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**Strengthening anti-discrimination policies**

**Document 5**

# Concerning needs for improvement of Polish anti-discrimination policies

**Conducted in the framework of the**
**Twinning Project Poland – Austria**
**"Strengthening Anti-discrimination Policies"**
**(PL 02/IB/SO/06, FM No. 2002/000-605.01.02)**

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*Monika Platek*

# Report aiming to identify gaps in Polish law in the area of combating discrimination on grounds of race, ethnic origin, religion, belief and sexual orientation, with respect to Poland's international obligations

According to instructions given by the Principal, this report takes into consideration the reports previously prepared[1]. The experiences in the field of combating discrimination, which were presented to the Polish experts in Austria (1st -7th of September 2003) and Ireland (2nd – 7th of December 2003) have also been taken into the account.

The present report, following the agreement with the Principal is aimed at helping the Austrian experts, as well as the Polish experts, with working out logistic, institutional and procedural instruments allowing the implementation of:

A) the Directive 2000/43/EC of June 29th 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;

[1] This refers above all to:

1. The report [BcommDH (2003)4] of February 25th, authored by The Commissioner for Human Rights – Mr Alvaro Gil Robles in the part regarding 1) administration of justice 2) non discrimination and situation of minorities 3) women and children 4) slave trade 5) labour law and social rights 6) freedom of speech.
2. Analysis of the status quo of Polish Anti-Discrimination Legislation and Policies Conducted in the framework of the Twinning Project Poland Strengthening Anti-discrimination Policies (PL 02/IB/SO/06, FM No20002/000-605.01.02) November 2003).
3. **Recommendations of Experts for Eastern Europe adopted on September 26th 2003, regarding "Implementation of the Programme of Actions adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Intolerance related to them".**
4. The second report of the European Commission against Racism and Intolerance (ECRI), regarding Poland, adopted on December 10th 1999.
5. Final remarks of the Commission for Human Rights, founded on the basis of the art. 28 of the International Covenant on Civil and Political Rights (CCPR), to Poland's report on the execution of the Covenant's provisions.
6. Final remarks of the Committee on the Elimination of Racial Discrimination, founded on the basis of the art. 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
7. Final observations of the Committee on the Rights of the Child, regarding Poland, discussed in the framework of the analysis of the reports submitted by the States Parties on the ground of the art. 44 of the UN Convention on the Rights of the Child.
8. Report on measures to combat discrimination in the 13 candidate countries (vt/2002/47) country report Poland may 2003 by Ernest Zienkiewicz and Monika Mazur-Rafal; This report has been drafted as part of a study into measures to combat discrimination in the candidate countries, funded by the European Community action programme to combat discrimination.

B) the Directive 2000/78/EC of November 27th 2000, establishing a general framework for equal treatment in employment and occupation.

This report is assumed to be a brief document, avoiding repetition of issues which have been widely discussed in the below given papers, also for this reason that the work in the area covered by the report goes on for several months already and the expert's contribution to it is in part included in the material presented by the Austrian experts.

**The state of legislation:**

The essence of the term "equality" does not constitute a homogeneous notion, it is rather an assemblage of various concepts, such as: equality in law, equality before the law, equal protection by law, non discrimination and affirmative/positive discrimination. The connection between those concepts is complex and is subject to many controversies.

The principal difference between equality and non discrimination is that equality may have for meaning: equal approach to, and treatment of those who are in the same situation. It is so, since equal treatment of those who find themselves in an unequal situation is itself discrimination. The clause of non discrimination means acceptance of a fact that certain criteria cannot found grounds for differentiation of persons' situation. It is agreed that such grounds are e.g. race, belief, religion, gender, sexual orientation and others.

Neither penal law, nor civil or administrative law contain special regulation stating that the provisions thereof should be applied in the conditions free from any discrimination whatsoever. Furthermore, there is no such explicit rule in other special regulations, regarding e.g. social protection or lease of living quarters. Discrimination, with some exceptions to this rule only (e.g. under certain conditions, in the provisions of labour law, amended pursuant to the requirements imposed by EU), does not constitute a separate basis for liability or legal claims. The prohibition of discrimination is expressly articulated in the art. 32 of the Constitution of the Republic of Poland[2].

The provisions of the Constitution, if they are sufficiently precise, are to be applied directly. The Constitution also provides for measures to protect freedoms and rights. One can imagine that in case other provision infringes upon the art. 32 of the Constitution the

[2] Art. 32.
1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2.No one shall be discriminated against in political, social or economic life for any reason whatsoever.

citizen acquires right to file constitutional complaint and to claim compensation for any harm done to him by an action of an organ of public authority[3]. Nevertheless, a constitutional complaint is neither a simple procedure, nor an easily accessible one, thus, it is difficult to consider it protection of citizen against discrimination. In addition, we are dealing here with a situation where the fact of discrimination is the very result of the lack of appropriate regulation or legal act.

Through this not only a gap in the law is created, but also a "mental" gap – the areas of discrimination are not only disregarded, but even more – they pass unnoticed. We are directly facing it in the situations in which even the existence of appropriate provisions does not guarantee suitable sensitivity in treatment of persons in a manner that is free from any discrimination on grounds listed in the art. 13 of the Treaty of the European Community[4].

Discrimination, apart from certain particular exceptions, does not constitute a crime (which is not necessarily a wrong solution). The Penal Code penalizes in one and the same provision (art. 256) public propagation of the fascist regime, or other unspecified totalitarian regime and incitement to hatred motivated by national, ethnic, racial, religious differences or by person's lack of religious beliefs. So expressed prohibition is aiming to serve freedom from discrimination on grounds of nationality, ethnicity, race and belief. Next article of the Penal Code (art. 257) is even more explicit, ruling that it is a crime to publicly insult a group of people or an individual because of their national, ethnic, racial or religious affiliation or because of their lack of religious beliefs. It is also a crime to violate person's bodily integrity for the same reasons. Protection of religious beliefs is

[3] Art. 77 of the Constitution

1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to the law.
2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

Art. 78 of the Constitution

Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Art. 79 of the Constitution

1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

[4] Art 13 of the Treaty of the European Community (TEC): sex, race, ethnic origin, religion or belief, disability, age and sexual orientation.

additionally ensured by the chapter XXIV of the Penal Code, stating crimes against freedom of conscience and belief.

