

Equality, Diversity and Enlargement

Fundamental rights & anti-discrimination



Employment & social affairs



European Commission

Equality, Diversity and Enlargement

Report on measures to combat discrimination
in acceding and candidate countries

Employment & social affairs

Fundamental rights and anti-discrimination

European Commission
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Foreword

The publication of this report comes at a crucial stage in the enlargement process, as we prepare to welcome ten new Member States to the European Union in 2004.

The independent experts who have drafted this report have looked at efforts by accession and candidate countries to tackle discrimination on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation. The report assesses how these efforts compare with EU rules on equal treatment and anti-discrimination. The main focus of the report is therefore on legal measures to combat discrimination and it does not go into the wide range of positive measures and programmes that exist to promote the integration of various disadvantaged groups.

I am pleased to see signs of progress and change with regard to the drafting and adoption of anti-discrimination legislation in many countries. The report identifies examples of good practice that should inspire both current and future EU Member States.

However, all of the countries covered by this report must do more before accession, in order to fulfil the obligations they have entered into in the enlargement negotiations concerning the transposition of European anti-discrimination legislation. The Commission will continue to monitor progress closely in the run-up to enlargement and beyond.

I would also like to stress the need for proper implementation and enforcement of anti-discrimination provisions. Simply adopting new laws is not enough. And, we must also recognise that discrimination is a complex phenomenon and that legal measures are clearly only part of the solution.

Awareness-raising is an essential element, in order to challenge discriminatory attitudes and to ensure that potential victims of discrimination are aware of their rights. Law courts or other tribunals must be prepared to hear cases brought by victims of discrimination. Victims must have access to independent support and advice. This is an area where the Equality Bodies required by European legislation should play an important role.

Ultimately, the development of effective legislation and policies to combat discrimination requires concerted efforts by governments and representatives of civil society. I hope that this report will help to promote a constructive dialogue between all of the relevant actors in the accession and candidate countries.

A handwritten signature in black ink, appearing to read 'Anna Diamantopoulou', with a long horizontal stroke extending to the right.

Anna Diamantopoulou
European Commissioner for Employment and Social Affairs

Table of Contents

Part 1

Measures to combat discrimination in the candidate countries – an overview

Introduction	8
1. Definitions	14
2. Material Scope	18
3. Exceptions to the prohibition on discrimination	21
4. Specific provisions on disability	22
5. Specific provisions on age	26
6. Positive Action	27
7. Remedies and enforcement	28
8. Awareness Raising and Social Dialogue	32
9. Specialised bodies	34
Conclusion	37

Part 2

Executive summaries of reports on measures to combat discrimination in the 13 candidate countries

Bulgaria	42
Cyprus	48
Czech Republic	53
Estonia	59
Hungary	64
Latvia	71
Lithuania	78
Malta	84
Poland	91
Romania	98
Slovakia	104
Slovenia	111
Turkey	116

Part 1

MEASURES TO COMBAT DISCRIMINATION IN THE CANDIDATE COUNTRIES - AN OVERVIEW

Mark Bell, University of Leicester

Introduction

This report was commissioned by the European Commission in the framework of the European Community action programme to combat discrimination (2001-06). The action programme is designed to support and supplement efforts at Community level and in the Member States to combat discrimination.

Two EC Directives banning discrimination on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation were adopted in 2000. These Directives present profound challenges to the existing approaches to combating discrimination across Europe. All Member States of the European Union – both existing and future – have been required to review their existing legislation and to make the necessary changes to comply with the Directives' requirements. This report focuses on the legal situation in the candidate countries for EU membership¹.

8

Readers should note that the research for this report took place during the period November 2002 – June 2003. The report does not therefore take into account developments after that period.

An initial observation is that no candidate country has yet fully implemented the requirements of either Directive 2000/43/EC² (hereafter the Racial Equality Directive) or Directive 2000/78/EC³ (hereafter the Employment Equality Directive). Nonetheless, there is plenty of evidence that most candidate countries are in the process of preparing for implementation of these Directives, or have already taken partial steps to accomplish this goal. Moreover, it is encouraging to note that many states are debating anti-discrimination laws that go beyond the minimum standards required by the Directives. These discussions are often centring on the possible adoption of single equality legislation for all grounds of discrimination in Article 13 of the EC Treaty.⁴

As an overview, this report cannot capture all the nuances and complexities of the national legal situations. For a detailed and comprehensive understanding of the laws in the candidate countries,

¹ For the purposes of this study, the term candidate countries is used with regard to the ten acceding countries that are due to join the EU in May 2004 (Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Slovenia, Cyprus and Malta) as well as Bulgaria, Romania and Turkey.

² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22. Member States are under an obligation to complete implementation of this Directive by 19 July 2003.

³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. Member States are under an obligation to complete implementation of this Directive by 2 December 2003.

⁴ Sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation.



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as well as specific references, it is essential to refer to the national reports. Given the absence of implementing legislation in many states, the extent of compliance often has to be deduced from potential applications of a variety of existing laws, which are not aimed at transposing the Directives but may contribute to fulfilling their requirements. This has the inevitable effect of introducing a degree of ambiguity and legal opinion can clearly vary on the precise interpretation of national rules (especially in the absence of any existing case-law). For these reasons, it is not always possible to provide a definitive answer as to the extent to which national law complies with the Directives.

Consequently, the report focuses on the existence of specific provisions for combating discrimination. This reflects the general requirements of the European Court of Justice relating to the transposition of Directives. In *Commission v Greece*, the Court rejected the argument that a directly applicable constitutional equality clause was sufficient implementation of the right to equal pay for women and men. It declared:

‘the principles of legal certainty and the protection of individuals require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations are observed’.⁵

This indicates the need for detailed and targeted legislation to implement fully the Directives.

The country summaries presented in this report are based on more detailed analyses set out in individual country reports. The national reports are based on answers to a common questionnaire that examines each part of the two Directives. The summaries also include a short introduction, which provides some background information on each country including the situation of various minority groups. The figures used are taken from a variety of official and non-official sources and reflect different national definitions and practices with regard to data collection.

This overview will provide a systematic examination of the principal provisions of the Directives and the law in the candidate countries. To commence, there is a general review of the state of play as regards the transposition process and the basic legal frameworks.

(a) Transposition of EC anti-discrimination legislation - the state of play in the candidate countries

The candidate countries can be divided into three groups: (i) states where transposition has partially occurred; (ii) states where transposition is in progress; and (iii) states with no immediate plans for transposition.

(i) States where transposition has partially occurred

Six states have already adopted legislation that seeks to implement the two Directives: Romania, Slovakia, Latvia, Slovenia, Lithuania and Malta. Although none of these laws addresses all elements of the Directives, they constitute a first step in this direction.

⁵ Para. 54, Case C-187/98 *Commission v Greece* [1999] ECR I-7713.

In Romania, Ordinance 137 was adopted in August 2000 on 'Preventing and Punishing All Forms of Discrimination'. This Ordinance was backed up by parliamentary legislation in 2002 (Law 48/2002). This forbids discrimination in a wide range of areas and on all the grounds in Article 13, although age is not fully covered. However, the new Labour Code adopted in January 2002 forbids discrimination on the ground of age, as well as the other Article 13 grounds.

Slovakia and Latvia provide quite similar examples. New Labour Codes entered into force in April and June 2002 respectively. Both contain open-ended prohibitions on discrimination that explicitly mention all Article 13 grounds, with the exception of sexual orientation. In both cases, sexual orientation was in the initial proposal, but deleted during the Parliamentary process. Slovakia is now preparing additional legislation to complete implementation of the Directives.

Slovenia adopted a new Employment Act in 2002 forbidding discrimination on all the grounds in Article 13 EC, yet it does not comply with some detailed aspects of the Directives. For example, there is no definition of direct or indirect discrimination.

In Lithuania, a new Labour Code entered into force on 1 January 2003. This forbids discrimination on all the grounds mentioned in Article 13 EC, with the exception of disability. A separate 'Law on the Social Integration of the Disabled' from 1998 already provided a general prohibition on discrimination linked to disability. Moreover, a draft Law on Equal Opportunities was introduced to Parliament in November 2002. This aims to extend the competence of the existing Ombudsman for Equal Opportunities between Women and Men to include all the other Article 13 grounds.

Finally, Malta has enjoyed specific legislation on disability discrimination since 2000 and this was complemented in 2002 with the Employment and Industrial Relations Act. As in Latvia and Slovakia, the 2002 Act provides a non-exhaustive list of prohibited grounds of discrimination, but age and sexual orientation are absent. This was despite representations from NGOs to the government specifically requesting the addition of sexual orientation to the law.

(ii) States where transposition is in progress

Most of the remaining states have at least commenced discussions with a view to implementation of the Directives. This process is most advanced in Bulgaria, Estonia and Poland where draft legislation has been submitted to Parliament. In Bulgaria, the draft Prevention of Discrimination Act aims to introduce broad single equality legislation covering all Article 13 grounds and enforced by a Protection against Discrimination Commission. However, it has encountered public and parliamentary opposition. In Estonia, the draft Law on Equality and Equal Treatment also aims to cover all Article 13 grounds and it has similarly provoked difficult debates in Parliament. As a consequence, the draft Law was withdrawn and a new proposal was due to be submitted in September 2003. In the meantime, Parliament has already approved a new law on the Legal Chancellor's Office, which will provide a specialised body for combating discrimination on all grounds in the draft legislation. In Poland, a draft law amending the Labour Code in order to comply with the Directives received a first hearing in Parliament in January 2003. A draft bill to establish a strengthened General Inspector for Discrimination Affairs was presented to NGOs in December 2002.

In Hungary, the Ministry of Justice produced a 'Concept Paper' as part of a broad consultation process. A draft Bill was due to be submitted to Parliament before the end of 2003. Significantly, this proposes the adoption of a comprehensive anti-discrimination law. As a sign of the government's commitment to making progress in this area, a Minister without portfolio in charge of equal opportunities has been appointed.

In the Czech Republic, a government working group has prepared a draft general law on equal treatment and protection against discrimination in order to implement the various EU equality Directives.

Finally, new legislation is being drafted in Cyprus for the implementation of the Directives. When this is complete, it will be submitted to the social partners and non-governmental organisations (NGOs) for consultation.

(iii) States with no immediate plans for transposition

Whilst Turkey does not appear to have specific plans for full transposition of the Directives, an initial step was taken with the Job Security Act of August 2002 and the amendment of the Labour Code in June 2003. The latter includes a general clause forbidding discrimination in employment based on various grounds, including race and religion.

(b) The current legal framework in the candidate countries

The legal framework for protection against discrimination varies considerably in the candidate countries. A common element is constitutional protection against discrimination. However, states are then divided between those relying on specific anti-discrimination laws and those with a scattered system of anti-discrimination clauses.

(i) Constitutional protection against discrimination

All candidate countries possess written constitutions that include anti-discrimination requirements.⁶ None expressly covers all the Article 13 grounds; indeed, disability, age and sexual orientation are not mentioned in any constitutional equality clause. Notwithstanding this gap, open-ended constitutional requirements for equal treatment are often cited as a foundation of protection in the absence of specific anti-discrimination rules. Whilst these clauses are unlikely to be treated as sufficient implementation of the Directives by the Court of Justice, they do form an important bedrock of the legal system.

Open-ended constitutional provisions on equality can be found in Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Slovakia, Slovenia and Turkey. In terms of the grounds specifically mentioned in constitutional equality clauses, the precise wording varies. However, terms similar to the following Article 13 grounds can be found in several constitutions:

⁶ In the Czech Republic, this is found in the Charter of Fundamental Rights and Freedoms, which is separate from the Constitution, but part of the Constitutional order and it takes precedence to ordinary legislation.

- Sex: all states, except Latvia;
- Racial or ethnic origin: all states, except Latvia and Poland;
- Religion or belief: all states, except Latvia and Poland.

The effectiveness of constitutional protections against discrimination is often curtailed where the equality guarantee can be only enforced against the state and not in actions between private parties (e.g. Malta, Latvia). However, in several states, constitutional equality requirements apply horizontally; that is, they can be invoked in proceedings against private actors, such as employers. These states include Bulgaria, Lithuania, Poland and Slovakia.

(ii) Specific anti-discrimination law or anti-discrimination clauses?

Beyond constitutional protection, two main legal methods of combating discrimination can be identified. The most common method currently found in the candidate countries appears to be a system of scattered anti-discrimination clauses. National legislation is arranged on a sectoral basis: for example, specific laws regulate matters relating to healthcare, education, consumer protection, etc. Within each of these laws anti-discrimination clauses can be found, rather than an autonomous law on discrimination applying across different areas. This model was particularly evident in Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Poland and Slovakia. The national reports identified a number of weaknesses in this approach. First, there is a problem with inconsistency between anti-discrimination clauses. The Hungarian report noted a variation in the terms used to describe the discrimination grounds and inconsistency in the list of discrimination grounds. Second, it was evident that the anti-discrimination clauses rarely provide further specific provisions on discrimination, such as definitions of indirect discrimination or harassment. Finally, the anti-discrimination clauses do not always contain clear provisions on their enforcement or the applicable sanctions. For example, although there are many anti-discrimination clauses in Bulgarian law, there is only one example of judicial enforcement of such clauses.⁷

It is significant that many of these states are now moving in the direction of specialised anti-discrimination legislation, although obviously this presents challenges to the existing national legal tradition. In addition to the draft laws discussed earlier, specific legislation dealing with disability discrimination is a common manifestation of this trend. Indeed, disability laws exist in Bulgaria, Cyprus, Hungary, Latvia, Lithuania, Malta, Poland and Romania.

Disability is also the only ground of discrimination that is frequently defined in national law. Specific definitions of disability, or approximate concepts (e.g. 'handicap'), exist in Bulgaria, Cyprus, the Czech Republic, Hungary, Malta, Poland and Romania. The reason for defining disability is possibly linked to the social welfare structure of some national legislation, in particular, national legal systems that create special rights for disabled persons in the workplace. Furthermore, the presence of quota systems for the employment of disabled persons in several states requires a more precise definition of when a person is deemed to be disabled. However, the predominant concept of disability appears to be a narrow medical definition, focusing on levels of impairment. For example, in Poland, disability is classified

⁷ This was a case of racial discrimination in 2002.

into three levels: significant, moderate and mild.⁸ The medical model leads to an emphasis on the most overt and severe forms of disability. By focusing on the physical or mental capacity of the individual, it fails to consider that disability often stems from the obstacles created by the current organisation of the working environment.⁹ For example, dyslexia is a less visible form of disability, but this can place an individual at a significant disadvantage in the workplace unless appropriate accommodation is provided. Whilst the Employment Equality Directive does not define disability, there is a risk that laws based on the medical model will not prove sufficiently comprehensive or effective in practice.

