



## Executive Summary

### Country Report Poland 2010 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.

In the recent years Poland has transposed the equality directives mainly in the employment field. There were still a number of gaps (for instance the non-implementation of the Racial Equality Directive beyond employment or the lack of the equality body). Gaps in the implementation caused number of actions of the European Commission, including referrals to the European Court of Justice.

The risk of losing cases in the European Court of Justice mobilized Polish Government to final approval of the law on equal treatment.

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<sup>1</sup>The 2006 Polish executive summary and country report were written by Monika Mazur-Rafał and Magdalena Pająk.

After many years of work, and numerous draft versions of the law, finally *Sejm* passed the “Act of on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment” that entered into force on January 1<sup>st</sup>, 2011.

The Act designates as an equality body the existing Ombudsperson office (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*). Poland was the only EU state without equality body.

It is still 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 subsequent drafts of the “law on equal treatment” or refusal of the Governmental Plenipotentiary for Equal Treatment to establish working team on problems of LGTB minority. There were number of protests voiced in the years 2008-2010 by the social organizations (also reaching European Commission and Polish Prime Minister) regarding Government Plenipotentiary for Equal Treatment and activities (or rather lack of activities) of its office.

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. One of its last initiative was the preparation of the draft of Polish Disability Discrimination Act (presented to Prime Minister in December 2008 but still not finalised by the Government despite promises).

Sexual minorities are in a very difficult position in Poland since they are the group attacked most often. Many initiatives both national and international (like for instance the draft of the horizontal directive) were presented by some politicians or publicists as promotion and attack of homosexuality.

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.

Until 2010 the Labour Code remained main element of Polish anti-discrimination legislation (it was amended in 2004 and 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.

Within the employment field 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.

For many years implementation was limited to the employment field covered by the labour code. Finally The “Act of December 3<sup>rd</sup>, 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment” was passed by the *Sejm* and entered into force on January 1<sup>st</sup>, 2011 (henceforth as *Act on Equal Treatment*). The law aims to implement five directives: 1986/613; 2000/43; 2000/78; 2004/113 and 2006/54.

New Act on Equal Treatment (Art. 1) in contrast to the labour code (which still remains the main source in the employment under labour contract) contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation.

New law in addition to the wide protection from discrimination in the employment field (extended to civil contracts, self-employment and independent professions) provides protection from discrimination in all fields outside employment, but only in relation to race, ethnic origin and nationality (also gender, but only in access to social protection, goods and services, including housing and not in the health care and education).

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.

Other interesting potential piece of legislation was 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 (in December 2008). At that time Polish Prime Minister promised that the relevant act would be prepared by the Government and ready in the December 2009. Instead the Government prepared “a draft framework for a draft law on equal opportunities of disabled persons” (October 2009), and until the end of 2010 the draft law was not finalised. It would widen the scope of the protection as provided by new Act on Equal Treatment.

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, however slowly, and numerous activities aiming at raising awareness bring the change.



### 3. Main principles and definitions

The 2010 Act on Equal Treatment introduced several legal definitions that until 2010 were included only in the Labour Code and related only to employment field (however currently definitions from labour code are also binding, sometimes they are slightly different than those in the Act on Equal Treatment).

*Direct discrimination* takes place when “a natural person because of gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, is treated less favourably than another is, has been or would be treated in a comparable situation”.

*Indirect discrimination* is defined as situation in which for a person because of his/her gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practise/action taken, unfavourable disproportions or particular disadvantage occur or could occur, 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 any unwanted conduct with the purpose or effect of violating the dignity of a natural person and of creating intimidating, hostile, degrading, humiliating or offensive environment. The Act on Equal Treatment also treats as unequal treatment and prohibits less favourable treatment of persons caused by rejection of harassment or submission to harassment.

New 2010 Act on Equal Treatment prohibits *instruction to discriminate*, both incitement/encouraging and ordering to discriminate.

The Act also introduces general *prohibition of victimisation* and provides that using somebody's rights to defend against unequal treatment (“rights stemming from the breach of the rule of equal treatment”) must not be the basis for adverse treatment, must not cause any negative consequences against the person. The protection extends to a person who in any way supports the person exercising his/her rights.