Similar legal protection has not been attributed to other features of differentiation, such as: disability, age, gender or sexual orientation, even though the latter is frequently reason for violation of bodily integrity, as well as for public insulting. In such case a person has right to seek protection in the general provisions, stating prohibition of insulting (art. 216 of the Penal Code) and of violation of bodily integrity (art. 217). Both are offences prosecuted on private accusation. This means that the legislator does not consider them situations of paramount importance, in which the citizens are entitled to receive protection obliging an agency of prosecution to prosecute the crime and to lodge indictment. In case of disabled persons, persons discriminated on the basis of gender and persons of homosexual orientation, such state of affairs is related to general low sensitivity to the fact of discrimination suffered by these groups and ignorance of the scale of the discrimination. One should bear in mind that penal law is an exceptionally bad measure to shape positive social behaviour. In some situations expressing a decided condemnation of an act of discrimination can bring positive effects, informing members of society about an undesired conduct. Nevertheless, it is difficult to imagine that prohibition of discrimination of women, included in the Penal Code, could lead to positive results. Putting aside the fact that (given the majority of men in the parliament) never would such act be passed, since the legislator protects his own interests above all, and not the interests of the weaker, such amendment, even if theoretically adopted, would not have much chance for being applied without additional support from awareness-raising and educational actions, conducted on a large scale. The complaints submitted by the organisations combating sexism and xenophobia to the Government Plenipotentiary for Equal Status of Women and Men prove it well enough. These organisations constantly complain about the cases instituted on the basis of art. 257 of the Penal Code being discontinued. It does not necessarily prove of the ill will of prosecution agencies. None the less, it is a clear signal that appropriate educational actions are not conducted, not only on the level of civil society but also on the level of agencies of prosecution and

administration of justice. Lack of definition of terms "national minority" and "ethnic minority" also constitutes a problem (consult the case of Silesians[5]).

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[5] European Court of Justice. Fourth section. Case of Gorzelik & Others v. Poland. Application no. 44158/98. Judgment of December 20th 2001. This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

The case originated in an application (no. 44158/98) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Polish nationals, Jerzy Gorzelik, Rudolf Kolodziejczyk and Erwin Sowa ("the applicants"), on 18 June 1998. date the applicants (who all describe themselves as "Silesians"), together with one hundred and ninety other persons, decided to form an association entitled "Union of People of Silesian Nationality". The founders subsequently adopted a memorandum of association. The applicants were elected to the provisional management committee and were authorised to proceed with the registration of the association.

On 11 December 1996 the applicants, acting on behalf of the provisional management committee of the "Union of People of Silesian Nationality", lodged an application for the registration of their association with the Katowice Regional Court. They relied on, *inter alia*, section 8(2) of the Law of 7 April 1989 on Associations (hereinafter referred to as the "Law on Associations"). They submitted the memorandum of association along with the other documents required by the Law on Associations. The relevant parts of the memorandum of association read:

"1. The present association shall be called the "Union of People of Silesian Nationality" (hereinafter referred to as the "Union").

Paragraph 30 provided:

"The Union is an organisation of the Silesian national minority."

On 27 January 1997 the Katowice Governor, acting through the Department of Civic Affairs, submitted his comments on the application to the court. These comments contain lengthy arguments against allowing the association to be registered, the main thrust of which is as follows:

"(i) It cannot be said that there is a 'Silesian', in the sense of a representative of a distinct 'Silesian nationality'. 'Silesian' is a word denoting a representative of a local ethnic group, not a nation. This is confirmed by paragraph 7 (1) of the memorandum of association, which aims merely to 'awake and strengthen the national consciousness of Silesians'. …

In conclusion, turning to the circumstances surrounding the refusal to register the applicants' association, the Government attached considerable importance to the fact that the applicants had refused to amend – even slightly – the most controversial provision of their memorandum of association and the name of their organisation. Had the applicants deleted or altered the disputed paragraph 30 of the memorandum, their association would have been registered without any difficulty.

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In the Government's opinion it had not been disproportionate to require the applicants to delete that single provision, especially as the averred objectives of their association could have been achieved without it.

Against that background, the Government concluded that the interference with the applicants' right to associate with others could not be deemed to be so severe as to constitute a breach of Article 11.

The Court recalls at the outset that the right to form an association is inherent in the right laid down in Article 11, even if that provision only makes express reference to the right to form trade unions.

The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning.

In the field of family law the situation of homosexual persons remains distinctly unequal, as they are refused a regulation under civil law, which would grant to their relationships status similar to the one enjoyed by married heterosexual couples.

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The way in which national legislation protects the freedom of association and the manner in which the State authorities apply the relevant provisions in practice give an indication of the development of democracy in the country concerned.

While it is true that States are entitled to satisfy themselves that an association's objectives and activities are in conformity with the domestic legal order, they must do so in a manner compatible with their obligations under the Convention and subject to the Court's review.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities, but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. That does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. It must also look at the interference complained of in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient.

The Court notes at the outset that the Polish authorities, in justifying their refusal to register the applicants' association under the name "Union of People of Silesian Nationality", relied on the ground that both the intended name and certain provisions of the Union's memorandum of association, which characterised Silesians as a "national minority", implied that their real intention was to circumvent the provisions of the electoral law.

They also attached considerable importance to the fact that, had the members of the Union been recognised as a "national minority" in the process of the registration of their association, they would automatically have been afforded an unqualified and legally enforceable claim to special privileges granted to national minorities by the relevant legislation. In that regard, the authorities relied heavily on a further argument - which was rejected by the applicants – that the Silesians were neither a "nation" nor a "national minority", but simply one of several ethnic groups of Polish citizens. They accordingly considered that the name chosen by the applicants for their association would be deceptive for the public and contrary to the law. In particular, they invoked the principle of equality before the law, holding that the registration of the applicants' association in the manner suggested by them would amount to discrimination against other ethnic groups (see paragraphs 19, 23 and 41 above).