There are no examples of national laws that define sexual orientation. However, several states (Latvia, Malta and Slovakia) have chosen to omit specific reference to sexual orientation in anti-discrimination law. Instead, they provide an open-ended list of prohibited grounds, leaving the possibility that courts will interpret the law as implicitly including sexual orientation. This is unlikely to be sufficient to comply with the Employment Equality Directive. First, there is a clear negative inference where other grounds are expressly mentioned and sexual orientation is absent. Secondly, it creates ambiguity as to the scope of protection, both for employers and for individuals. This conflicts with the approach of the Court of Justice noted earlier, which places considerable emphasis on clarity and precision in national implementing legislation.

1. Definitions

Both Directives define four forms of unlawful discrimination: direct discrimination, indirect discrimination, harassment and instructions to discriminate. Direct discrimination deals with situations where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation' because of a prohibited ground of discrimination.¹⁰

Indirect discrimination occurs where 'an apparently neutral provision, criterion or practice' would put persons of a particular racial or ethnic origin, religion or belief, age, disability or sexual orientation at a particular disadvantage, unless it can be 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.¹¹

⁸ Arts 3 and 4, Law on Vocational and Social Rehabilitation and Employment of Disabled Persons 1997.

⁹ L Waddington and A Hendriks, 'The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 403.

¹⁰ Art 2(2)(a), Racial Equality and Employment Equality Directives.

¹¹ Art 2(2)(b), Racial Equality and Employment Equality Directives.

Harassment is unwanted conduct with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.¹²

Finally, the ban on instructions to discriminate¹³ means that it will be unlawful to give an instruction to a third party to discriminate on any of the grounds covered by the two Directives

(a) Direct discrimination

There are surprisingly few states that have specific definitions of direct discrimination. In various states, the Constitutional Court has developed a definition of discrimination in its case-law on the constitutional equality guarantee. In Poland, the Constitutional Court treats the principle of equality as requiring equal treatment of persons in a similar situation and different treatment of those in different situations. An equivalent approach can be identified in case-law from Estonia and Hungary. In Turkey, the Constitutional Court has relied on the case-law of the European Court of Human Rights under Article 14 of the Convention on Human Rights to shape its interpretation of the Turkish constitutional equality guarantee. However, in all these examples, direct discrimination is given a flexible interpretation with wide possibilities to justify discrimination. This does not accord with the approach in the Directives, which only permits direct discrimination to be justified under a small number of express and limited exceptions.

Malta and Cyprus possess specific disability discrimination legislation that incorporates a definition of direct discrimination in similar terms to the Directives. For example, in Malta, Article 3(1) of the Equal Opportunities (Persons with Disability) Act 2000 states:

‘A person shall be discriminating against another person on the grounds of disability in any circumstances relevant for the purposes of any provision of this Act, if:
(a) in circumstances which are similar or are not materially different, he treats or proposes to treat a person who has a disability less favourably than he treats or would treat a person who does not have such a disability ...’.

In contrast, Article 2 of the Maltese Employment and Industrial Relations Act 2002 defines discrimination in a more flexible fashion:

“discriminatory treatment” means any distinction, exclusion or restriction which is not justifiable in a democratic society ...’.

A similar definition is provided in Romanian Ordinance 137/2000.¹⁴ However, an approach that permits a non-exhaustive list of justifications for direct discrimination is unlikely to be compatible with the Directives.

¹² Art 2(3), Racial Equality and Employment Equality Directives.

¹³ Art 2(4), Racial Equality and Employment Equality Directives.

¹⁴ Article 2(1) states: ‘According to the ordinance herein, the term ‘discrimination’ shall encompass any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’

There is no definition of direct discrimination for the grounds of racial or ethnic origin, religion or belief, age, disability or sexual orientation in Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Slovakia, Slovenia and Turkey.

(b) indirect discrimination

The Czech Republic, Estonia, Lithuania, Malta, Poland and Turkey lack a specific definition of indirect discrimination covering the grounds in the Racial Equality and Employment Equality Directives. Bulgaria, Hungary, Latvia, Romania, Slovakia and Slovenia do possess definitions of indirect discrimination, but only within employment legislation. The disability laws in Malta and Cyprus contain provisions that approximate to a definition of indirect discrimination, albeit in slightly different terms to those found in the Directives.

The definitions in Latvia and Slovakia are the closest to those found in the Directives. For example, section 13(2) of the Slovak Labour Code states:

‘For the purpose of the principle of equal treatment, indirect discrimination is an apparently neutral instruction, decision, or practice which puts at a disadvantage a larger group of natural persons, unless such instruction, decision or practice is appropriate and necessary, and can be justified by objective circumstances.’

(c) Harassment

The situation is much weaker in relation to harassment. In fact, there is no candidate country with laws that currently comply with the definition of harassment in the Directives. Where national law defines harassment, this is in reference to sexual harassment and it is not applicable to other grounds. For example, there are specific definitions of sexual harassment in the Czech Republic and Malta. In Slovakia and Slovenia, harassment is not specifically forbidden, however, the law offers implicit possibilities for recourse. ‘Insulting or ridiculing’ a person is a criminal misdemeanour in Slovak law¹⁵ and this could be used as a means to challenge some forms of harassment. Article 44 of the Slovene Employment Relationship Act¹⁶ contains a duty on employers to guarantee the personality of an employee by respecting and protecting their privacy and personality. It is suggested that this could form a basis for challenging a failure to prevent harassment on the part of an employer.

(d) Instruction to discriminate

Poland and Bulgaria are the only states to include measures in national law that approximate to the requirement in the Directives to forbid instructions to discriminate. The 1994 Polish Law on Employment and Countering Unemployment forbids discrimination by public and private employment agencies and in vacancy information supplied by employers.¹⁷ This covers all the Article 13 grounds of discrimination. In Bulgaria, Article 23 of the Promotion of Employment Act forbids

¹⁵ Section 49, Misdemeanor Act No. 372/1990.

¹⁶ No. 42/2002.

¹⁷ Article 12(3).

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employers from posting vacancy information with the public employment agency that includes discriminatory requirements. However, this does not appear to cover discrimination linked to religion or sexual orientation. Moreover, there are no clear sanctions attached to breach of this provision.

In other states, it is frequently noted that where discrimination is forbidden under the Penal Code, then instructions to discriminate may constitute an attempted criminal offence, or assisting in the commission of a criminal offence.¹⁸ Alternatively, instructions to discriminate could, in certain circumstances, be challenged under laws forbidding incitement. For instance, public incitement to hatred against persons, *inter alia*, on the grounds of their sex, race or religion is a criminal offence in Lithuania.¹⁹

2. Material Scope

18

Both the Racial Equality and Employment Equality Directives require discrimination to be forbidden in employment and vocational training.²⁰ However, the Racial Equality Directive goes further, requiring the equal treatment principle to cover also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.²¹

A frequent observation in the national reports was that Roma communities face severe disadvantage in many of these areas. There are specific problems in education, where the Roma confront discrimination and even exclusion from mainstream educational institutions. The legacy of educational deprivation compounds ongoing discrimination in the labour market. Problems were also mentioned in accessing services, such as entering leisure facilities, as well as very poor accommodation conditions.

It is particularly difficult to provide a comprehensive summary here, given the patchwork of legal protection found across the candidate countries. In many states, constitutional equality guarantees are mentioned as a source of protection throughout all the areas covered by the Racial Equality Directive. However, in this section the focus is on the presence of specific legislation.

¹⁸ For example, this is noted in the reports from Hungary, Malta and Lithuania.

¹⁹ Article 72, Criminal Code.

²⁰ Art 3(1)(a)-(d), Racial Equality and Employment Equality Directives.

²¹ Art 3(1)(e)-(h).

(a) employment

Protection against discrimination in employment is the strongest area of existing legislation across the candidate countries. The situation for each ground of discrimination is summarised below:

- racial or ethnic origin: Bulgaria, Cyprus, Czech Republic, Hungary, Lithuania, Latvia,²² Malta, Poland, Romania, Slovakia, Slovenia, Turkey;
- religion or belief: Bulgaria, Cyprus, Czech Republic, Hungary, Lithuania, Latvia, Malta, Poland, Romania, Slovakia, Slovenia, Turkey;
- disability: Bulgaria, Cyprus, Czech Republic, Hungary, Lithuania, Latvia, Malta, Romania, Poland, Slovakia, Slovenia;
- age: Bulgaria, Czech Republic, Hungary, Lithuania, Latvia, Romania, Slovakia, Slovenia;
- sexual orientation: Bulgaria (partial protection); Czech Republic, Lithuania, Romania, Slovenia.

Both Directives specify that discrimination should be forbidden in relation to access to self-employment and by organisations of employers, employees or professional associations. These aspects are not covered by the current legislation in Bulgaria, the Czech Republic, Hungary, Latvia and Slovenia. The armed forces and the police are also outside the scope of the law in Bulgaria.

There is no specific legislation on employment discrimination in Estonia.

(b) vocational training

Protection against discrimination in the provision of vocational training is also relatively common in the candidate countries. The situation is summarised below:

- racial or ethnic origin: Cyprus, Czech Republic,²³ Hungary, Latvia, Malta, Poland (partial²⁴), Romania, Slovakia, Slovenia, Turkey (partial²⁵);
- religion or belief: Czech Republic, Hungary, Latvia, Malta, Poland, Romania, Slovakia, Slovenia, Turkey (partial);
- disability: Czech Republic, Hungary, Malta, Poland (partial), Romania, Slovakia, Slovenia;
- age: Czech Republic, Hungary, Malta, Poland (partial), Slovakia, Slovenia;
- sexual orientation: Czech Republic, Romania, Slovenia.

There is limited protection available in Bulgaria and no protection exists in Estonia.

(c) social protection

The field of social protection is often regulated by a patchwork of different laws. For example, the Bulgarian report identifies at least six separate pieces of legislation relevant to this field. For this

²² The law in Latvia on all grounds of discrimination does not apply to those working in the state civil service.

²³ Vocational training for independent professions is not covered on all grounds.

²⁴ Vocational guidance is not covered on all grounds.

²⁵ There is a general provision that educational institutions are open to all persons, irrespective of, *inter alia*, race and religion.

reason, it is difficult to give an accurate overview of whether the legal protection available is sufficiently comprehensive. Moreover, the list of prohibited grounds varies between different legal instruments and this adds to the complexity.

In relation to discrimination on grounds of *racial or ethnic origin*, the situation is broadly as follows:

- protection in all aspects: Romania;
- protection in some aspects: Bulgaria, Cyprus, Hungary, Lithuania, Latvia, Slovakia;
- no specific protection: Estonia, Czech Republic, Malta,²⁶ Poland, Slovenia, Turkey.

(d) education

In relation to assessing the prohibition of discrimination in education, similar difficulties arise. Regulations on education might not cover all aspects (for example, higher education as well as primary and secondary education). In relation to discrimination on grounds of *racial or ethnic origin*, the situation is broadly as follows:

- protection in all aspects: Hungary, Latvia, Romania;
- protection in some aspects: Bulgaria, Lithuania, Slovakia, Turkey;
- no specific protection: Cyprus, Estonia, Czech Republic, Malta, Poland, Slovenia.

(e) goods and services

The legal situation is significantly weaker with regard to discrimination in access to and the supply of goods and services. For discrimination on grounds of *racial or ethnic origin*, the situation is as follows:

- protection in all aspects: Cyprus, Czech Republic, Hungary, Romania;
- protection in some aspects: Bulgaria, Slovakia;
- no specific protection: Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Turkey.

(f) housing

Significantly, there is very little evidence of legislation specifically forbidding discrimination in housing. In fact, Romania is the only state that clearly possesses laws in this area. In relation to discrimination on grounds of *racial or ethnic origin*, the situation is as follows:

- full protection: Romania;
- no specific protection: Bulgaria, Cyprus, Estonia, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia, Turkey.

²⁶ In respect of Malta, there are no specific anti-discrimination provisions on the areas outside employment and training. However, Chapter 319 of the Laws of Malta contains a general and non-exhaustive prohibition on discrimination where this relates to a violation of a right guaranteed by the European Convention on Human Rights. This could be invoked as a source of protection in some cases relating to discrimination outside employment.

3. Exceptions to the prohibition on discrimination

The Directives permit a number of exceptions to the ban on discrimination. Most prominently, both Directives allow national legislation to provide an exception where the characteristic is a 'genuine and determining occupational requirement'.²⁷

Bulgaria, the Czech Republic, Hungary, Latvia, Malta, Romania and Slovenia possess exceptions comparable to the genuine occupational requirement found in both Directives. None are exactly in the terms of the Directive and they may need revision to fulfil the quite rigorous standards set therein. The law in Malta clearly echoes the Directives. This states that the ban on discrimination:

'shall not apply to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be fulfilled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by applicable laws or regulations.'²⁸

21

In contrast, the Labour Law in Latvia permits differential treatment where the characteristic is 'an objective and substantiated precondition for performance of the relevant work or for the relevant employment'.²⁹

Romania is one of the few states where an exception specific to religious discrimination can be found. Article 15(5) of Ordinance 137/2000 states that its provisions 'shall not be interpreted as a restriction on the right of educational institutions that train personnel employed in worship places to deny the application of a person whose religious status does not meet the requirements established for access to the respective institution.'

No such exceptions can be found currently in Cyprus, Estonia, Lithuania, Poland or Slovakia.

²⁷ Art 4, Racial Equality and Employment Equality Directives.

²⁸ Article 26(3), Employment and Industrial Relations Act 2002.

²⁹ Article 29(2).

4. Specific provisions on disability

The Employment Equality Directive contains a number of specific provisions on disability discrimination. Notably, the prohibition of discrimination is complemented by a duty on employers to provide reasonable accommodation for disabled persons where this would enable them to participate in employment.³⁰ However, the duty is only to make *reasonable accommodations* and it will not apply where this would impose a 'disproportionate burden' on the employer.