The 2010 Act on Equal Treatment finally implemented the *duty to provide reasonable accommodation* stating that the employer is obliged to provide the necessary reasonable accommodation for a disabled person remaining with him in the employment relationship, participating in the recruitment process or undergoing vocational or professional training, apprenticeship, practice. Necessary reasonable accommodation means introducing, where needed in a particular case, necessary changes and adjustments to the specific needs reported to the employers, stemming from somebody's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer. The burden shall not be disproportionate when it is sufficiently remedied by public funds.

The 2010 Act on Equal Treatment extends protection for *legal persons* on the grounds of race, ethnic origin and nationality of its members. All forms of discrimination are prohibited, right to compensation relates also to legal persons.

*Discrimination by association* is not regulated and remains still rather unknown concept (it did not appear in any of several versions of draft law on equal treatment). Similarly, there are no provisions or clear rules on how to deal with situations of *multiple discrimination* nor any plans to fill this gap.

The 2010 Act on Equal Treatment introduces exception regarding genuine and *determining occupational requirements*. The exception covers “possibilities and conditions of undertaking and conducting occupational activities as well as training (including higher education)”. The test of the proportionality of measures and legitimate aim was also introduced. Before the 2008' amendment to the labour code put national legislation in line with the Directives in terms of *genuine and determining occupational requirements* within the scope of the labour code.

Similarly other exceptions as provided in Directives are mirrored in the Act on Equal Treatment and in fact relevant provisions are almost verbatim translation from the text of the Directive. This refers to the employers with an ethos based on religion or belief, discrimination on the ground of age.

Act on Equal Treatment provides also *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres as well as it does not cover the freedom of choice of the party to the contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality.

#### 4. Material scope

According to Labour Code 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. Since enactment of the 2010 Act on Equal Treatment prohibition of discrimination extends to civil contracts, selfemployment or independent professions (regulated till large extend also by their self-regulatory bodies, like for instance advocates, legal advisors).

Act on Equal Treatment prohibits discrimination in *membership of, and involvement in trade unions, organizations of employers, or any organization whose members carry on a particular profession, including the benefits provided for members of such organizations* (all grounds are covered).



Until 2010 the Directives were not transposed in any other field outside employment. The 2010 Act on Equal Treatment widens the protection beyond employment, but limiting it to just implementation of directives.

The 2010 Act on Equal Treatment prohibits *discrimination in social protection*, on the grounds of gender, race, ethnic origin or nationality and discrimination in relation to *healthcare* on the grounds of race, ethnic origin and nationality. The Act does not use the term *social advantages* but the definition of the social protection (not legal but elaborated by doctrine) traditionally extends to the issues of social advantages.

There is also the anti-discrimination clause in the Act on the System of Social Security, which is a basic statute for social security area. This provision limiting until 2010 the principle of equal treatment of all socially insured to grounds of sex, marital status, and family status was extended (in force since 01.01. 2011) to grounds of race, ethnic origin and nationality.

The Act on Capital-based pensions, amended by the Law on Equal Treatment prohibits discrimination in calculating the amount of pension on the grounds of gender, race, ethnic origin, nationality, health condition, family and marital status.

New 2010 Act on Equal Treatment finally *expressis verbis* prohibits discrimination in *education and higher education*, but only on the grounds of race, ethnic origin or nationality.

Similarly the Act finally *expressis verbis* prohibits discrimination in *access to goods and services*. The relevant provision prohibits unequal treatment in access to services, including *housing, goods* and purchasing rights (*praw*) and energy if they are offered to public, on the grounds of sex, race, ethnic origin and nationality.

## 5. Enforcing the law

The 2010 Act on Equal treatment introduced general compensation claim stating that anyone (civil and legal persons) who suffers from the infringement of the principle of equal treatment is entitled to compensation. The relevant general rules of civil code and civil procedure code apply.

The Civil Code provides compensation claims for material and immaterial damages. The compensation in case of material damage should cover all damages being consequence of unlawful act or lack of acting of the person who discriminated the claimant.

The civil code regulates also pecuniary damages and state that damages should be appropriate which means that should ensure effective address of suffered damage. Additionally the court may order the payment of an appropriate sum for indicated public interest.