The Court observes that it is not its task to express an opinion on whether or not the Silesians are a "national minority", let alone to formulate a definition of that concept. Indeed, the formulation of such a definition would have presented a most difficult task, given that no international treaty – not even the Council of Europe's Framework Convention for the Protection of National Minorities – defines the notion of "national minority".

Nor did Polish law define that term at the material time. In the context of parliamentary elections it did, however, make a reference to "registered associations of national minorities" and provide for a number of privileges for such associations under the electoral law (see paragraph 28 above). But there was no legal procedure at the domestic level whereby a national or other minority could seek recognition.

While the Court considers that that gap in the law left a degree of legal uncertainty for individuals and a degree of latitude for the authorities, especially since persons claiming to belong to a minority, in order to be recognised as such, had to make use of a procedure which was not designed for that purpose, it does not find that that fact in itself had consequences for the applicants' rights under Article 11. The Court considers that the central issue lies in a different aspect of the case.

The Court would also point out that pluralism and democracy are, by the nature of things, based on a compromise that requires various concessions by individuals and groups of individuals. The latter must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole. This is particularly true as regards the electoral system, which is of paramount importance for any democratic State.

The Court accordingly considers that, in the particular circumstances of the present case, it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the State, a system which is an indispensable element of the proper functioning of a "democratic society" within the meaning of Article 11. There has therefore been no breach of that provision.

The position of children who are victims of violence related to their age still is unequal. Discrimination on ground of age is usually perceived as discrimination in the workplace. However, the age refers to discrimination in other areas too – in this case we are dealing with providing appropriate protection of the integrity of a person who is deprived of it because of his age. The prohibition of physical violence expressed in the Convention on the Rights of the Child, and additionally repeated in the general prohibition of corporal punishment included in the Constitution[6] is being neglected. The Convention determines actual and universal status of the child. The content of Polish Constitution, commanding respect for the views of the child, is in conformity with the spirit and the letter of the Convention. Analysing the Convention, as well as the Constitution, one cannot confine oneself to pure analysis of the text. It is so, because the essence of the problem is related to practical application of the norms which are constructed[7]. According to the Convention, a child (a person below the age of eighteen years) is a subject of rights and freedoms and not an object of other persons' rights. The Convention demands that the identity, dignity and privacy of a child were recognised. The Convention, in view of the child's interest, imposes on parents and all the other persons, as well as on the authorities and organisations, an obligation that in all actions concerning children the best interest of a child should be their primary consideration.

At the same time, the Convention respects the autonomy of a family and provides for the state to undertake to ensure the child such protection and care as is necessary for his or her well-being.

The traits characteristic of the childhood and adolescence are: psychophysical immaturity, socio-moral immaturity and lack of means to satisfy one's needs. This causes the child to rely on the society of adults. However, this does not imply adults' ownership of a child. The adults should consider it duty and privilege to have possibility and obligation to shape a person to become a human being of full worth and content with his life's quality.

The Convention on the Rights of the Child itself does not provide means to claim efficiently the rights enshrined in it. Submitting the reports by the states parties together

[6] Art. 40. No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application or corporal punishment shall be prohibited.

[7] Kowalska – Ehrlich, B. (1996) Ochrona dziecka w swietle Konwencji Praw Dziecka i w prawie polskim. W: Ksztalcenie Obywatelskie. Wybór tekstów dla nauczycieli. Centrum Edukacji Obywatelskiej. Warszawa:
152-162.

with their obligation to provide further information on the implementation of the Convention is, judging from the individual's point of view, a very poor procedural means. Therefore, it is a matter of state's self-obligation to ensure that the law and the conducted policy are in compliance with the Convention ratified by the state party.

Thus, one should notice that in the practice of Polish prosecution agencies and courts it is accepted that there is an area of exclusion (a "countertype") to the scope of penalization of the art. 217 of the Penal Code, which is a situation when the beating of a child is considered to serve educational purposes. Similar lack of protection is experienced by children aged from 15 to 18 years who are used as prostitutes. It happens so, as the provisions of the penal law remain unchanged, despite explicit recommendation of the Council of Europe, regarding the need to provide children with protection against sexual exploitation[8]. It orders member states to introduce amendments into the criminal law so as to protect the children against sexual abuse and exploitation for purposes connected with slave trade and prostitution, including measures such as penalisation of not only persons profiting from the prostitution but also persons who avail themselves to the services rendered by the children. Specifically, we are talking about punishing the clients of children prostitutes.

Disproportion in the legal status of women is still visible – the more and more often we are dealing here with indirect discrimination – e.g. in the provisions referring to violence within the family, self-defence in connection with the violence within the family, rape, abuse of superior position in hierarchy (art.25 in connection with art. 207, art. 197, art. 199 of the Penal Code) – or, as in the case of rape, with ignoring the fact that a crime is committed against men as often as it is committed against women, which, being a social taboo, is subject neither to an evaluation nor reflection.

At the moment, we are dealing with the problem of discrimination on three levels: on the level of legislation, where there is no appropriate regulation of legal status of persons discriminated against on grounds of features which make them distinct (e.g. sexual orientation), on the level of law in action (e.g. despite the prohibition of xenophobia practical application of such provisions, considering the scale of this social phenomenon, is rare), and on the level of social sensitivity to the problem of discrimination (e.g. despite the principle of equal treatment between women and men, there is lack of adequate

[8] Recommendation of the Council of Europe R (91)11 On protection of Children against Sexual Exploitation – Zalecenia R(91)11. Amended in 2001.

application of existing provisions, and, moreover, lack of appropriate understanding, on the social level, of the size of discrimination and no sensitivity to it).

There are still situations in which specific feature causes a person to experience discrimination, due to lack of appropriate legal regulations, e.g. such is the case with discrimination of homosexual persons, deprived, for the reason of their sexual orientation, of possibility of registering their partner relationship.