In the national reports, the authors were asked to explore various aspects of current labour market practices that relate to the inclusion of disabled persons. For instance, pre-employment medical examinations are clearly relevant to combating discrimination based on disability. In particular, where a medical examination discloses a disability, there is a risk that an employer may decline to continue with the appointment of the individual. The legal regulation of medical examinations varies considerably in the candidate countries. For some states, this is an obligation on the employer imposed by labour law. In this context, it is frequently regarded as a positive step, designed to promote health and safety in the workplace and to provide protection for workers' health. In other states, medical examinations are permitted, but not required.

Labour law in Bulgaria, Hungary, Poland, Romania and Slovenia requires general medical examinations. For example, in Bulgaria, all first-time employees and those out of work for more than three months must complete a medical examination. The medical certificate issued defines the person's capacity and this may render them ineligible for entry into certain occupations. In determining an absence of sufficient capacity, no provision is made to consider the extent to which a reasonable accommodation could alleviate any impaired ability. The situation is quite similar in Romania. In Poland and Slovenia, the duty to conduct the examinations is placed on the employer. Hungarian law operates more selectively. It defines certain occupations where preliminary or even periodic medical examinations are required. These include public transport drivers and those working with guns.

More limited requirements for medical examinations exist in Estonia, Lithuania, Malta and Slovakia. There are no specific requirements imposed by the Czech Republic, Cyprus and Turkey.

³⁰ Art 5.

Overall, it emerged that there are three main strategies present in the candidate countries for tackling disability discrimination: quota systems, specialised employment and making reasonable accommodations. Some states follow a combination of these options; Estonia is the only country with no apparent instruments on disability discrimination.

(a) Quota systems

The Employment Equality Directive does not expressly provide legal protection for employment quotas for disabled persons. Nevertheless, such quotas can be viewed as one form of positive action and there is implicit legal authority in Article 7(2) of the Directive.³¹ Indeed, employment quotas have been a common element of national disability policies in Europe.³² This legacy is reflected in the national legislation of several candidate countries. The reservation of a certain proportion of posts for disabled workers is required in the Czech Republic, Cyprus, Lithuania, Malta, Poland, Romania and Turkey. The enforcement of these quota systems is more difficult to gauge. For example, the Cypriot quota system applies to public employment, but it is not fully implemented in practice. Elsewhere, the Czech quota system in theory requires 5% of jobs to be allocated to disabled workers in firms with more than 20 employees. However, the law provides employers with two alternatives; first, to make an additional financial contribution to the state; and second, to purchase goods from firms where more than 55% of workers have a disability. Disability organisations have argued that employers prefer paying the charge than employing disabled workers.

(b) Specialised Employment

Another group of states, which overlaps with those above, have made legal provision for separate employment of disabled persons in specially organised enterprises or dedicated units within mainstream firms. National law provides for this strategy in Bulgaria, Cyprus, Hungary, Romania and Slovakia. Bulgaria appears to have the most institutionalised system of specialised employment. Where the health authority so prescribes, an individual is entitled to 'reassignment'; this involves transfer to different work or adjusted work. If the employer cannot provide this, then the employee may be dismissed. Employers are obliged to make available 4-10% of annual vacancies for reassigned work or they may choose to fund sheltered workshops. In principle, those with more than 300 employees must create specialised workshops, however, the extent to which this is enforced in practice is unclear.

The Employment Equality Directive places a greater priority on integrating persons with disabilities into the mainstream labour force, rather than making separate provision. There is a risk that specialised employment curtails opportunities for disabled persons and underestimates individual capacity. Moreover, allocation to separate employment does not fit comfortably with the Directive's emphasis on reorganisation of the current working environment in order to provide an

³¹ 'With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions of facilities for safeguarding or promoting their integration into the working environment.'

³² L Waddington, 'Evolving disability policies: from social welfare to human rights – an international trend from a European perspective' (2001) 19 *Netherlands Quarterly of Human Rights* 141.

inclusive workplace. Clearly, for some individuals with severe disabilities specialised employment may be the most appropriate option. However, this should be residual and only where reasonable accommodation cannot be achieved. This approach was found in Slovakia, where specialised employment was an alternative if reasonable accommodation is not possible.

(c) A duty to make reasonable accommodation

Although this is the main provision set out in the Employment Equality Directive, there was only limited evidence of this approach being adopted in the candidate countries. The clearest examples can be found in Cyprus, Hungary, Malta, Latvia, Slovenia and Slovakia, although it must be acknowledged that the duties placed on employers do not conform precisely to the standards found in the Directive. Moreover, there is no case-law yet reported under these provisions, so it is difficult to judge their effectiveness.

Cyprus and Malta have specific disability legislation that can be approximated to the Directive's approach. For example, Cyprus adopted the Law concerning Persons with Disabilities in 2000.³³ This places a duty on employers to provide 'reasonable access and facilities in the working environment'.³⁴ In assessing the reasonableness of measures to be taken, Article 9(2) specifies that the following factors must be considered:

- I. the nature and required cost of the measure;
- II. financial resources (of the person under the duty);
- III. financial situation of the state, where it is under the duty;
- IV. existence of support from the state;
- V. 'the socio-economic situation of the disabled'.

In contrast to this detailed framework, the Slovenian Employment Act merely foresees transfer to another position, rehabilitation or the provision of part-time working in response to disability.³⁵

Even more limited approaches can be found in Romania and Lithuania. For instance, Lithuanian law does not contain a duty to make reasonable accommodations, but it does entitle disabled workers to be exempt from overtime and night work, as well as guaranteeing them 35 days holiday each year.³⁶

³³ Law 127(I)/2000.

³⁴ Article 4(2)(d).

³⁵ Article 200.

³⁶ Article 20, Law on the Social Integration of the Disabled.



Hranuch
1939

5. Specific provisions on age

The Employment Equality Directive distinguishes age discrimination from the other grounds, notably by providing a wider range of possible justifications for differential treatment.³⁷ In fact, the Directive does not provide an exhaustive list of legitimate reasons permitting different treatment based on age, instead it gives an indicative list. For example, this includes 'fixing a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement'.³⁸

Latvia appears to be the only state that has incorporated a test for justifying age discrimination similar to that found in the Employment Equality Directive. Article 29(3) of the Labour Law allows differential treatment on grounds of age to be justified on objective and reasonable grounds. In May 2003, the Constitutional Court decided that an age limit of 65 for positions in higher education was discrimination and could not be justified.

26

Other national courts have responded differently to legal challenges to age limits in employment. In Poland, the Supreme Court reached the opposite conclusion, deciding that dismissal of a woman because she had reached the age for entitlement to a retirement pension was not unlawful discrimination.³⁹ The situation is more nuanced in Hungary, where the Constitutional Court held that 'age-related restrictions concerning the filling of certain positions shall not be regarded as discriminative unless they are arbitrary'.⁴⁰ The Slovene Constitutional Court initially upheld a labour law provision permitting employers to dismiss workers at retirement age.⁴¹ However, it later changed its view and emphasised that 'an objective and non-arbitrary reason' was needed to justify a difference in treatment based on age.

National legislation often imposes minimum employment ages throughout the candidate countries, as well as regulating the age of entitlement to a retirement pension. There is little regulation of age discrimination in relation to occupational pension schemes because these do not seem to be commonly available in the candidate countries. The impact of reaching the pension entitlement age varies. In Romania and Malta, an employer cannot require workers to retire at an age

³⁷ Art 6.

³⁸ Art 6(1)(c).

³⁹ Judgment of 21 April 1999, I PKN 31/99, OSNAPIUS 2000/12/505.

⁴⁰ Decision No. 857/B/1994.

⁴¹ Art 101, Employment Relationship Act.

lower than the state pension age. In only two states, the Czech Republic and Slovakia, does protection against unfair dismissal clearly continue, even after the worker is entitled to a pension. In Bulgaria, an employer may dismiss an individual of retirement age, however, protection from dismissal for other reasons is retained. In contrast, unfair dismissal rights are definitively lost after retirement age in Cyprus, Latvia, Lithuania, Malta and Romania.

There were a few examples of forced retirement imposed by law on the grounds of age. In Turkey, the retirement age for civil servants was recently reduced from 65 to 61. In Cyprus, civil servants must retire at the age of 60; in Latvia, civil servants must retire at the age of 62, although they may be retained on the approval of their manager. Compulsory retirement because the employer chooses to dismiss on grounds of age seems prevalent. This practice was identified as commonplace in Hungary and Malta. In the Czech Republic, it was noted that age is frequently used as a criterion in selection for redundancy. In contrast, it is unlawful in Bulgaria to include age as a criterion for redundancy selection.

6. Positive Action

Both the Racial Equality and Employment Equality Directives provide legal protection for positive action. Positive action is defined as ‘specific measures to prevent or compensate for disadvantages’ linked to a ground of prohibited discrimination.⁴² This should not be confused with reverse discrimination, sometimes referred to as ‘affirmative action’. In its case-law on sex discrimination, the Court of Justice has held that programmes involving automatic preferential treatment at the point of employment selection constitute unlawful discrimination.⁴³ If the Court applies similar principles to the Racial Equality and Employment Equality Directives, it can be anticipated that quota schemes will not be permitted, with the exception of the disability ground.⁴⁴ An example of positive action clearly permitted under the Racial Equality Directive would be the provision of vocational training courses specifically targeted at members of the Roma community.

There are few examples in the candidate countries of legal protection for positive action measures by private actors (i.e. employers or service-providers). Some forms of positive action for disabled persons can be found, in addition to the quota schemes. In Bulgaria, public procurement law offers two possibilities. First, certain tenders are reserved to specialised enterprises of disabled workers. Second, in general tenders, these specialised enterprises are given preferential status; for

⁴² Art 5, Racial Equality Directive, Art 7(1), Employment Equality Directive.

⁴³ e.g. Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539.

⁴⁴ Art 7(2), see earlier discussion.

example, their bids will be deemed to be the lowest if they are no more than 10% above any other bid. Elsewhere, in Hungary the Disabled Persons Act provides that as 'disabled persons have lesser access to their rights equal to others, therefore it is reasonable to accord preferences to them in all possible ways'.⁴⁵

There was also evidence of positive actions in many candidate countries to promote equal opportunities for Roma communities. In most instances, this took the form of integration programmes: the Czech Republic, Hungary, Slovakia and Slovenia. For example, in the Czech Republic, special financial assistance exists for Roma students entering higher education. Romania appears to have gone further than these states, in particular through a quota scheme for Roma students in admission to universities. The legality of this scheme is protected through Article 15(3) of Ordinance 137/2000.

Finally, there was also some evidence of positive action in respect of older workers. In Slovenia, the 2002 Employment Act extends to workers over 55 the option of partial retirement, part-time working and a right to refuse over-time and night work.⁴⁶ In Malta, incentives are provided to firms recruiting unemployed persons aged over 40.

7. Remedies and enforcement

Both Directives place considerable emphasis on ensuring effective enforcement of the law. To this end, states are placed under an obligation to ensure adequate procedures for bringing discrimination complaints,⁴⁷ as well as 'effective, proportionate and dissuasive' sanctions.⁴⁸ These general principles are supplemented with detailed requirements, such as extending legal standing to organisations working to promote equal treatment,⁴⁹ allowing them to act on behalf or in support of people who bring discrimination complaints. The Directives also set out provisions designed to protect victims against retaliation as a result of making a complaint.

(a) Procedures for bringing a complaint of unlawful discrimination

In most states, a combination of criminal, civil and administrative procedures are available to victims of discrimination. Moreover, given that the constitutions of all the candidate countries

⁴⁵ Art 3.

⁴⁶ Arts 202-203.

⁴⁷ Arts 7(1) and 9(1), Racial Equality and Employment Equality Directives.

⁴⁸ Arts 15 and 17, Racial Equality and Employment Equality Directives.

⁴⁹ Art 7(2) and 9(2), Racial Equality and Employment Equality Directives.

include equality guarantees, then proceedings for breach of the constitution are a further option. Beyond the general legal procedures, specialised judicial and administrative forums can be also identified.

(i) Specialised anti-discrimination bodies

Romania is the only state currently possessing a special body for hearing discrimination cases. The National Council for Combating Discrimination came into being in autumn 2002. Individuals can make a complaint of discrimination and the National Council will reach a legally binding determination.

(ii) Specialised labour law tribunals

A more common option in the candidate countries is to provide specialist tribunals for hearing labour law cases. Labour courts or tribunals exist in Cyprus, Hungary, Lithuania, Malta, Poland and Turkey. In addition, the Labour Inspectorate has a role in enforcing employment discrimination law in the Czech Republic, Estonia, Hungary, Latvia and Slovakia. For example, in Latvia, the State Labour Inspection can receive complaints from workers and has the power to impose fines of up to € 400 where the Labour Law has been violated. However, so far no complaints have been made about discrimination. In contrast, the Czech Labour Offices can impose fines of up to € 32,000. Although complaints of discrimination have been received, problems with proof have presented barriers in this area.

(iii) Other bodies

Many states possess the Ombudsman institution and this is frequently cited as a forum for raising discrimination complaints. The Ombudsman exists in Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. However, in none of these can the Ombudsman impose sanctions, although they may be able to commence legal proceedings (e.g. Slovenia).

(iv) Conciliation

There was very little evidence of national legislation providing for a specific conciliation process in discrimination cases. Malta is the only example here, where the National Commission for Persons with Disability can receive individual complaints and attempt to mediate a settlement. Elsewhere, general labour conciliation was noted in several states – for example, in Poland conciliation commissions can be established in order to resolve specific employment disputes. In Hungary, the education commissioner provides a conciliation service in disputes relating to educational provision. Finally, in Latvia, complaints can be brought to the National Human Rights Office, which must attempt conciliation.

(b) Legal Standing for Associations

There was no possibility for associations and other bodies to bring cases on behalf of an individual in Bulgaria, Cyprus, Hungary and Slovakia.

Legal standing for associations is permitted to some extent in the Czech Republic, Estonia, Lithuania, Malta, Poland, Romania and Slovenia. In Latvia, trade unions may bring actions on behalf of their members. Trade unions enjoy the same right in Turkey, but only in respect of the labour courts. There is little data on any association making use of these opportunities. In Poland, the Code of Civil Proceedings was amended in order to implement this part of the Directives. Legal standing will be granted to those organisations working to protect equality and prevent discrimination and cases may be brought on behalf of an individual with their consent. However, it will be limited to those associations specified by Ministerial ordinance.