Additionally, in the matters not covered by the Act on Equal Treatment, one can use another form of civil protection – protection of “personal goods/values” (“personal welfare”. According to the Constitution, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights for persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of the public authorities. On the basis of the Civil Code, an individual whose personal values become endangered by another’s actions can demand that the action cease, unless it is not unlawful. Furthermore, the individual concerned can demand from the person who infringed his/her rights that the effects of violation be removed, in particular that a statement of appropriate content and form be made. The claimant can also demand pecuniary satisfaction or payment of an appropriate sum for indicated social cause. If the consequence of the infringement of personal values is material damage, the victim may demand reinstatement in general law terms.

Still claims stemming from an employment relationship can be determined either by a labour court or by a conciliation committee. The special employment 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.

Another conciliation mechanism is provided for in the Code of Civil Procedure and allows the court, acting through a single judge, to confirm an agreement reached between the parties before the court proceeding was commenced.

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. However Act on Equal Treatment introduced new possibility in the administrative procedure stating that if there was court ruling that found infringement of the rule of equal treatment one may demand reinstatement of the administrative procedure, providing that this infringement influenced the final administrative decision.

In terms of non-judicial measures, a complaint to the Ombudsperson (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 advisor (*radca prawny*). 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 of an employee. Furthermore, due to the mentioned changes of the Code of Civil Procedure social 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, for instance 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 *'situation 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 situation testing) therefore in reality so far persons who bring cases which are in fact based on situation testing do not admit it in the court – do not admit that situational testing took place, rather argue that they were simply discriminated against.

Since the amendment of the Labour Code (2004), the *burden of proof* has shifted from the complainant to the respondent, however only in employment cases. New Act on Equal Treatment introduces shift of the burden of proof in all compensation proceedings regarding infringement of the rule of equal treatment governed by the Act. According to Act whoever (complainant) alleges infringement of the principle of equal treatment, has to substantiate (pleas) the probability of violation. In the case of prima facie evidence (probability) of violation of the principle of equal treatment the respondent is obliged to show that respondent did not committed the violation.

Regarding *sanctions* under Polish anti-discrimination law, there is no specific system of sanctions (apart from Civil Code and 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 generally only redresses the damage and does not include a serious sanctioning element.

## 6. Equality bodies

Until 2010 no institution or body has been officially designated to be the specialised body as required by Directive 2000/43. There was 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.

The 2010 Act on Equal Treatment finally designates as an equality body the existing Ombudsperson office (Commissioner for Civil Rights Protection – *Rzecznik Praw Obywatelskich*).

The law adequately amended existing Law on the Ombudsperson imposing on the Ombud new competences (in addition to its very broad mandate - protecting human rights and freedoms and the rights and freedoms of the citizen).

However, even new law obliged Ombud to take number of responsibilities it did not envisaged any additional resources, funding etc. for fulfilling new obligations, therefore the role of the Ombud as an equality body remains illusory. Current Ombudsperson, prof. I.Lipowicz publicly criticized this situation several times (including presentations before the Parliament and In the Constitutional Tribunal) and even proposed that the law was suspended for two years since there are no funds for proper fulfilment of the competences of the equality body.

The 2010 Act on Equal Treatment provides that Ombudsperson in the implementation of the rule of equal treatment should: analyse, monitor and support equal treatment of all persons; conduct independent surveys of discrimination; prepare and publish independent reports, and issue recommendations regarding discrimination issues.

The problem of providing independent assistance to victims is more complicated since according to the Polish Constitution and new Law on Equal Treatment those competences refer to the vertical understanding of the human rights (relation between public organ and a person) and are limited when it concerns conflicts in between private parties. In such a case according to law Ombud may limit its actions to providing to the victim the information on the rights and possible actions.

The second institution that have the mandate to promote the equal treatment of all persons without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment.

After the abolition of the Government Plenipotentiary for the Equal Status of Men and Women (acting in 2001-2005 and abolished in November 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 created in 2006. Sometimes the Government claimed that this Department was the Polish equality body (especially in terms of gender discrimination), however, this was a very controversial issue

The Government Plenipotentiary for Equal Treatment is a post created in 2008 (April) within the Chancellery of the Prime Minister (2010 Act on Equal Treatment provided new legal basis for its operation). The main task of the office is to execute the policy of the Government in the field of equal treatment.

The Plenipotentiary does not have its own office or budget and uses the office of the Prime Minister.

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 policy regarding persons with disabilities 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.