However, debating on this issue we must bear in mind that the scope of the Directives, which are the basis for this paper, is not equal. Only the Directive regarding equal treatment in employment covers wide range of freedom from discrimination, including, apart from race and ethnic origin, religion, belief, disability, age, gender and sexual orientation (CD 2000/78/EC of November 27$^{th}$ 2000). As far as other social relations are concerned (e.g. the field of education, social protection, healthcare, provision of goods, including housing) the scope of non discrimination is limited to non discrimination on grounds of race or ethnic origin (CD 2000/43/EC of June 29$^{th}$ 2000).

Working on implementation of the two Directives one should pay attention to other forms of discrimination, which fall within the scope of the Directive 2000/43/EC, in view of the content of the art. 32 of the Constitution, art. 13 of the Treaty of the European Community and the Protocol no. 12 to the European Convention for the Protection of Human Rights.

Facing the existing phenomena of discrimination within Polish society calls not only for appropriate legal regulations and executorial procedures, but also for appropriate sensitivity to discrimination and understanding of its essence. The law itself is not enough. I'm observing on daily basis to what extent the practice of family courts, as well as penal courts, is dominated by paternalistic schemes of reasoning, which lead to far-reaching discrimination of women and children, despite constitutional provisions guaranteeing freedom from that sort of discrimination. Equally often I'm observing how the proceedings do not start even, because the phenomena of xenophobia remain unnoticed and racial discrimination is denied, and although such events occur, due to low level of sensitivity to this phenomena, they are negated. Present debate, originating from an attempt to liquidate some areas of discrimination against women (right to procreation) and homosexuals (right to register partner relationships), shows best that it is not only the provision of law which is important, but also consent or lack of consent to factual non discrimination.

As far as lawyers are concerned, it means that the interpretation of art. 33 of the Constitution[9] as referring solely to the situation of women opposed to the situation of men is only an attempt to liquidate the unequal status of women and through this it aggravates discrimination of women, asserting that it takes place. Free from discrimination treatment of women and men will take place when the art. 33 of the Constitution is read not only horizontally but also vertically. Real equality of women and men requires declaring that women, irrespective of origin, age, sexual orientation, etc., shall not be treated differently from other women; it applies respectively to men. Therefore, lack of discrimination means that homosexual persons of certain sex will no be treated less favourably, because of their sexual orientation, than heterosexual persons of the same sex. Given this, it is inadmissible to bring forward the argument that heterosexual couples, who remain in concubinage, have no particular rights. Putting aside the fact that this is not an entirely true statement (court procedures dispense persons who remain in such couples from obligation to participate in certain proceedings as a witness, they have right to the apartment of the partner after his death, they have right to an allowance in certain situations, etc.), one should notice that heterosexual persons remaining in the concubinage have a choice and can change their legal status at anytime. Homosexual couples do not have such possibility. There are no good arguments, apart from deep prejudice towards homosexuals and long tradition of discrimination against them, for maintaining such situation.

The problem of discrimination against women on the ground of criminal law, family law and often labour law (attitude towards violence within the family, towards rape, towards responsibility for divorce, etc.) is no different, the same applies to acceptance of violence against children (penal law). The law, which undoubtedly should be an outset for further development, is only one of the links of a chain that has to be used to change the awareness and sensitivity to phenomena of discrimination covered by the art. 13 of the Treaty of the European Community.

[9] Art. 33.1.Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.

2.Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

**Procedures**

Poland has entered into the Council of Europe on November 26th 1991 and has ratified the European Convention for the Protection of Human Rights on January 19th 1993. Poland has also ratified Protocols no. 1, 4, 6 and 7 to the Convention and has also signed Protocol no. 13, which bans capital punishment in all circumstances, but has not signed Protocol no. 12, which introduces general prohibition of discrimination.

How to guarantee in practice implementation of the two above mentioned Directives? Should a universal act prohibiting discrimination be adopted, or would the signature and ratification of Protocol no. 12 to the European Convention of Human Rights be enough so far? Considering the position of the Convention amongst the provisions of European Union, I would definitely declare for such resolution. Not only would this be more economical, but also more appropriate, given the purposes and the spirit of those provisions, and Poland's position on the arena of international legal order.

Shall we be relieved by that from obligation of bringing in concrete amendments to concrete provisions of the law? I leave to civil law specialists the problem, if, upon adopting the Protocol no. 12 to European Convention for the Protection of Human Rights, modifications to the general part of the Civil Code would still be requisite. As regards penal law, changes would definitely still be necessary. There would also be need for introducing certain provisions to the acts regulating social protection, lease of living quarters, access to education (e.g. the question of special classes being created for minority groups of students, whereas there is need for stressing possibility of exercising such model of education, which would support cultural identity, etc.).

Apart from the law, important is the cooperation between self-government's organs and local government's organs, as well as wider support for non-governmental organisations, which, according to their statute, have as their tasks countering and combating discrimination. Organisations combating racism and xenophobia and organisations supporting actions aimed at combating discrimination against homosexuals, which act in Austria can be a good example of such practice. Their cooperation with the representatives of the local government is good, though the representatives of the latter themselves admit that these organisations should be granted higher allocations than those that are granted to them now.

The Tribunal for non discrimination acting in the Republic of Ireland seems to be a very good solution, as far as is concerned an organ to which one may appeal, if a citizen recognises that he was faced with discriminatory practices. What constitutes definite advantage of the Tribunal is: its accessibility, lack of formalism, employment of mediation procedures and retributive justice, and, last but no least, passing the decision-making to adequately trained specialists in the field of discrimination issues, who are not lawyers though. A lawyer helps with the judges' of the Tribunal work, but he does not preside at the proceedings. The Tribunal pays attention so that in course of proceedings, as well as in the content of the grounds for the issued decisions, was employed language which is completely understandable and free from juristic vocabulary difficulties. Irish Tribunal employs 7 judges and serves a country inhabited by 4 million people. How to transpose it to the country inhabited by 38 million people, like Poland is, remains question of logistics. Anyway, I do not propose exact copying of Irish institution – although it seems that the solutions employed there serve well to raise legal culture of the society and to make it evolve towards understanding of what is discrimination and why it is undesired.