(c) Time limits

The Directives do not lay down any specific requirements with regard to the time limits for bringing discrimination complaints.⁵⁰ However, the Court of Justice maintains a general principle that time limits must not 'render virtually impossible or excessively difficult the exercise of rights conferred by Community law'.⁵¹

The time limits for bringing legal proceedings vary greatly, both between states and between different legal procedures within each state. It is not possible to present all of these variations, but the time limits applicable to employment disputes are presented below. States appear more than once where different time limits apply to different aspects of employment law.

30

Time Limit	Country
1 month	Estonia (dismissals), Latvia (discrimination in recruitment, promotion, conditions) Romania, Slovenia
2 months	Bulgaria (dismissals)
3 months	Malta
4 months	Estonia, Turkey
2 years	Latvia
3 years	Bulgaria, Czech Republic, Hungary, Lithuania, Poland, Romania (pay), Slovakia

There is no time limit on employment cases in Cyprus.

(d) The burden of proof

Both Directives provide for a shift in the burden of proof from the complainant to the respondent where the complainant establishes facts from which it may be presumed that unlawful discrimination has occurred.⁵²

⁵⁰ Art 7(3) and 9(3), Racial Equality and Employment Equality Directives.

⁵¹ Para. 34, Case C-231/96 *Edis v Ministero delle Finanze* [1998] ECR I-4951.

⁵² Arts 8 and 10, Racial Equality and Employment Equality Directives.

There is no provision for a shift in the burden of proof in Romania, Bulgaria, Estonia, Lithuania, Malta or Poland.

In most states, the rules on the shift in the burden of proof are limited to the employment sphere. This is most restrictive in Cyprus, where only dismissals are covered. It applies generally in employment matters in Hungary, Latvia, Slovakia, Slovenia and Turkey. In the Czech Republic, there is the shift in the burden of proof for all grounds as regards employment discrimination. However, for cases of racial and ethnic discrimination this extends to the areas outside employment covered by the Racial Equality Directive, with the exception of housing.

(e) Victimisation

No specific protection against victimisation can be found in Bulgaria, Estonia, Hungary, Poland, Romania or Slovenia.

As with the burden of proof, the concept of victimisation is mainly found within employment law. Therefore, victimisation in the exercise of employment rights is forbidden in Cyprus (protection from dismissal only), The Czech Republic, Latvia, Malta, Slovakia and Turkey.⁵³ Only in Slovakia does this rule extend more generally. Article 12(4) of the Constitution prohibits victimisation resulting from the exercise of basic constitutional rights.

(f) Sanctions

There is a complex patchwork of sanctions available in the candidate countries. In many cases, there has been very little or no litigation on discrimination issues, therefore it is difficult to assess the effectiveness or potential of sanctions.

In Romania, the National Council for Combating Discrimination can impose a maximum fine of approximately € 250 in individual cases and € 500 in cases of discrimination against a group of persons. It has already issued decisions on a range of complaints. This administrative procedure co-exists with the alternative option of bringing a complaint through judicial procedure. Indeed, victims need to avail of the judicial procedure in order to obtain individual compensation.

As noted earlier, in several states, anti-discrimination clauses are scattered throughout the legal codes. This is especially true in Hungary and Bulgaria. In both these states, the applicable sanctions depend on the specific law under which a case is being brought. Consequently, the sanctions have not been devised with a view to combating discrimination in particular and this was deemed to result in a lack of effectiveness.

The sanctions available are most clearly identified in relation to employment law disputes. Reinstatement is a remedy for unlawful dismissal in Cyprus, Estonia, Hungary, Poland, Slovenia and Turkey. Compensation is a more common sanction for employment discrimination. In Turkey, the employer must pay compensation of 6-12 months of wages, if the employee is not reinstated.

⁵³ The law only protects the individual against dismissal in response to a complaint.

In Estonia, this is subject to a maximum value of 6 months of wages, whereas in Hungary, Latvia, Malta, Slovakia and Slovenia, no fixed limits are imposed. In addition, where Labour Inspectorates exist, they can impose fines on businesses for a breach of the Labour Code (Czech Republic, Estonia, Hungary, Latvia and Slovakia). However, there was little evidence that Labour Inspectorates had ever exercised these powers in relation to combating discrimination. Moreover, a fine does not result in compensation for the individual.

The criminal law offers further possibilities in several states. In Malta, victimisation and harassment in employment are also criminal offences, subject to a fine of up to € 2,500 or six months imprisonment. In Latvia, discrimination could be challenged under Article 78 of the Criminal Code, but no prosecutions have been brought yet.

8. Awareness Raising and Social Dialogue

(a) Dissemination of information

The Directives oblige Member States to bring 'to the attention of the persons concerned' the implementing provisions in national law.⁵⁴ Whilst the national reports revealed a variety of awareness-raising initiatives, the focus here is on actions taken by the government. Practice varies considerably. Few or no initiatives were reported in Bulgaria, the Czech Republic, Estonia, Hungary and Turkey. Training in anti-discrimination law seems the most prevalent response and this has occurred in Cyprus, Lithuania, Slovakia and Romania. This is typically directed towards civil servants and lawyers.

In Slovakia, a number of activities were organised pursuant to a government action plan against racism and intolerance during 2000-2001. A variety of initiatives have taken place in Poland, in particular through the sponsorship of the General Inspector for Counteracting Discrimination. Under her auspices, grants have been made available to groups combating discrimination on grounds of sex, race, national and ethnic origin, age and sexual orientation. In Slovenia, there have been several initiatives relating to education. Eleven schools took part in a one-day workshop on 'Path To Tolerance', examining issues such as xenophobia, racism and homophobia with students.

⁵⁴ Arts 10 and 12, Racial Equality and Employment Equality Directives.



Emiel
1989

(b) Dialogue with the social partners and civil society

Member States are additionally under an obligation to promote dialogue with the social partners and non-governmental organisations with a view to promoting equal treatment.⁵⁵ Social dialogue is considerably more advanced than dialogue with NGOs. National institutional structures for social dialogue now exist in Bulgaria, Cyprus, the Czech Republic, Hungary, Lithuania, Latvia, Malta, Poland, Romania, Slovakia, Slovenia and Turkey.

Dialogue with NGOs is more intermittent. Nonetheless, in several states specific bodies have been established to facilitate dialogue in this field. Generalised bodies exist in the Czech Republic (Human Rights Council), Malta (Civil Society Committee), Slovenia (Government Commission for NGOs) and Turkey (Human Rights Advisory Council). Elsewhere, a variety of councils have been created. These organisations bring together NGOs and government representatives in specific fields. National Councils on Disability exist in the Czech Republic, Hungary, Lithuania, Latvia, Poland and Turkey. In Cyprus, dialogue is maintained with the Federation of Organisations for the Disabled.

In Romania, a National Alliance Against Discrimination has been recently created as a forum for dialogue between a range of NGOs. Furthermore, Lithuania has established a Council of National Communities to promote dialogue with different ethnic groups.

It was reported that NGOs were specifically consulted on draft laws to implement the Directives in several states, including Bulgaria, Estonia, Lithuania, Hungary and Poland.

9. Specialised bodies

The Racial Equality Directive contains an obligation for Member States to designate a 'body or bodies for the promotion of equal treatment'.⁵⁶ Member States are given a wide discretion as regards the institutional structure of this body, but it must enjoy a number of minimum competences:

- providing independent assistance to victims in pursuing complaints of discrimination;
- conducting independent surveys on discrimination;
- publishing independent reports and making recommendations on any issues relating to discrimination.

⁵⁵ Arts 11 and 12, Racial Equality Directive; Arts 13 and 14, Employment Equality Directive.

⁵⁶ Art 13.

There is no equivalent obligation in the Employment Equality Directive, therefore, Member States may choose to limit the competence of the equal treatment body to racial and ethnic discrimination. Interestingly, the national reports indicate that many states are intending to create bodies with responsibility for all grounds of unlawful discrimination.

(a) Specialised bodies already in existence

The clearest example of a specialised body for combating discrimination is found in Romania. As discussed earlier, the National Council for Combating Discrimination can receive and decide complaints, both from individuals and NGOs. Its competences include all the Article 13 grounds of discrimination, except for age. In addition to its enforcement role, it has a broad mandate to monitor government proposals and observance of the law by public authorities, as well as making recommendations to the government. Its role was extended in 2002 to include elaborating and instituting affirmative actions on preventing discrimination.⁵⁷ Its first activity report was issued in March 2003. One of the Council's key activities during the recent period has been monitoring discrimination in advertisements. To this end, it identified 668 discriminatory advertisements during one week in October 2002. It should be noted that complaints of discrimination could also be brought to the attention of the Ombudsman in Romania.

No specialised body deals with racial and ethnic discrimination in Malta, but the National Commission Persons with Disability enjoys such a mandate for disability discrimination cases. Alongside its law and policy reviewing function, it can provide legal and financial assistance to individuals in order to help them enforce the legislation.

In Poland, a number of bodies already exist. At the general level, there is the Ombudsman, who can investigate complaints of a breach of human rights, including by private actors. The Ombudsman cannot impose sanctions and cases on the rights of third country nationals and minorities amounted to just 1% of complaints in 2001. Furthermore, out of the 240 positions in the Ombudsman's office, only 1.5 are dedicated to the rights of foreigners and national minorities. Alongside the Ombudsman, are the Plenipotentiary for Disabled Persons' Affairs and the General Inspector for Counteracting Discrimination.⁵⁸ Both these bodies monitor laws, disseminate information and provide advice, but they do not have a remit to receive individual complaints. The competence of the General Inspector was enlarged in 2002 from sex discrimination to include discrimination on grounds of racial or ethnic origin, religion or belief, age and sexual orientation. However, the budget remained similar⁵⁹ and the organisation has a total of just 17 staff, with four working on non-gender grounds. Work is in progress to amend the functions of the General Inspector in order to comply with the Racial Equality Directive. The General Inspector would continue to deal with all grounds, except disability. He/she would have a specific role to assist individuals.

⁵⁷ Decision 1514/2002.

⁵⁸ Also referred to as the Plenipotentiary for Equal Status of Men and Women.

⁵⁹ Approximately € 437,000.

(b) Proposed specialised bodies

In February 2003, the Estonian Parliament amended the statute of the Legal Chancellor in order to give the office special responsibility for combating discrimination. The Legal Chancellor already exists and it is a type of Ombudsman. From 1 January 2004, it will provide advice on all forms of discrimination, monitor the impact of laws and make proposals for laws where appropriate. It will not have the power to impose sanctions and clearly the effectiveness of its work will depend heavily on Parliament adopting the draft Law on Equality still pending in the Estonian Parliament.

In Lithuania, a draft law is before Parliament with the objective of extending the remit of the Ombudsman for Equal Opportunities of Women and Men to cover all Article 13 grounds. The law will ensure that the Ombudsman enjoys the competences required by the Racial Equality Directive. Currently, the Ombudsman is appointed by Parliament. She can receive and investigate complaints, or initiate investigations herself. This can lead to the imposition of administrative sanctions.

The draft Prevention of Discrimination Act before the Bulgarian Parliament would establish a Protection against Discrimination Commission. The Parliament and the President would appoint the Commission jointly. Structurally, it would have responsibility for discrimination on all Article 13 grounds, but it would consist of a gender sub-commission, a race and ethnic sub-commission and another sub-commission for all other grounds. The Commission would have promotional responsibilities; that is, conducting research, developing codes of practice and awareness-raising. In addition, the Commission would be able to receive complaints of discrimination. This could result in mediation or adjudication. In the latter instance, the Commission could impose sanctions and require positive measures to be taken.

36

In Hungary, the draft Bill would create an Equal Treatment Committee. This would enjoy the functions required by the Racial Equality Directive, but it would deal with all grounds of unlawful discrimination. Moreover, it would be able to impose sanctions for individual cases.

Although a variety of bodies already exist in The Czech Republic, the draft anti-discrimination law proposes a Centre for Equal Treatment. This would have the responsibilities required by the Racial Equality Directive, however, there is an ongoing debate as to its precise institutional structure.

Various bodies already exist in Slovakia with general functions, but no specific mandate to assist individuals (Human Rights and Minorities Office, Roma plenipotentiary). It is now proposed to amend the statute of the National Centre for Human Rights with a view to making it responsible for assisting victims of discrimination, as well as providing information and conducting surveys on discrimination.

(c) Ombudsmen and similar institutions

As mentioned earlier, many states possess the Ombudsman institution. In Latvia, discrimination cases fall within the remit of the National Human Rights Office. It has a role to advise and assist individuals. In this context, it must seek to mediate a settlement, but it cannot impose any sanctions. More generally, it has the role of monitoring and reviewing respect for human rights in

Latvia and it can initiate a constitutional complaint before the Constitutional Court. The Human Rights Ombudsman in Slovenia and the Cypriot Ombudsman have very similar roles.

The Minorities Ombudsman in Hungary has comparable functions, but only in relation to race and ethnic discrimination. The Ombudsman is appointed by Parliament and can receive complaints of violations of constitutional rights. Whilst the Ombudsman has investigative powers, he/she can only make non-binding recommendations and cannot investigate the activities of private parties.

In cases relating to discrimination in the provision of goods and services, several states noted the existence of consumer protection agencies to which discrimination complaints could be brought. Specifically, this includes the Czech Trade Inspectorate, Hungarian consumer arbitration boards and the Slovak Trade Inspectorate.

Bulgaria adopted a law establishing an Ombudsman in May 2003.

(d) No specialised bodies

There are no specialised bodies or similar institutions existing in Turkey.

Conclusion

Although none of the candidate countries has fully transposed the Racial Equality and Employment Equality Directives, there is ample evidence that the Directives are shaping the development of anti-discrimination law in these states. Romania is the candidate country that appears to be in the most advanced stage of transposition, although it does not yet fully comply with all of the detailed requirements of the Directives. Partial implementation has already occurred in Malta, Slovakia, Slovenia, Lithuania and Latvia. Legislative proposals designed to implement the Directives are pending in Estonia, Bulgaria and Poland. Draft legislation is being prepared in Hungary, the Czech Republic and Cyprus. Turkey gives the greatest cause for concern; there is very little existing anti-discrimination law and no apparent plans to respond to the Directives.

Taking a thematic approach to implementation, sexual orientation discrimination has proven the most controversial ground. Indeed, this was deliberately omitted from new legislation in Malta, Latvia and Slovakia. Age discrimination is also an area of weakness – for example, it is not fully covered by Ordinance 137/2000 and Law 48/2002 in Romania. With regard to compulsory retirement policies, it is difficult to discern a general pattern.

