. Polish law does not transpose the requirements of the Directive exactly, especially in relation to the criteria of different treatment – “the objective is legitimate and the requirement is proportionate”. Polish Labour Code only mentions “justifiability”. Furthermore, the additional qualifiers referring to occupational requirements – “genuine and determining” – were not included 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 employee allegedly discriminated against.

It remains unclear whether Polish anti-discrimination law covers discrimination by association, because there are no provisions regulating the issue and there have not yet been any cases. 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 and occupation* 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. Furthermore, any unfavourable treatment on account of membership or non-membership of any trade union is prohibited, irrespective of the type of employment relationship. The rules apply equally to the 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 people's rights on the grounds of religion or belief, age, disability or sexual orientation. 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. 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 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 (Article 18^{3d}).



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 changes to the Law on the Code of Civil Procedure in 2004 (Article 61 § 4), 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. 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.

Since the amendment of the Labour Code, the burden of proof has partially shifted from the complainant to the respondent. 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. This solution is used in respect of any kind of discrimination, but only under the Labour Code.

Regarding sanctions under 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. 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” (§ 19 p. 2.1-10).

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 does not have its own staff and its position is very unclear, even to government agencies. Employees of the Department for Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy, when interviewed or even during public debates, could not explain 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.

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.

The National Labour Inspectorate supervises and monitors the implementation of labour law in Poland. Although the body deals with a wide variety of labour law issues and could have a significant role to play in the promotion and implementation of equal treatment, in practice this task does not seem to be a priority for it.