I think that in course of further work on statutory filling of the gaps relating to discrimination it will be worthy to return to the idea of Irish tribunal and reflect on possibility of adapting similar institution to Polish conditions.

*Maria Romer*

# Suggestions of legal solutions in the field of counteracting discrimination on the grounds of race, ethnic origin, religion, beliefs, age and sexual orientation

1. Suggestions of legal solutions, necessary for adequate counteracting discrimination on any grounds, have been based on assessment of effectiveness of present legislation in this field, and on lack of regulations necessary to implement Directives 2000\78\EC and 2000\43\EC. Suggestions contained in the opinion are also the result of experience from the course of the project so far. As the project has not been completed yet, it may appear necessary to supplement presented suggestions.

Strengthening anti-discrimination policies seems to depend primarily on passing a unified act which would: contain an open list of actions of discriminatory nature, grant the right for compensation for discriminatory actions, and describe the manner of filing and considering complaints about such actions.

Conclusion about the need for such an act is based – among others – on the assessment of the effectiveness of present Polish legislation concerning non-discrimination, combating racism and xenophobia, and on selected recommendations of international bodies concerning counteracting discrimination, incl. Report Of The Commissioner For Human Rights, Mr Alvaro Gil-Robles, On His Visit To Poland 18 – 22 November 2002 for the Committee of Ministers and the Parliamentary Assembly.

In the report, it's been noticed that Poland has not signed Protocol No. 12 to European Convention of Human Rights (concerning general prohibition of discrimination) yet, that – despite anti-discrimination clause in the Constitution – Poland still does not have anti-discrimination legislation in fields like turnover of real estate between individuals or access to public places. The report highlighted cases of discrimination by public authorities and individuals on grounds like gender, sexual orientation, disability or HIV/AIDS. Hate crimes against homosexuals, who also do not often receive adequate protection from the police, have been noticed as well. It was stressed in the report that Poland hosts 13 national and ethnic minorities, whose population is estimated to be approximately 1 million people. representatives of minorities informed the Commissioner about common occurrence of

xenophobia, anti-Semitism, negatives stereo-types of behaviour towards them, lack of promotion of tolerance in school curricula, and lack of guarantee of the right to use minority languages in relations with administrative authorities. The status of minorities is regulated mainly by bilateral agreements. As a result, not all minorities are included into such agreements. The report underlined also: discrimination against Roma/Gypsies especially with regard to education and employment, victims of domestic violence, trafficking in human beings, which is not covered by comprehensive regulations, and problems of refugees.

The need for comprehensive regulation with regard to prohibition of discrimination, racism and xenophobia stems also from remarks of Helsinki Foundation for Human Rights to 15th and 16th report on the implementation by Poland of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. In the remarks it was stressed that Polish legal system lacks definition of national or religious minority. It was also highlighted that despite Article 13 of the Constitution and Article 256 of the Criminal Code (which prohibit and penalize spreading hatred on national, ethnic, racial or religious grounds), in practice such activities takes place and is not punished. In the summary, the Helsinki Foundation recommended a number of actions the State should undertake, incl. withdrawing of any subsidies for publications aimed against religious minorities, indicting *ex officio* those who publicly incite hatred or commit acts of vandalism or violence against members of national or religious minorities. These remarks also indicate the complexity of the problem, the variety of manifestations of discrimination and support the need for a comprehensive regulation.

The need for such regulation – containing provisions prohibiting any discrimination, racism and xenophobia and determining rules of procedure and of granting adequate compensations – stems also from experience from study visits to Vienna and Dublin.

2. The assessment of current legal status quo in Poland, with regard to Directives 2000/78/EC and 2000/43/EC, leads to a conclusion that that Polish legislation is not sufficient to achieve goals set in the Directives.

Provisions of the Labour Code, which comply with the Directives (incl. definitions of direct and indirect discrimination, harassment, sexual harassment, and mobbing) and will enter into force on 1st Jan. 2004, provide procedure of seeking compensations for theirs infringements.

In the remaining legal documents of widely understood “social law”, incl. Act of 14 Dec.1994 on Employment and Counteracting Unemployment (Journal of Laws 2003 No. 58,

with subsequent amendments), Act of 29 Nov. 1990 on Social Welfare (Journal of Laws 1998 No. 64 with subsequent amendments), Act of 27 Aug. 1997 on Employment and Rehabilitation of Persons with Disabilities (Journal of Laws 1997 No. 123 item 776, with subsequent amendments), and also in Act of 25 June 1997 r. on Aliens (Journal of Laws 1997 No. 114 item 739, with subsequent amendments) there are no comprehensive regulations which would concern prohibition of discrimination and possibilities of seeking compensation.

Act of 13 October 1998 on the System of Social Insurance (Journal of Laws 1998 No. 137 item 887, with subsequent amendments) also did not introduce the right to compensation for infringement of the principle of equal treatment (apart from statement in Article 2a that the Act is founded on equal treatment of all insured persons regardless of sex, marital or family status and the principle of equal treatment refers in particular to: (1) conditions of being included into the system, (2) obligation to pay social insurance contributions, (3) calculation of the benefits, (4) periods of payment of benefits and of retaining the right to these payments; and apart from the right to bring the matter before a court if the insured person considers himself/herself unequally treated).

In practice, this is a „blank norm" Article 2a of Act on the System of Social Insurance has not appeared yet neither in the practice of labour and social insurance courts nor in Supreme Court's rulings.

Similar situation takes place in labour law. Although on 2 June 1996 – as a result of an amendment of 2 Feb. 1996 – the Labour Code obliged employers to respect dignity and other personal values of employees, employees were guaranteed equal rights by way of equal performance of the same duties (Article $11^2$), and prohibition of discrimination in employment relationship on the grounds of gender, age, disability, race, nationality, beliefs (especially political or religious ones) and trade union membership was introduced (Article $11^3$) and prohibition of discrimination could be drawn even earlier from a number of international treaties ratified by Poland (e.g. ICCPR, ICESCR – Journal of Laws 1977 No. 38, items 167 & 169, Convention No. 111 of International Labour Organisation of 25 June 1958 on discrimination in employment and occupation – Journal of Laws 1961 No. 42, item 218), ECHR – Journal of Laws 1993 No. 61 item 284, amended; European Social Charter – Journal of Laws 1999 No. 8, item 67), raising claims by way of infringement of these principles was very rare, which is reflected by very small number of Supreme Court's rulings on these provisions.