A manifest weakness in much of the existing legislation is the absence of clear definitions of direct and indirect discrimination, harassment or a ban on instructions to discriminate. Where definitions

have been adopted, often they are not entirely consistent with the provisions of the Directives.

Laws tend to be most advanced in relation to workplace discrimination. Protection against discrimination in areas such as housing, healthcare and education is quite patchy. Frequently, this reflects the absence of a comprehensive anti-discrimination law and instead reliance on a scattered network of anti-discrimination clauses in many different legislative acts.

Responses to disability discrimination vary greatly. The focus on reasonable accommodation in the Employment Equality Directive has not yet filtered through in many candidate countries. Indeed, quota systems are prevalent, though with little evidence of practical enforcement.

Enforcement of anti-discrimination law will present real challenges in the candidate countries. There is very little experience with litigation in this area and considerable reform is necessary to comply with the Directives' standards – for example, the extension of legal standing to associations or the shift in the burden of proof. Nonetheless, many of the existing and proposed laws are founded on enforcement through individual complaints and litigation.

Encouragingly, imaginative responses can be found to the need to create equal treatment bodies for race and ethnic discrimination. In most cases, the new institutions emerging will deal with all discrimination grounds in Article 13 and this is an example of positive spillover effects from the minimum standards in the Racial Equality Directive. Indeed, the innovative approaches being adopted in the candidate countries will make a valuable contribution to the new equality enforcement model developing across Europe.

Part 2

Bulgaria - Executive summary

Introduction

Bulgarian society is composed of an ethnic Bulgarian majority and ethnic minorities, the largest being the Turkish community, which represents 9.4% of the population according to the 2001 official census. In addition, the census records that 4.6% of the population are Roma, but unofficial estimates⁶⁰ put the figure as high as 10% of the population. There are also a number of other communities, including Bulgarian-speaking Muslims, Jews, Russians, Armenians and Macedonians. The traditional religion is Eastern Orthodox Christianity, while the largest religious minority are Muslims (around 12%), followed by Protestants, Catholics and various non-traditional faiths.

There is a clear need to tackle prejudice and discrimination against ethnic and religious minorities in Bulgaria amongst public authorities at various levels, in the media and throughout society. Roma, in particular, suffer from intolerance, harassment and racially motivated violence. They also face discrimination in education, employment, service provision, healthcare, social security, criminal justice and access to justice. This results in severe inequality and isolation. Roma housing and education are de facto segregated and enormously inferior. The Turkish community, Bulgarian-speaking Muslims and Macedonians also suffer from discrimination and social exclusion. People with disabilities are isolated. They face many barriers in accessing public places and they are segregated in education and employment, suffering, as a result, substantial inequality of opportunity. The majority of people with severe mental disorders are completely isolated in institutions where many suffer inhuman and degrading conditions. Sexual minorities also face intolerance and denial.

Awareness of equal treatment principles among officials, the public, and, importantly, the legal community in Bulgaria is very limited. Although there are already anti-discrimination clauses in various pieces of national legislation, these are scattered and not comprehensive. They do not provide the precise definitions of discrimination required by the Racial Equality and Employment Equality Directives, nor do they ensure sufficiently effective remedies for victims of discrimination. Many of these issues could be addressed through the Prevention of Discrimination Bill being discussed in Parliament at the time of publication of this report.

⁶⁰ Minority Rights Group, London.



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1. Main legislation

The Constitution, which applies directly to any field and against all parties, public and private, bans discrimination on grounds of race, national origin, ethnic appurtenance, sex, origin, religion, education, belief, political affiliation, personal and public status, and property. Further, discrimination is prohibited under incorporated international law. Bulgaria is bound by all the principal relevant treaties, which are enforceable at the national level against any party, public or private, and take precedence over domestic laws. Moreover, various domestic laws governing specific fields, such as employment, education, criminal and tax procedure, and social assistance, prohibit discrimination. Other laws applicable to specific fields, such as social security, telecommunications and postal services, and power provision, instead of prohibiting discrimination, require equality, without mentioning any grounds. The Protection, Rehabilitation and Social Integration of Invalids Act prohibits disability discrimination in any field and by any party.

Very few of these laws include clear definitions of discrimination that correspond to those included in EC legislation. The overall clarity and precision of equality law is insufficient, as very few concrete prohibitions of specific discriminatory conduct are provided for and there is no elaborating case law. The provisions differ in terminology, the protected grounds and scope. The level of protection afforded to the various grounds is not uniform. In addition, no specific remedies are provided for complaints of discrimination, whilst the general remedies are not sufficiently effective.

44

Adopted in extensive consultation with NGO experts and proposed by the Government, a comprehensive anti-discrimination draft law was introduced to Parliament in September 2002. This draft law aimed to transpose EC Directives relating to gender equality as well as the Racial Equality and Employment Equality Directives. In various aspects, the draft aimed to go beyond EU law. The draft provides for extensive uniform protection of all grounds covered. It applies to the exercise of any right in all of the fields covered by the Racial Equality Directive and prohibits discrimination based on association. It provides for detailed concrete prohibitions of specific discriminatory conduct in key fields, such as employment, education and service provision, envisaging enhanced safeguards and specific effective remedies. The draft provides for both general and specific duties on authorities, employers and educators to take positive measures. It envisages strong administrative enforcement by an independent equality commission, and offers effective judicial protection, including standing for NGOs to bring anti-discrimination actions on their own behalf, and collective actions by victims and NGOs. Sanctions under the draft are substantial and time limits beneficial to victims.

Public debate on the draft has been limited, negatively focusing on sexual minorities, and on sexual harassment. The draft was stalled within Parliament due to objections against its detailed and comprehensive nature, as well as the enhanced safeguards and remedies. At the time of publication of this report, a revised version was circulating within the Bulgarian parliament. This revised version would significantly weaken the provisions of the draft law.

2. Main principles and definitions

The few statutory definitions of direct and indirect discrimination are fragmentary in scope and inconsistent with EC law. Harassment, instruction to discriminate and victimization within the meaning of EC law are neither outlawed, nor defined. No duty to provide reasonable accommodation for people with disabilities is provided for. The provisions on exemptions for genuine occupational requirements are not sufficiently clear. This is also true of the provisions on special protection measures benefiting groups such as disabled people and minors.

3. Material scope

Discrimination on grounds of racial or ethnic origin, as well as religion or belief, is prohibited in a range of areas. Specific legislation provides protection against such discrimination in relation to certain aspects of social protection, education, access to goods and services. However, there is no specific protection against discrimination in housing.

In relation to employment, there is protection against discrimination on grounds of racial or ethnic origin, religion or belief, disability and age. There is only partial protection against sexual orientation discrimination in employment. There is limited protection against discrimination in relation to vocational training.

4. Equality bodies

There is currently no national equality body in Bulgaria. The pending Prevention of Discrimination Bill would set up an independent body for the protection and promotion of equal treatment, consisting of three specialised subcommittees on race, sex and other discrimination. The envisaged anti-discrimination commission would have a variety of powers. Most notably, the commission would be entitled to investigate complaints and sanction breaches through issuing binding instructions and orders. The commission could also provide conciliation, review legislation, propose to authorities to amend their discriminatory acts and to take positive measures, challenge administrative acts in court, consult persons on their rights and duties in equality law and act as *amicus curiae*.

5. Enforcing the law

The current, scattered legal provisions against discrimination are very difficult to enforce. Victims rarely seek redress; there is a low awareness of the legal avenues available to challenge discrimination. Legal aid is not provided in civil matters, which is a barrier to access to justice. This affects most critically the Roma, who experience high rates of illiteracy and have little access to information about remedies and procedures. Anti-discrimination litigation is a very new phenomenon. However, as judges and other officials lacking anti-discrimination law training, and the provisions are broad and general, there are many obstacles to application of the legal provisions. To date, only two judgments have made findings of discrimination, and not a single administrative deci-

sion. One judgment found racial/ethnic discrimination in the case of a refusal of access to the publicly available services of a swimming pool. The other judgment redressed sex discrimination in commercial advertising. There have been no judgments on discrimination on grounds of religion or belief, disability, age or sexual orientation. The lack of awareness of anti-discrimination among the public and law enforcement officials, barring protection from being sought or provided, is comparable for all grounds. However, rights groups, whose litigation efforts account for the fledgling anti-discrimination case law, have focused, mandated by the overwhelming lack of rights of Roma, on racial discrimination.

1. Victims may only have recourse through general remedies. These include administrative enforcement and review, civil actions for damages, special actions for damages against the State, and labour claims. No shift of the burden of proof is provided for. There is no public entity to support complainants. Rights NGOs informally provide legal representation to some complainants. NGOs have no formal standing to represent or support complainants in court or before other authorities, or to initiate proceedings on their own behalf. In law, trade unions have standing to represent employees in court, while consumer associations may bring actions before the courts where general consumer interests are infringed. However, these underused possibilities have not been employed in discrimination cases.

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Where discrimination is banned by the legislation governing a field in which discrimination occurred, it is open to a victim to complain to the relevant administrative body charged with enforcing that legislation. Such a body may impose a sanction on a discriminator, most commonly a fine, and, possibly, suspension of their activities, or order them to prevent or eliminate discrimination, or its consequences. Sanctions are not discrimination-specific. They are applicable for any breach of a particular law, including discrimination. The harshness of sanctions varies across the various laws prohibiting discrimination. As a result, discrimination is not subject to uniform sanctions in all fields. Often, the amounts of fines are not dissuasive. Victims have no standing in administrative enforcement proceedings. An administrative enforcement body may not award compensation.

In practice, administrative enforcement is inadequate to redress discrimination because general enforcement bodies lack anti-discrimination awareness. Furthermore, the enforcement of the bodies' decisions is insufficient. As a result, redress is rarely sought via administrative enforcement and no administrative sanctions have been imposed for discrimination.

Where a public authority's decision is discriminatory, a victim may seek review by the higher-ranking authority, or the courts. Both may abolish, or amend an unlawful discriminatory decision. Where an authority discriminatorily refuses to act, the superior body may compel it to, or determine the matter itself. In practice, anti-discrimination redress has rarely been sought, and has not been obtained, via administrative review.

Further, a victim may go to court to determine their right to non-discrimination under the Constitution, incorporated international law, or domestic laws, asking the court to order a discriminator to take or omit any action, which respect for this right requires, including future continuous or repetitive action. A victim may further seek damages. In practice, this has been the remedy most used in discrimination cases. In one of the two existing judgements establishing dis-

crimination, that concerning a racist denial of access to publicly available services, the court found breaches of equality under the Constitution and incorporated international law, and awarded damages.

Where damages have resulted from discrimination by public authorities, a victim may seek compensation in court only after an authority's discriminatory decision was annulled in administrative review proceedings. Rarely sought, discrimination damages have not been awarded against an authority.

In employment, a victim may ask the court to annul an employer's discriminatory decision, including in cases of unfair dismissal, or to declare a contractual clause null and void. In several discriminatory dismissal cases sponsored by rights groups, courts have ignored, or blankly denied discrimination allegations, ruling instead on other issues.

Cyprus - Executive summary

Introduction

Anti-discrimination law in Cyprus has evolved against the backdrop of a long drawn out conflict between the Greek Cypriot and Turkish Cypriot communities and foreign intervention, which started soon after the island's independence in 1960. Eventually the conflict culminated in the de facto division of the island in 1974, following a political coup supported by the Greek military junta and the subsequent Turkish military intervention in the northern part of the island. This Report only covers the situation in the territory controlled by the government of the Republic of Cyprus.

Recently, a number of equality and human rights legislative measures were introduced, primarily as a result of the Republic's accession commitments and for the purpose of compliance with international law. Anti-discrimination law in Cyprus is principally based on Constitutional provisions, such as Article 28 of the Constitution and other human rights provisions contained therein, and on legislation and international conventions. Article 28 of the Cyprus Constitution states: "All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby." A framework exists in Cyprus at national level to put into effect the principle of equal treatment and for combating discrimination on the basis of racial/ethnic origins, nationality and religious belief; however this does not include sexual orientation, disability or age. Apart from constitutional provisions, European and International Treaties ratified by the Republic of Cyprus prohibit discrimination in various fields such as education, acquisition of property and employment.

In the transposition of the acquis, progress is rather slow on the ground of sexual orientation; hardly any public debate has taken place on the subject, due to the fact that homosexuality was until recently a criminal offence. The law was amended following a case against the Cyprus Government at the European Court on Human Rights (*Modinos v Cyprus*). Similarly, little progress can be recorded as regards age discrimination. As for the other grounds of discrimination such as racial or ethnic origin, religion or belief and disability, some progress can be noted, as there are already some legal instruments to combat discrimination on these grounds.

Although there are constitutional provisions and incorporated international human rights instruments, Cyprus lacks specific and detailed legislative provisions in respect of many elements of the Racial Equality and Employment Equality Directives. It must be noted, however, that the Law concerning Persons with Disabilities addresses some of the requirements contained in the Employment Equality Directive. The Cypriot authorities have publicly stated their intention to transpose the

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MEASURES TO COMBAT DISCRIMINATION IN ACCEDING AND CANDIDATE COUNTRIES

Racial Equality and Employment Equality Directives before accession to the EU. The relevant legislation is apparently being drafted by the government. However, at the time this Report was prepared draft legislation was not available for study. Already Cyprus has adopted a specialised anti-discrimination Act as regards sex equality that came into effect on 1 January 2003, legislation that serves as a useful model for future anti-discriminatory legislation on the other grounds.

1. Main legislation

Article 28(2) of the Cyprus Constitution guarantees the enjoyment of economic, social and cultural rights by all persons without any discrimination and provides that every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or indirect discrimination against any person on the grounds of: community; race; religion; language; sex; political or other conviction; national or social descent; birth; colour; wealth; social class; or any ground whatsoever, unless the Constitution itself otherwise provides.

In addition, Law 13(III) 2002, which incorporates Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, provides for a general prohibition on discrimination: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This Law entered into force on 1 December 2002.

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As far as anti-discrimination law in employment is concerned, there is a general provision that renders dismissal on grounds such as "race, colour, family condition, religion, political opinion, national origin or social descent" unfair and therefore actionable, under the Law on Unfair Dismissal. The Law concerning Persons with Disabilities has introduced a modern framework for tackling disability discrimination. Measures to promote gender equality have the longest legal history in Cyprus. The introduction of the Law for Equal Treatment of Men and Women in Employment and Occupational Training of 2002 was an important development in this context.

2. Main principles and definitions

The terms 'direct' and 'indirect' discrimination are not defined in the Constitution. Specific legislative definitions can, however, be found in the laws on gender equality and disability discrimination. However, there is no legislative definition of these concepts in respect of discrimination on grounds of racial or ethnic origin, religion or belief, age and sexual orientation.

As for discrimination on the ground of disability, the Law concerning Persons with Disabilities contains provisions against direct discrimination, which is defined as "unfavourable treatment" when compared to "a person without disability in the same or similar situation" or on the basis of "characteristics which generally belong to persons with such disability" or "alleged characteristics", or in contravention of the code of practice. Also for disability there appears to be an *indirect* discrimination provision, although this is not defined as such. The duty to provide reasonable accommodation is not expressly provided for in Cypriot law. Nonetheless, the Law on Persons with Disabilities does contain a duty on employers to

provide reasonable access in the working environment, which includes making necessary modifications and changes to the organisation of work.

Cypriot Law contains no provisions for harassment on the grounds of racial, ethnic origin or religion or belief, disability, age or sexual orientation, even though there have been reports of complaints about racial harassment of migrants. Furthermore, there are no provisions in Cypriot law concerning “instructions to discriminate” on any grounds (race and ethnic origin, age, disability, religion, sexual orientation). Harassment and victimisation are nowhere defined or outlawed. In the case of gender, comparable definitions of harassment and victimisation do exist, but instruction to discriminate is not prohibited.

3. Material scope

Discrimination in employment is forbidden on grounds of racial or ethnic origin, religion or belief and disability. There is no protection against discrimination on grounds of age or sexual orientation.

In the areas outside employment covered by the Racial Equality Directive, protection is variable. There is an underlying protection derived from the Constitution and incorporated human rights instruments. However, this is not sufficient to satisfy the detailed requirements of the Directives. More specific, yet not comprehensive, protection is available in respect of discrimination on grounds of racial or ethnic origin in social protection and goods and services.

4. Equality bodies

There is no body for equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. However, there are other bodies, which do play a role to this end but do not cover what the Racial Equality Directive requires. The most effective body by far is the Ombudsman or Commissioner for Administration, who is vested with power to investigate complaints against the public service and its public officers, including the Police and the National Guard, and can investigate complaints regarding acts or omissions or human rights violations, or complaints of discrimination and maladministration by public authorities. A Report is prepared in relation to each investigated case. In the event that the Commissioner concludes in this Report that the complainant has suffered some injury or injustice, the Report also contains the Commissioner's suggestions or recommendations to the competent authority concerned, for reparation of the injury or injustice, specifying the time within which such reparation must take place. If the competent authority fails to give effect to a suggestion or recommendation for reparation, the Commissioner may make reference to this, by special report submitted to the House of Representatives and the Council of Ministers. The recommendations of the commissioner are not binding, however, the ombudswoman has proved to be the most effective body in dealing with question of racial, gender and other discrimination.

The semi-independent National Institution for the Protection of Human Rights, established in 1998, has a general mandate to keep under surveillance respect for human rights. Among its functions is to hear and investigate complaints regarding violations of human rights, including complaints from migrant workers and other non-citizens of the Republic.

5. Enforcing the law

There are difficulties in addressing complaints of discrimination. There are some active NGOs that help and make representations to the authorities on a case-to-case basis. However, victims of discrimination on grounds such as age and sexual orientation cannot find support. Individuals who have been *personally* aggrieved have a legitimate interest in Cyprus administrative law to engage in proceedings. Under the Constitution such recourse is only available to a person who possesses an existing legitimate interest in his/her personal capacity, or by virtue of being a member of a particular community, and who is *adversely* and *directly* affected by such decision, act or omission.

The existing constitutional practice is such that any matter that is contrary to the principle of equal treatment, as guaranteed by Article 28 of the Constitution, and the human rights sections of the Constitution, is unconstitutional, as the principle underlies all relevant laws. Therefore, any such act or practice is considered to be null and void and of no legal effect, as case law has confirmed. Secondly, the equality provisions contained in the international treaties, signed and ratified by the Republic, have superior force over any municipal law and therefore override any provisions that are contrary to the principle of equal treatment. Thirdly, the laws of the republic on Equal Treatment (gender, disability and minority anti-discrimination) expressly repeal any contrary provisions; even if they did not, under the doctrine of implied repeal, the latest laws prevail wherever there is a conflict.

There is a shift of the burden of proof on the employer once a prima facie case of dismissal is established. The Termination of Employment Law is framed in such a way that imposes the burden of proof on the employer, i.e. the employer has to prove that an employee had been discharged for one of the reasons that permit summary dismissal. If the alleged unreasonableness, resulting in dismissal, is based on the ground of discrimination, the burden of proof has to be discharged by the employer to prove, on the balance of probabilities, that (s)he acted reasonably. Similarly, in administrative and labour proceedings in the cases of gender discrimination, the burden of proof shift occurs, as provided by the Law for Equal Treatment of Men and Women in Employment and Occupational Training of 2002.

Where legislation provides for specific sanctions against discrimination, they appear to be proportionate and potentially effective. For example, there is scope for damages in unfair dismissal cases. However, the implementation of the law has not yet proved effective. The trade unions complain that basic workers' rights of migrants are routinely violated and the district work offices do not operate as genuine judicial bodies that investigate matters.

Czech Republic - Executive summary

Introduction

The Czech Republic, lying in the heart of Central Europe, has a mixed urban and rural population of 10.3 million inhabitants. In 1918, the land constituting the present-day Czech Republic formed part of Czechoslovakia. Later dissembled in 1938, then re-established in 1945, it was finally divided into the Czech Republic and Slovakia on 1 January 1993. A new constitution was adopted on 16 December 1992, establishing the present day Czech Republic as a democratic country. With the adoption of the new constitution in 1992, a foundation for human rights and minority rights was established. The greatest protection of human rights came through the promulgation of the Charter of Fundamental Rights and Freedoms, which is considered to be part of the constitutional order (see Section 1 below).

Despite the guarantees in the Constitution and ratifications of various international agreements on the protection of human rights, the treatment and protection of minorities, particularly of the Roma, is still problematic. The Czech Republic's minorities account for approximately 8% of the population. These are primarily Slovaks (2%) and Roma (2-3%).⁶¹ Despite a number of initiatives supported by the Czech authorities, including the "Concept for Roma Integration" that was agreed by the government in June 2000, Roma continue to face discrimination in all aspects of society including education, housing, employment, and police abuse. For instance, Roma children are still placed in special schools for people with learning disabilities, housing of Roma communities continues to be largely segregated and incidents of violence at the hands of skinheads are still being reported. The Council for Roma Affairs administers a programme providing special State financial subsidies to support Roma students in higher education.

In general, anti-discrimination clauses can be found in various pieces of national legislation, but these are scattered and not comprehensive. The amendments to the Labour Code provide more specific protection against discrimination. Nonetheless, Czech law lacks the precise definitions of discrimination required by the Racial Equality and Employment Equality Directives and it does not yet ensure sufficiently effective remedies for victims of discrimination. Further action is required in order to ensure full conformity with the Directives.

⁶¹ Report from the Czech Government on the Situation of National Minorities in 2001. Available from: <http://www.vlada.cz/1250/aktuality.htm>

In late spring 2003, a draft of a single anti-discrimination law (the Draft Law on Equal Treatment) was submitted to the Legislative Council of the government. It is not yet clear if and when this particular draft will be submitted to the Parliament. Non-governmental organisations widely support the adoption of anti-discrimination law and the enforcement of equality principles and have cooperated on the discussion on its content. There has been no public discussion, e.g. in the media, on the issue.

1. Main Legislation

The Czech Republic does not have a comprehensive anti-discrimination law. Rather, anti-discrimination provisions are included in various Czech laws. As a result, adequate safeguards and remedies in cases of discrimination are still lacking. The Czech Republic will need to do more to meet the requirements of the EC anti-discrimination directives.

The Czech Republic's Constitution provides a general framework for anti-discrimination laws. The Charter of Fundamental Rights and Freedoms ("the Charter"), an instrument of the constitutional order, provides further but still broad protection against discrimination under its Article 3. This provision guarantees equality in access to fundamental rights and freedoms and provides a non-exhaustive list of grounds of discrimination, expressly prohibiting discrimination on the grounds of sex, race, colour, language, religion or belief, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth or other status. The Charter encompasses most of the scope covered under the EC directives, but it does not expressly cover discrimination on grounds of sexual orientation, age and disability. The main problem with the Charter is that in order to obtain protection against discrimination it must be stated in specific relevant statutory laws. The Charter's indirect applicability severely limits its effectiveness in protecting against discrimination.

Civil law protection against discrimination consists of anti-discrimination provisions in a series of different laws. Specific areas are legally protected against discrimination through corresponding laws but by no means does Czech law provide comprehensive protection against discrimination generally.

Criminal law affords some limited protection. The criminal law contains no definition of discrimination. Although a number of racially motivated acts are classified as aggravated crimes and are coupled with severe penalties, the criminal code covers only the most serious incidents, such as those involving racial hatred or violence, and acts motivated by hatred or violence on grounds of religion or belief. Crimes of less severity are classified under the Misdemeanours Law.

Legislation proposed to implement the Racial Equality and Employment Equality Directives has taken two different roads. One entails efforts to comply with the Directives by passing amendments like that to the Labour Code, which encompasses the entire scope of the Directives but is limited only to labour law matters. The second involves a proposal for a General Draft Law on Equal Treatment and Protection against Discrimination, which would seek to fully implement the Directives and apply to all matters under civil law, including labour law. However, the lack of consensus on whether to follow the example of the Labour Code, passing individual amendments for existing laws to implement Directives or to pass one general law, has hindered efforts to complete implementation.

2. Main Principles and Definitions

Not all grounds of discrimination are covered under Czech law. In particular, the Charter does not cover discrimination on grounds of sexual orientation, age or disability. The proposed draft law would cover all grounds of discrimination but debates surrounding the best way to implement the Directives are preventing a vote on the draft law.

Protection against direct discrimination, indirect discrimination, instructions to discriminate, harassment and victimisation is severely limited by the general failure to define these concepts in specific legislation. Under the Labour Code's amendment, direct and indirect discrimination are defined, but the Code's definition of indirect discrimination does not appear to meet the standards set by the Racial Equality and Employment Equality Directives. The proposed General Draft Law attempts to remedy the situation by containing definitions of both direct and indirect discrimination corresponding to the definitions found in the Directives.

Instruction to discriminate is not defined under Czech law and no explicit provisions against such instruction exist. A violation can be asserted only if a specific anti-discrimination law or international treaty applies to the specific area of law governing the incident. Liability for such acts varies depending on what law governs the situation. For instance, employers are strictly liable for employees' instructions to discriminate, under Labour law, provided certain conditions apply.

The Labour Code defines occupational requirements broadly, permitting employers who cite material reasons to maintain such requirements. The Law on Employment contains similar provisions. The most prevalent exemption relates to the clergy in churches and religious assemblies who are exempt in general from State interference. Any labour disputes challenging occupational requirements are therefore exempt and the matter is left to the church or religious assembly to resolve.

Czech law does not impose a duty to provide reasonable accommodation for people with disabilities. The general duty of employers, under the Labour Code, to secure conditions for proper job performance is too broad to provide any substantive guidelines for a decision on the reasonableness of accommodation or a determination on disproportionate burden. Moreover, employers generally prefer not to hire disabled workers and as a result, issues of reasonable accommodation are not often addressed. Accessibility standards have recently been adopted in regulations governing building construction. New construction projects are required to meet standards securing disabled access to new buildings, and approval of building permits is contingent on meeting such requirements. These regulations also apply to any new reconstruction projects on older buildings, but do not require existing buildings that are not undergoing reconstruction to provide such access. The proposed general draft law attempts to improve this situation by including a provision requiring appropriate measures be taken in providing reasonable accommodation provided it does not impose a disproportionate burden. The draft law also includes criteria for determining whether or not there is a disproportionate burden.

3. Material Scope

The Czech Republic does not fully comply with the requirement of the EC Racial Equality Directive to ban racial discrimination in education, training, social security, health care, access to goods and services and housing. The material scope of the prohibition of discrimination is limited to protection afforded in non-discrimination clauses of specific Czech laws. The level of protection, if any, varies in different fields according to the provisions of the relevant laws. The strongest protection can be found in relation to access to goods and services.

Discrimination in employment and vocational training is forbidden on grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation.

4. Equality Bodies

Specialist Inspectorates or Departments within certain ministries are given investigative functions to carry out investigations initiated by complaints. However, they are limited to imposing penalties on individuals. Two such departments are the Employment offices, which defend discrimination on the grounds covered by the Labour Code, and the Czech Trade Inspection office, which defends discrimination on the grounds covered under the Law on Consumers.

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The General Draft Law on Equal Treatment and Protection against Discrimination proposes the establishment of a Centre for Equal Treatment, to provide independent legal assistance to victims of discrimination in pursuing their discrimination complaints, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to discrimination. In addition, the draft law proposes the introduction of conciliation procedures to address disputes between parties.

5. Enforcing the Law

In practice, discrimination cases can be redressed through civil, criminal or administrative proceedings. Such discrimination cases are generally well covered in the media.

In civil cases, an individual can initiate a private suit either through a tort claim, a claim for infringement on personal integrity, or a contract claim, a claim for a dispute arising from a labour contract. In all cases concerning discrimination the principle of the reversal of the burden of proof applies. Material damages can be claimed for damages suffered as a result of the discrimination. In rare cases non-pecuniary damages, determined by the court, are allowed where expressly permitted in the law.

Criminal proceedings can also be initiated, though not at the request of the victim, when serious crimes relating to discriminatory acts occur. However, in practice this rarely occurs and misdemeanour proceedings are often substituted. Penalties imposed include, but are not limited to, imprisonment, community work and financial penalties.