It seems that it can be explained by the lack of consciousness about possibilities of claiming one's rights and by lengthiness of court procedures. Therefore, it can be said that if

even existence of adequate legal guarantees in the field of discrimination is not reflected in practice, in those areas of social life where legal provisions do not refer directly to prohibition of discrimination, xenophobia and racism, victims of discrimination are virtually helpless and lack adequate legal protection. Such a conclusion stems from the report by Ms. Weyss and from a number of earlier reports.

3. Thoughts presented in the beginning and experiences from study visits to Austria and Ireland support the need for adequate legislative changes towards comprehensive regulation of issues stemming directly from Directives 2000/78/EC and 2000/43/EC. Within the project „Strengthening Anti-discrimination Policies" it seems to be a justified need to elaborate a draft act which would assemble all provisions concerning discrimination *sensu largo*. In such an act – accordingly to standards set by the Directives – one should include definitions of direct and indirect discrimination, harassment (discrimination) on racial, ethnic, or religious grounds, and of incitement to discrimination (which could/should cover also press publications or speeches inciting to discrimination) as well as of assisting in discrimination, as agreed in Expert Recommendations for Eastern Europe adopted at a meeting in Prague between 24 and 26 Sept. 2003 on implementation of Declaration and Action Plan of World Conference Against Racism, Xenophobia and Related Intolerance.

The act should provide adequate compensation by way of infringement of its principles, and the manner of procedure. It would be applicable to all situations where discrimination, xenophobia, racism or incitement/assistance to them occurs; it would be applied directly in these fields of law where there are no specific anti-discrimination provisions. It would not affect present legislation, in particular the Labour Code, with the only reservation that if the act provides more protection than earlier ones, this new act should be applied. The act should also determine the procedure of making claims and responsibility for infringement of its provisions.

The act should constitute a legal basis for establishment of an organ being a counterpart of the Equality Authority which operates so successfully in Ireland. Such an organ, after appropriate changes, could be the Secretariat of the Government Plenipotentiary for Equal Status of Women and Men. Apart from legal and political steps towards securing equal access to employment and self-employment, social security, equal opportunities of development, education, public goods and services and culture for everybody irrespective of racial and ethnic origin, monitoring manifestations of racism and xenophobia, as well as education on preventing them, the Office should have a separate team which will consider – within a mediation procedure – complaints on all acts of racism, xenophobia and other forms

of discrimination, and will decide on granting adequate compensations to the victims. Similarly to settlements made in mediation procedures in labour cases, a compromise made before the Office should be enforceable after the court provided it with an executing order.

Such a manner of procedure would not burden the courts and – through its little formality – would create an opportunity for speedy and possibly peaceful resolution; it would also have an influence on development of social consciousness on human rights and on the fact that discrimination, intolerance, racism and xenophobia constitute a violation of these rights and do not go unpunished.

*Katarzyna Gonera*

# Foundations of anti-discrimination regulation

## General remarks

From the report *Analysis of the status quo of Polish Anti-Discrimination Legislation and Policies* prepared by Austrian experts it stems that Polish legislation does not fully comply with requirements set by EU Directives – 2000/43/EC of 29 June 2000 which introduced the rule of equal treatment regardless of race and ethnic origin, and 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Requirements of Directive concerning for equal treatment in employment and occupation are met to a greater extent, though not completely; to a lesser extent – ones set by Directive on equal treatment regardless of race and ethnic origin. The legal status quo compliant with both Directives will be achieved on 1st Jan. 2004, but only as regards equal treatment and prohibition of discrimination in employment (as this is the only field regulated by Labour Code). Fields that stay intact by the Directives are:

1) conditions of access (i.e. equal treatment, equal access, abolition of discriminatory criteria) to so-called „self-employment" (which means undertaking business activity on the basis of Act of 19 Nov. 1999 on business activity or performing „free professions" which were excluded from this Act and are regulated by special acts, e.g. barristers, legal advisers, patent & trademark attorneys),
2) equal access (i.e. abolition of discriminatory criteria) to social protection, incl. social welfare, healthcare and education and to public goods and services (incl. housing).

It can be said that deficit of regulation occurs in all the fields that fall outside employment relationships.

Polish legal system does not contain comprehensive and autonomous regulation concerning discrimination on the grounds of race, ethnic origin, religion, age, and sexual orientation, which would fulfil all the requirements for EU Member States resulting from the above mentioned directives. Present provisions – contained in Labour Code (including proposed amendments), Criminal Code, Code of Small Offences, and other acts – (also draft ones, e.g.

draft Act on National Minorities) – are dispersed, fragmentary, and do not constitute a coherent system of protection from discrimination. Polish legislation does not contain enough regulations especially in the fields (listed in Article 3 sec. 1 e), f), g), h) of 2000/43/EC Directive) which go beyond employment and occupation and are related to social protection, (incl. social insurance and healthcare), education and access to public goods and services (incl. housing).

**Manner of regulation**

There are two possible options.

**First one** implies amending a number of laws which concern issues covered by both Directives (e.g. Act on Business Activity, Act on Protection of Tenants and Communal Housing Supplies, Act on Special Conditions of Sale to Consumers, Act on Tourist Services, Act on the System of Education, Act on Healthcare Centres, Act on Higher Education, Act on Social Welfare) in order to introduce provisions which would: prohibit direct and indirect discrimination, ensure equal and non-discriminatory treatment, and introduce sanctions for institutions and persons that would violate these principles, incl. adequate compensation for victims of discrimination.

However, such a solution would not bring desired results due to dispersion of anti-discrimination provisions. It would be unclear and cause difficulties for institutions that apply the law (e.g. public administration bodies, courts) as well as for the addressees of anti-discrimination provisions.

Moreover, such a solution would enforce repeating similar or even the same provisions in a number of acts, e.g. thore concerning definition of direct and indirect discrimination, the burden of proof, compensation for the victims, prohibition of victimisation (i.e. repressions for actions undertaken in order to exercise the rule of equal treatment).

It is not possible to pass over the issues of equal treatment and non-discrimination in these acts (which regulate issues covered by the Directives which contain provisions of both public [administrative] and private [civil] nature), assuming that it will be permissible to apply provisions of Labour Code (Articles $11^3$, $18^{3a}$ to $18^{3e}$) *mutatis mutandis* as provisions of the Labour Code may not be applied (directly or *per analogiam*) in relations governed by administrative law or relations governed by civil law, since there is no counterpart of Article

300 of the Labour Code in civil law[10]. It means while provisions of Civil Code may be applied *mutatis mutandis* in issues not regulated by labour law, provisions of the Labour Code may not be applied to issues not covered by civil law (so it works only in one direction).

Therefore, the second option is more advisable.

**The second option** assumes elaboration of an act containing provisions that would transpose the provisions of both Directives into Polish legal system in non-employment aspects (as these are regulated by the Labour Code).
This act could be common for both civil law relations (e.g. with regard to refusal of entering into a contract of sale or rental) and administrative ones (e.g. access to education – both at level governed by Act on the System of Education or at level governed by Act on Higher Education).
This conclusion may be drawn also from comparative studies. Acts that govern the whole issue of equal treatment and non-discrimination – apart from present legislation like labour codes or civil codes – have been already introduced or are being elaborated in EU member states (e.g. Austria or Ireland) or in candidate countries (e.g. Czech Republic).

**Subject of the act**

Generally speaking, the subject should be all the issues (or overwhelming majority of them) which have been pointed out in „Analysis of the *status quo* of Polish Anti-Discrimination Legislation and Policies".
This includes in particular:

1) Introducing the principle of equal treatment and setting a general prohibition of discrimination. This way, development of Article 32 of the Constitution could be made without amending the Constitution;
2) Detailed description of prohibited grounds of discrimination in all relationships of public (administrative) and private (civil) nature, on the model of Article $11^3$ of the Labour Code;

[10] Article 300 of the Labour Code says: „In matters not regulated by provisions of labour law, provisions of Civil Code shall be applied *mutatis mutandis* to a labour relationship if they are not contradictory to the principles of labour law." [translator's note]

3) Introducing definitions of direct and indirect discrimination, positive action (acceptable unequal treatment in order to equalise the chances), harassment, and mobbing;
4) Determining the scope of the act – at this level, it should be considered whether domestic legislation is to implement only the basic standard of protection as set by the Directives 2000/43/EC and 2000/78/EC, or whether it should provide higher standard as Suggested by report of Austrian experts (which mentioned equal access to goods and services – incl. housing – regardless of racial and ethnic origin but also of religion and sexual orientation);
5) introducing provisions on the burden of proof, in accordance with both Directives;
6) ensuring effective, proportionate and deterring compensations for the victims, e.g. in the form of damages, fines, and other measures of civil and administrative law, which fall under category of compensation constituting a sanction for those infringing the principle of equal treatment and non-discrimination;
7) introducing measures necessary for protection of the victims against repressions for a complaint or a procedure aiming at enforcement of the principle of equal treatment and non-discrimination (specific issues appearing in this field have been described in Austrian experts' report).

The above issues may be considered substantial ones. Regulations concerning them would aim at detailed description what discrimination is, what cases of unequal treatment are prohibited, what may be the sanctions for those who infringe the prohibition of discrimination, and what effective compensation the victims may receive. Therefore, it's about – among others – regulating the grounds of liability for infringement of the principle of equal treatment and non-discrimination, as well as appropriate sanctions.

Irrespective of substantial provisions, future anti-discrimination act should contain ones of systemic nature (establishing appropriate body or development of existing one, providing it with adequate powers, incl. to monitor discrimination, to provide information to the general public about reasons of discrimination, to organise educational actions, and to promote equality) as well as procedural provisions. The latest ones entail need for decision whether such an office should conduct procedures (like its counterparts in other countries – e.g. Austria, Ireland, or Czech Republic [according to draft act], also in the U.S.) like:

- investigation,
- mediation (resulting in reaching a compromise between the victim and the perpetrator),
- administrative procedure resulting in a warrant to undo the results of an infringement (the warrant would be subject to appeal against to administrative or ordinary court);

- procedure resulting only in non-binding opinion for the court on whether discrimination has occurred in a given case.

Manner of proceeding before this body will depend on the scope of its powers and goals that are to be achieved by establishing it.

**Closing remarks**

From report elaborated by Austrian experts, a conclusion seems to stem indirectly that it would be advisable to establish a new body (office) covering the issues of discrimination comprehensively or to provide the existing on with additional powers related to ensuring equal status to various groups of people regardless of gender, race, ethnic origin, religion, age, disability, and sexual orientation.

Future anti-discrimination act should not only determine the powers of the office (its head, chairperson, whatever the name of the body will be), but provide it with effective instruments of anti-discrimination policy.

A good model may be e.g. Act on Protection of Competition and Consumers, which is composed of three parts: (a) substantial provisions, (b) systemic provisions concerning powers of the Head of Office for Protection of Competition and Consumers ands structure of the Office itself, and (c) procedural provisions which govern various procedures before Head of the Office, decisions issued by the Head, and possibilities of appealing against these decisions etc.

*Roman Wieruszewski*

# Preliminary opinion on manner of fulfilling Poland's international obligations in the field of counteracting discrimination

Effective counteracting various forms of discrimination is one of the foundations of democratic state of law. The rule of equal rights and non-discrimination is also one of the basic norms of international human rights law. It has been enshrined in Universal Declaration of Human Rights (Articles 2 and 7), International Covenant on Civil and Political Rights (Articles 2 and 26), European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14) and a number of other specific treaties.