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Discrimination can also be redressed through administrative procedures either through specialised bodies or through misdemeanour proceedings. The employment offices and the Czech Trade Inspection (CTI) are two administrative structures with the competency to protect against discrimination and thereby to conduct investigations and impose sanctions of up to 1,000,000 CZK. The complainants are not actual parties in the administrative proceedings nor are they recipients of penalties imposed. Employment offices can begin investigations either on their own initiative or through a complainant's initiation, but the CTI, on the other hand, can only initiate proceedings upon completion of its own investigations, provided acts of discrimination are ascertained. The effectiveness of these bodies has been limited, as only in a small number of cases have penalties been imposed. In misdemeanour proceedings, the claimant is not a party to the action either and proceedings can follow only if incidents are reported to the police.

Organisations were recently permitted by a special law to represent complainants under limited circumstances. A review would be premature at this time, as the law only came into force on 1 January 2003. In administrative proceedings, however, it is not possible to be represented by organisations especially since the victim is not a party to the proceedings. The Draft Law on Equal Treatment and Protection against Discrimination proposes that associations and trade unions be permitted autonomous legal standing to initiate proceedings before courts.

Estonia - Executive summary

Introduction

Estonia has an ethnically heterogeneous society, the majority groups being ethnic Estonians (68%) and Russians (26%). The latter is the result of the migration flows that took place in the aftermath of World War II. In certain urban areas non-Estonians constitute the absolute majority. Estonian is a mother tongue for 67% and Russian for 30% of the total population. 80% of the total Estonian population are Estonian citizens, 12.4% are stateless former Soviet citizens and 6.3% are Russian citizens (2000 national census). The statistical service reported in 2001 that the level of unemployment was higher among non-Estonians than among Estonians, and it was at its highest among the younger generations.

Estonian society is aging rapidly. According to the 2000 national census, residents of 55 years and older accounted for 26% of the total population. According to the Ministry of Social Affairs, persons claiming disability benefits accounted for 47,140 residents in 2002 (around 3% of the population).

59

Estonia adopted several social policy documents for the better protection of interests of vulnerable social groups. Estonia is trying to overcome disparities between ethnic communities by promoting Estonian language training among non-Estonians (mostly in the framework of the programme "Integration into Estonian Society 2000 – 2007"). Additionally the Government has adopted the General Concept of Disability Policy of Estonia and the National Concept on Elderly Policy. On the basis of these documents, special action plans to deal with the integration of disabled and elderly persons were adopted. Similar social policy measures were taken to tackle gender discrimination. Several projects with the aim of promoting equal treatment were also supported by the European Union, through the PHARE programme.

Estonian law does not yet comply with the requirements of the Racial Equality and Employment Equality Directives. At the beginning of 2002, the Ministry of Justice presented a Draft Law on Equality and Equal Treatment (hereinafter *Draft Law on Equality*) to the general public including the NGO community. The draft was submitted to the Parliament on 21 October 2002 (Draft # 1198 SE) but this Draft was withdrawn following the March 2003 elections. On 30 May 2003 the Minister of Justice and Minister of Education officially discussed the prospects for a new draft law to address discrimination. It was decided that a single law will cover all grounds of discrimination and the Ministry of Social Affairs will be responsible for preparing a new draft. A working group of representatives of both ministries was due to submit a draft to the Government for approval by 1

September 2003. It is highly probable that the basic principles of this new draft will be similar to those of the Draft Law on Equality.

1. Main legislation

Article 12 of the Estonian Constitution expressly prohibits discrimination. It does not provide an exhaustive list of grounds of discrimination. Therefore, a flexible and comprehensive mechanism of protection against discrimination may be based on this provision. The constitutional principle of non-discrimination, worded in general terms, is repeated in some other laws, e.g. in the Law on Cultural Autonomy of the National Minority (Article 3), Law on Employment Contracts (Article 10), Law on Wages (Article 5), Law on Employment Service (Article 6), Law on Advertising (Article 5, which bans offensive and discriminatory advertising), etc.

According to the Penal Code, the most severe violations of the principle of equal treatment constitute a crime: Article 89 (crimes against humanity), Article 90 (genocide), Article 152 (violation of equality), Article 153 (discrimination based on genetic risks). The Penal Code also bans activities that publicly incite hatred or violence on the basis of nationality, race, colour, sex, language, origin, religion, political opinion, financial or social status (Article 151). On 28 January 2003 Estonia signed the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through the use of computer systems. However, grounds such as age, disability and sexual orientation are not covered by Articles 151 and 152 of the Penal Code.

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The Law on Wages establishes special guarantees to ensure equal pay irrespective of sex. As yet it is a unique norm in Estonia, adopted to harmonise domestic law with the requirements of Directive 75/117/EC.

The principle of equality before the courts is expressly laid down in the Article 13 of the Code of Criminal Law Procedure and Article 6 of the Code of Civil Procedure.

In addition to domestic provisions, the norms stipulated by the ratified international treaties have priority over domestic legislation (Article 123 of the Constitution). Estonia has signed and ratified the vast majority of international instruments aimed at combating discrimination. However, references to international law are relatively rare in Estonian courts (with the exception only of the highest court instance).

To sum up, there is no anti-discrimination legislation as such in Estonia.

2. Principles and definitions

The Draft Law on Equality sets up definitions of direct and indirect discrimination which are very close to the definitions of the Racial Equality and Employment Equality Directives but cover more grounds of discrimination: race, ethnic origin, language, religious, political or other belief, disability, age, sexual orientation, property or social status. However, some elements that have been incorporated into the definitions of indirect discrimination in the draft law (such as that the meas-

ure puts a "considerably bigger number of persons" at a disadvantage) make the scope more restrictive than the definitions in the Directives.

Estonian law is not familiar with the concept of harassment and does not provide protection in the meaning of the EC Directives. However, the Penal Code includes provisions that could be used by victims of the most violent acts of harassment. Under the circumstances of "non-violent" harassment, a victim can only use those legal means that are provided by civil and administrative law for compensation of non-pecuniary damage. The Draft Law on Equality introduces the concept of harassment, defined similarly to the notions of the Directives.

The formal legal interpretation of Article 12 of the Constitution leads to the conclusion that it prohibits instruction to discriminate. In addition, section 4 of Article 3 of the Draft Law on Equality provides that the "giving of instructions to breach the provisions of this law shall be deemed discriminatory".

The concept of victimisation does not exist in Estonian law (save for the special protection of an employee who is elected to represent other employees). At the moment a victim can only use ordinary protective mechanisms against unlawful actions. According to Section 2 of Article 17 of the Draft Law on Equality, an employer cannot victimise an employee because the latter has addressed the Legal Chancellor, court or other institution in order to protect his or her rights.

Estonian law provides certain exemptions to these general rules. For example, Section 2 of Article 10 of the Law on Employment Contracts makes it possible for the employer to allow a suitable working and rest time regime that satisfies the religious requirements of an employee. The same law lays down the age limits for employees, while the Law on Public Service foresees certain limits on the basis of age in access to public officials' positions. Estonian law has also established minimum or maximum age requirements for certain important positions in the public domain.

According to the Law on Employment Contracts (Article 86), an employer can terminate an employment contract *inter alia* for reasons of the health of the employee, his or her long-term incapacity to work and due to the age of an employee. Very similar provisions are applicable to public officials. A minor worker enjoys certain privileges and is subject to certain restrictions under Estonian labour law in the interests of his or her health.

The Draft Law on Equality (Article 6) foresees certain circumstances under which the non-fulfilment of requirements of equality and equal treatment will be permitted. Measures to reduce or eliminate inequality based on sex, disability or age are not considered to be discrimination, while such measures should not aggravate the situation of other persons. The draft does not legalise similar measures to address inequalities on the basis of ethnic origin or mother tongue, which may be very topical in Estonia. Article 14 of the Draft Law stipulates that it will be permitted to treat persons differently because of their age if it is objectively justified and necessary. The same draft also foresees obligation of providing reasonable accommodation for disabled persons (Article 13).

3. Material scope

Article 12 of the Constitution is applicable to all spheres of public life. The Draft Law on Equality includes a list of spheres of public life in which the principles of equality and equal treatment must be ensured (Article 5): 1) entry into employment contract and appointment to office; 2) payment of wages; 3) promotion of employees and officials; 4) termination of employment contract or removal from service; 5) opportunities for training, retraining and advanced training; 6) opportunities to be an individual entrepreneur (self-employment); 7) setting of work conditions; 8) membership of and involvement in organisations of workers and employers or in professional organisations and the benefits provided for by these organisations; 9) access to social security, health care or social insurance services; 10) access to goods and services which are available to public; 11) activities in other spheres of public life.

Housing is not specially referred to in this list. However, it is definitely covered by the notion "other spheres of public life". All aspects of education are intended to fall under the heading "opportunities for training, retraining and advanced training".

This part of the draft Law on Equality also stipulates that the legal requirements will not be applied 1) to religious organisations with registered statutes (upon profession of religion or cult or work as a priest); 2) in family or private life relations; 3) in the realisation of the right of inheritance.

4. Equality bodies

As yet there is no specialised body to fight against discrimination in Estonia. However, the amended Law on Legal Chancellor gives that body the mandate to deal with discrimination on the basis of sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for in the law (Section 2 of Article 19).

According to the Draft Law on Equality, a person who is wronged by a perpetrator of discrimination may bring an action or complaint to the court. He or she can also apply to the Legal Chancellor's Office where there are two procedures available depending on the nature of the dispute. If it concerns activities of public institutions, the general procedure of the ombudsman can be used. If the dispute arises between private parties, a conciliation procedure is available. The conciliation procedure can be initiated only on the basis of victim's application and it presupposes the consent of an alleged discriminator. The agreement between parties in conciliation procedures may include an obligation to pay compensation.

The Draft Law on Equality provides for the obligation of the State and municipal institutions to promote the principles of non-discrimination in various spheres of public life.

5. Enforcing the law

A victim of discrimination can use penal procedures (if he suffered from crimes stipulated by the Penal Code), administrative court procedures (complaints against the action of an official or state/municipal institution) and civil procedures (e.g. moral damage etc.). Additionally a person can file an application to non-judicial entities such as the Labour Disputes Resolution Commission, the National Labour Inspection and the ombudsman (Legal Chancellor). The Draft Law on Equality foresees that discrimination disputes may be solved by the Legal Chancellor (Article 18).

There is no developed case law or practice on discrimination-related offences in Estonia. The Labour Inspection did not reveal any cases of discrimination on the basis of race, ethnic origin, disability, sexual orientation or religious belief. The Labour Dispute Commissions have not solved any cases concerning discrimination in this field either.

One of the possible explanations for this factual situation is a low level of awareness of persons about their rights. Additionally, associations with a legitimate interest can engage in judicial or administrative procedures on behalf or in support of the complaint only indirectly. There is no shift or easing of the burden of proof in discrimination-related cases (except with regard to wage disputes). The adoption of the draft Law on Equality and Equal Treatment paralleled with relevant public campaigns would improve the situation.

Hungary - Executive summary

Introduction

Although Hungary is a relatively small country with a population of 10 million, the country's society is highly heterogeneous. According to the 2001 official census, 190,046 people considered themselves to belong to the Roma community. Whilst there were many other minority communities identified, the next largest are German (62,233) and Slovak (17,692). However, minority organisations estimate their community membership to be much higher. In particular, the Roma community is judged to be 400,000 to 600,000 persons.⁶²

The 2001 census also revealed considerable religious diversity in Hungary. Whilst around half the population are Catholics, there were significant numbers of Calvinists (1,622,796) and Lutherans (303,864). 12,871 persons stated that they were Jewish.

64

Despite this diversity, it was not so long ago that the issue of equal treatment and non-discrimination appeared emphatically on the Hungarian political and public agenda. It came to the limelight years after the political transition of 1989. The first comprehensive volume of studies on women's equal opportunities was published in 1997. The first medium-term action plan for the improvement of the living conditions of the Roma – Hungary's largest ethnic minority – was adopted in the same year, whereas the law on the rights and equal opportunities of disabled persons was passed in 1998. Awareness about age discrimination is still largely lacking, and only recently has the issue of discrimination based on sexual orientation started to attract public attention.

Case law was also relatively slow to evolve until quite recently. For a long time most of the lawsuits that became known to the wider public were almost exclusively related to discrimination against the Roma, the largest "visible" ethnic minority. Official prejudice, segregation in schools, discrimination in employment and access to services have been key areas of concern for Hungarian Roma and have consequently constituted the subject matter of the most widely known discrimination cases as well. However, some successful cases on other grounds have also attracted public attention recently. These include a case launched to curb a district mayor's attempt to ban a gay and lesbian organization from a cultural festival and a case brought by a disabled person against a fashionable café where wheelchair access was not provided.

⁶² Report submitted by Hungary pursuant to the Framework Convention for the Protection of National Minorities: available from: <http://www.meh.hu/nekh/Angol/4-1.htm>



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The increased awareness signified by the growing number and diversity of discrimination lawsuits has also been reflected by legislative efforts in the field. The Minorities Ombudsman, legal experts, international organs and NGOs have for a long time been emphasising the necessity of creating a general anti-discrimination act that could replace the present legal framework, which consists of a patchwork of anti-discrimination provisions. They have also been pressing for the development of an adequate system of sanctions suitable for the prevention of discriminatory acts and the effective punishment of the offenders. The necessity of setting up an effective institutional system to guarantee the implementation of the anti-discrimination act and the above sanctions has also been pointed out on several occasions. Other experts and governmental actors have argued for a long time against the comprehensive reform of the system, claiming that sufficient protection against discrimination might be provided through augmenting the existing provisions.

A debate on the need for anti-discrimination legislation began in 1997, started to intensify in late 2000 and reached its high point in early 2002. It came to a conclusion in the spring of 2002 with the appointment of a new government, the programme of which explicitly contained the promise of a new comprehensive anti-discrimination law. A detailed "concept paper" was published by the Hungarian authorities in late 2002 as a basis for consultation. The Draft Bill of the Act on Equal Treatment and Equal Opportunities (hereinafter: Draft Bill) was in the process of being finalised at the time of writing this report. The Draft Bill is clearly aimed at transposing the Racial Equality Directive and the Employment Equality Directive into the Hungarian legal system. The intensity of involvement of independent experts, NGOs and social partners in the legislative process reached a higher than usual level, and the Justice Ministry also made efforts to inform the public about the planned reform. In spite of this, awareness of the coming changes and their consequences may not be regarded as appropriately widespread. Finally, an important step in the fight against discrimination was the appointment on 6 May 2003 of a minister without portfolio for equal opportunities.

Overall, it is clear that whilst Hungarian law contains a variety of provisions that offer protection from some forms of discrimination, further action will be necessary to comply fully with the Racial Equality and Employment Equality Directives.