Moreover, in connection with Poland's accession to the EU, it is necessary to implement Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and 2000/78/EC establishing a general framework for equal treatment in employment and occupation. According to these Directives, Member States are obliged – among others – to:

a) review all their domestic legal provisions and abolish those contrary to the principle of equal treatment,

b) ensure effectiveness of domestic regulations implementing the Directives, e.g. by introducing sanctions for violating them,

c) ensure procedural measures facilitating the victims in exercising their rights, in particular by [reverse of] the burden of proof and various forms of legal aid,

d) designate institutions that will be responsible for promotion of equal treatment, incl. by providing adequate information, assistance for person discriminated against, and undertaking research on discrimination.

In the light of the above mentioned Directives, the institutions appointed for counteracting discrimination should perform three functions:

- assistance for the victims
- moulding adequate policies of the state in this field and carrying on social dialogue,
- dissemination of information and promotion of anti-discrimination activities

These institutions should be independent. There may be various institutional solutions, although it is important that their introduction be preceded by a broad social debate. This recommendation was carried out very well e.g. by Great Britain, where over 900 NGOs participated in nationwide discussion on establishing a system for counteracting discrimination.

When implementing the Directives, particular Member States use various methods. For instance, in Belgium there is one body working on discrimination on the grounds of race and ethnic origin, religion, disability, age and sexual orientation. Gender discrimination is a field of work of another institution. In Ireland, there are two bodies. Both work in the whole field of discrimination, so the ground of gender is included into their activities. One of them is a promotional and intervention body, another is a quasi-court one. In Netherlands, there is one body working on all forms of discrimination.

A general tendency which may be observed in Europe is establishing a single body covering all forms of discrimination incl. gender issues, and not multiplying such bodies. It is very important to carry on the broadest possible social dialogue. Social consultations should cover all issues of discrimination (incl. gender, sexual orientation, age, race and ethnic origin, disability) and give answer to the question which model will be the best in Polish conditions.

There are two theoretical options of implementation of the above mentioned Directives:

1. adequate amendments to existing legislation,
2. passing a new act.

Considering these options, I subscribe to elaborating a new comprehensive act which would took the following two issues into consideration:

a) it would include the definition of discrimination (in its various forms) and rules of the burden of proof in cases of charges of discrimination,

b) it would determine the institutional framework of various forms of activities to prevent and combat discrimination.

Surely, the latter issue incites the most serious doubts and discussions. In relation to suggestion of establishing a Inspector General for Counteracting Discrimination, various doubts – of systemic, practical and financial nature – are raised.

At first, it should be clarified that, according to the Directives, Member States are obliged to „designate a body or bodies for the promotion of equal treatment of all persons...". Therefore, the Directives do not require **establishing** special institutions responsible for counteracting discrimination, because „**designation**" mentioned by 2000/43/EC Directive may mean separation of a special structure within the existing bodies responsible for the protection of human rights on domestic level. Therefore, designers of the new legislation have various institutional solutions to choose from, although it should be remembered that the Government Plenipotentiary should consider duties imposed on her so far (see: Regulation of the Council of Ministers of 25 June 2002 on Government Plenipotentiary for Equal Status of

Women and Men and resolution of the Council of Ministers of June 2000), although the question how far they should be respected is still open.

In constitutional concept of the system of state, there is a special body established for guarding human and civil rights and liberties, incl. protection from discrimination. This is primarily why one should be particularly careful with suggesting systemic solutions which provide establishing new institutions whose tasks overlap with tasks of the Ombudsperson. This includes in particular promotional function or assistance for victims of discrimination. On the other hand, one should consider establishing appropriate bodies with powers to settle disputes in this field, e.g. on the model of the Equality Tribunal in Ireland.

In each case one should avoid distribution of tasks among many institutions: the Ombudsperson, the Ombudsperson for Rights of the Child, suggested Inspector General, Head of Office for Equal Status of Women and Men, and Inspector for People with Disabilities. This may cause obscurity of structures of the State, disputes of powers, and significant costs, while giving no guarantee of effective operation. Such a distribution of powers is unfounded especially as experience shows that the list of grounds of discrimination is continuously enlarged.

It should be also mentioned that there is no need for the new act to duplicate the provisions of international treaties (that were ratified upon consent of the Parliament expressed in a separate act). The Republic of Poland took the monist attitude of introducing such treaties to its legal system; therefore, publication of a treaty in the Journal of Laws opens the way to its direct application. It is possible to implement them through separate provisions, but it is useful only if these provisions are more detailed or more favourable (and in compliance with the Constitution at the time).

These remarks regard also international agreements that co-regulate the issues of prohibition of discrimination and those that will be ratified in the future; for instance, so far Poland has not been – but probably will be – the party to Revised European Social Charter or Protocol No. 12 to European Convention of Human Rights.

Considering the above, it is necessary to avoid generality in the new act. Instead of declarations of goals and ideas, precise developments of these goals and ideas should be proposed. Repeating some provisions of the Constitution in draft bills is a fault, because Polish legislature has set an a rule of direct application of the Constitution directly, unless otherwise provided in the Constitution itself (Article 8 Para. 2 of the Constitution of the Republic of Poland).

The Constitution is not a document from which a single provision (e.g. Articles 32 or 33) may be isolated and interpreted without relation to other provisions, especially those with significant axiological content. Direct application of the Constitution means that is provisions may and should be used in the process of application of law as a basis for decisions. When interpreting particular provisions, the Constitutional Tribunal is helpful as its rulings appear around particular provisions, incl. Articles 32 and 33.

Direct application of the Constitution does not preclude making legislation of lower precedence which would develop, clarify or detail its provisions in various field of social, political and economic life – if only in line with the Constitution. On the contrary – developing provisions of the Constitution is advisable, but this requires effort and can not amount to repeating the Constitution. In this context, considering the Constitution is rather terse when it comes to combating discrimination on grounds other than gender, it is advisable to elaborate an act containing appropriate innovations of substantial and procedural nature covering all forms of discrimination.