1. Main legislation

Hungary has ratified all the major international instruments combating discrimination, including the UNESCO Convention against Discrimination in Education, ILO Convention No. 111, and the International Convention on the Elimination of Racial Discrimination. The country is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The cornerstone of the existing anti-discrimination system is the country's Constitution, which includes a general prohibition on discrimination and a provision prescribing the strict punishment of discriminatory acts and practices. This fundamental ban is augmented by various anti-discrimination clauses that exist in several acts regulating different fields of life, such as employment, education, health care, and so on. The main criticism voiced in connection with this system is that it

provides for a very uneven level of protection. In some sectors (e.g. health care) these non-discrimination clauses do not go beyond declaring a prohibition and fail to set up a consistent system of sanctions, whereas there are a number of fields (e.g. social security) where not even the prohibition of discrimination is explicitly declared. In other areas (such as employment) a relatively extensive anti-discrimination system is established with a wide range of sanctions, however often these remain unused due to the competent authorities' lack of willingness to apply them or due to the low level of assertive capacity on the part of the vulnerable groups concerned.

In practice the articles of the Civil Code that set forth the sanctions prescribed for the violation of inherent rights are used by victims of discrimination, attorneys, human rights activists and NGOs as a substitution for a general anti-discrimination sanction system, since these can – though with some limitations – be applied to any kind of discrimination with no regard to the nature of either the field (labour, education, service sector, etc.) or the ground of discrimination (ethnic, gender, etc.).

The Penal Code only sanctions discrimination in its most extreme form: Violence Against a Member of a National, Ethnic, Racial or Religious Group (Article 174/B) carrying a penalty of up to five years, rising to eight in the case of armed assault. At the same time, petty offence sanctions exist for discrimination in employment, education and denial of access to services.

There are a number of aspects of the existing system that are not entirely in line with the Directives. The biggest deficiencies are: (i) the lack of basic definitions (e.g. that of direct discrimination, harassment or victimisation); (ii) the incoherent nature of the regulation (with certain fields completely lacking anti-discrimination provisions); (iii) the lack of a consistent system of sanctions and an institutional framework vested with the task to enforce the anti-discrimination provisions and apply the sanctions if necessary; (iv) the lack of legal standing in discrimination cases for NGOs and other entities with a legitimate interest in the implementation of the relevant regulations; and finally (v) the restricted and inconsistent application of the shift in the burden of proof, which does not exist outside the scope of labour law (see these in more detail below.)

2. Main principles and definitions

Although the principle of non-discrimination is declared in several statutes, the definitions related to discrimination are largely missing from the system. Until July 2001, there was no statutory definition of either direct or indirect discrimination in the Hungarian legal system. Interestingly – and characteristic of the incoherence of the present Hungarian anti-discrimination legislation – this changed when a definition of indirect discrimination was introduced into the Labour Code. At present, while there is a definition of indirect discrimination (although only in relation to labour law), still no definition of direct discrimination exists. Some analysis of the term “discrimination” can be found in the decisions of the Constitutional Court.

Unlawful harassment does not exist as a concept in Hungarian law, neither in connection with race nor in relation to gender. A similar situation prevails with respect to the instruction to discriminate: it does not exist as a concept, but the principle of holding superiors responsible for their unlawful instructions or orders is widely accepted. This however does not create liability for cer-

tain instances of instruction to discriminate (such as a company instructing a labour centre not to send people of a certain ethnic origin).

Exemptions and exceptions as contained in the Directives exist in labour law, although there are no provisions that clearly fall under the category of genuine and determining occupational requirements. There is no express duty on employers to provide reasonable accommodation for disabled workers.

The Draft Bill makes an attempt to create fundamental definitions compatible with the Directives. The solutions offered by the first version of the Draft Bill leave room for improvement with regard to both coherence and compatibility with the Directives. At this point however, it is impossible to judge what the final outcome will be.

3. Material scope

At present, the Hungarian anti-discrimination provisions cover most but not all of the fields listed in the Racial Equality Directive: employment and education are for instance covered thoroughly, whereas no specific non-discrimination clauses are in place with regard to housing or access to services. In theory, sectors with no express prohibition of discrimination (e.g. social security) fall under the general constitutional ban on discrimination. In some respects (e.g. with the inclusion of child protection) the Hungarian anti-discrimination system even goes beyond the scope of the Racial Equality Directive.

68

Discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation is forbidden in employment. Discrimination on the same grounds is also forbidden in vocational training, with the exception of sexual orientation, which is not covered.

4. Equality bodies

Although several bodies have competence to investigate and sanction discrimination, Hungary is at present short of a unified regulatory agency entrusted with all the powers envisaged under Article 13 of the Racial Equality Directive,

The Parliamentary Commissioner for Human Rights and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities may be closest to what is foreseen by the Racial Equality Directive – the latter being vested with the task of investigating complaints on violations of the rights of – including discrimination against – members of the thirteen acknowledged national and ethnic minorities, while the former is responsible for all other complaints concerning the infringement of constitutional rights (among others the right to equal treatment). They have sufficient independence, as well as the powers to conduct independent surveys, publish reports, and make recommendations. However, they are not entitled to sanction perpetrators. Nor do they have the power and financial means to provide assistance to victims of discrimination in pursuing their complaints. A further limitation is that they are only authorised to look into complaints against public authorities and public service providers, so private actors fall out of their scope of competence.

The Draft Bill proposes the establishment of the Equal Treatment Commission that would be competent to deal with all types of discrimination and proceed against all types of perpetrators. Beyond investigative authorisations, it would have the power to bring lawsuits, impose fines and initiate disciplinary proceedings. Through procedural techniques, legal assistance to victims of discrimination would also be resolved.

5. Enforcing the law

The Hungarian system of sanctions is fragmented and fails to cover various fields that come under the Directives.

The enforcement model is fundamentally individualistic. Remedies for discriminatory acts can be sought under the Civil Code (from the ordinary courts), the Labour Code (from the labour courts) and in various administrative proceedings (e.g. from the labour inspectorates, the consumer protection inspectorates or the local notaries), but the system of sanctions is rather incoherent. Extreme forms of racial discrimination are penalised through the criminal law.

The core provisions of this patchy system are to be found in Articles 76 (declaring that racial discrimination is a violation of civil rights) and 84 (containing the types of remedies to be sought) of the Civil Code. Remedies include the court declaration of infringement; forbidding the discriminating person from carrying on with the injurious behaviour; obliging him/her to provide the victim with moral and/or financial compensation; and finally the possibility to impose punitive damages on the perpetrator. It is the length of proceedings and the level of compensation that prevents sanctions from being effective, proportionate and dissuasive.

69

As shortcomings of implementation are also sometimes related to the low assertive capacity of the vulnerable groups concerned, it is also highly problematic that associations and other entities with a legitimate interest in ensuring compliance with anti-discrimination law do not have a full legal standing when providing victims of discrimination with legal assistance.

The shift in the burden of proof at present is only acknowledged in labour law. In civil law, the institution is so far unknown, although – as pointed out above – most discrimination cases are solved on the basis of the Civil Code.

The Draft Bill wishes to solve the problem of the scattered system of sanctions by establishing a more robust agency (the Equal Treatment Commission – see above) with a specific duty of promoting equal treatment, investigating all discrimination complaints and acting firmly against perpetrators.

The Draft Bill relies heavily on sanctions already operating in civil law. Furthermore, the document employs fines and the institution of disciplinary proceedings, while also suggesting some new forms, e.g. the banning of discriminating business associations from tenders aimed at acquiring state support.

By introducing the institution of *actio popularis*, the Draft Bill makes it easier for associations with a legitimate interest in ensuring compliance with anti-discrimination law to start and support discrimination complaints. The document also extends the application of the shift in the burden of proof to all – non-criminal – judicial procedures.

As a summary, we can conclude that in spite of its weak points and uncertainties, the passing of the Draft Bill would constitute a significant step towards bringing the Hungarian legislative framework into line with the Racial Equality and Employment Equality Directives.

Latvia - Executive summary

Introduction

Latvia is, and always has been, a multiethnic country, although the proportion of various ethnic groups among its population has varied. Ethnic origin is recorded in the Population Register. It is based on the ethnicity of either of a person's parents, and can be changed upon reaching the age of majority by choosing the ethnicity of any grandparents. The entry of ethnicity in passports is optional. By 1 January 2003, out of 2,331,467 inhabitants registered at the Population Register of Latvia, the ethnic composition was as follows: 58.4% Latvians; 29.0% Russians; 3.9% Belarussians; 2.6% Ukrainians; 2.5% Polish; 1.4% Lithuanians; 0.5% Jews; 0.1% Estonians; and 1.6% others, including 0.4% Roma. Latvian citizens constitute 1,795,454 persons or 77% of the population. Of these, ethnic Latvians constitute 75.6%. 21.62% of persons are non-citizens, of which ethnic Russians constitute the biggest group at 66.8%. This helps to explain why issues relating to non-citizens are often treated as mainly concerning Russians or Russian-speakers. The rights of citizens, non-citizens and linguistic issues are very sensitive. The Roma population experiences discrimination in employment and accessing services, however, this has not attracted much attention due to the lack of studies of the situation (the first such study is being conducted now). It should also be noted that the Roma population in Latvia is relatively small; 8300 according to the official data, although larger according to the data of Roma associations, since it is possible that the ethnicity of the other parent was chosen for official purposes despite the self-identification of the person and irrespective of her perception by others.

71

There are no studies on the issues of age in employment, however, it is common knowledge that people over the age of 40 have serious difficulties finding employment. The recent decision of the Constitutional Court nullifying provisions of a law that set an age limit for access to certain positions in academia and science is likely to lead to the reassessment of other age limits laid down in legislation.

The difficulties of disabled persons in finding employment are also common knowledge, although there are no studies to confirm this either. There is no documented evidence about the difficulties encountered by sexual minorities, but this is probably due to the fact that many homosexuals are forced to conceal their sexual orientation as a result of the attitudes commonly found in Latvian society. That this is to a significant extent still a taboo topic was demonstrated by the adoption of the Labour Law – the most advanced law in terms of outlawing discrimination - when during the consideration of the law in the Parliamentary committee the

express reference to sexual orientation in the non-discrimination clause was deleted, adding instead “other circumstances” to leave the list open.

In this context, it appears that it is necessary to take a more active stand to actually promote equal treatment, as the lack of case law cannot be taken as an indicator that no problems exist. Currently, consultations are only taking place on a regular basis with NGOs addressing issues of disability and gender. While the framework for dialogue with social partners exists too, the issue of discrimination has so far been addressed minimally. Consequently, there is also very little public debate, which so far has concentrated almost exclusively on the issues of Russian-speakers and the related issues (including linguistic ones). The creation of a special post of minister for special assignments for society integration affairs to address these issues is a promising development.

Although Latvia has introduced a number of measures to strengthen legal protection against discrimination, such as improvements to the Labour Code, further action will be necessary to comply fully with the Racial Equality and Employment Equality Directives.

1. Main legislation

At constitutional level the principle of non-discrimination is enshrined in Article 91 of the Latvian Constitution providing, *inter alia*, that “Human rights shall be observed without discrimination of any kind”. Thus, the Constitution outlaws all discrimination, but does not expressly state the grounds on which discrimination is prohibited. The Constitution is regarded as having direct effect, that is, it directly binds all public bodies, but it does not have horizontal effect. This means that while discrimination is illegal in the public sector even without any further laws, which are thus only needed to provide for sanctions and the enforcement of the principle of non-discrimination, in the private sector the introduction of special laws to outlaw discrimination is essential. The same applies to international treaties: the treaties binding on Latvia only bind the public bodies. An important advantage of these treaties lies in the fact that they expressly lay down the grounds on which discrimination is prohibited, an issue on which the Constitution is silent.

Anti-discrimination law is fragmented in Latvia: there is no one single comprehensive law, and separate non-discrimination clauses are included in various laws, but not in all of them. This is also the main problem in the Latvian anti-discrimination law since, as mentioned above, discrimination is not outlawed in the private sector unless expressly provided for by statute, and, even if it is outlawed in the public sector due to the supremacy of the Constitution, the absence of a specific implementing law considerably complicates enforcement of the prohibition.

The most comprehensive prohibition is found in the Labour Law adopted in 2001 and drafted taking into account the requirements of the relevant EC Directives, including the Racial Equality and Employment Equality Directives. It is the only law to include a provision on the shift in the burden of proof, but importantly this law does not expressly prohibit discrimination on the basis of sexual orientation. A number of other laws contain non-discrimination clauses with exhaustive lists of prohibited grounds of discrimination, which do not include all grounds

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covered by the Directives. Sexual orientation is notably missing from all Latvian laws, and also the ground of age is problematic. Even if the list of grounds is left open, thus potentially encompassing all grounds, this does not comply with the requirement that the law is expressly applicable to all specific grounds addressed by the Directives.

Finally, there are laws that do not contain any anti-discrimination clause at all, for example, the law on housing. There are two cases of discrimination that are covered by the Criminal Law: Article 78 protects victims against discrimination on the basis of racial or national origin (in the field of economic, political, or social rights only, and only if intent to discriminate can be shown) and Article 150 protects against discrimination based on religion or belief. Neither of these provisions has ever been applied to cases of discrimination, and the requirement of intent in Article 78 is considered to set a very high threshold for its application.

The lack of case law serves to confirm this. In fact, the scarcity of case law – there have been only two reported civil cases where discrimination was proved in the context of employment – clearly demonstrates that the existing anti-discrimination legislation is incomplete (the lack of the shift of burden of proof in any field other than labour relationships may be one of the principal reasons for this), and also that no sufficient attention has been given to discrimination issues.

2. Main principles and definitions

In Latvian law definitions are notably absent; the Labour Law is the only law that defines indirect discrimination. In relation to other non-discrimination clauses, the definitions may be borrowed from the case law of international institutions, but this does not permit the law to be clear and foreseeable. The grounds for discrimination are not defined either, and it is particularly feared that disability might be interpreted narrowly, using the technical meaning of this term, i.e. depending on formal recognition of a person's diminished ability to work. Victimisation is defined under the Labour Law, but protection against it exists only in the framework of the Labour law and in connection with a complaint to the National Human Rights Office. There is no outlawing or definition of either harassment or instruction to discriminate.

3. Material scope

While the Constitution prohibits all discrimination in the public sector, thus encompassing all possible grounds, although not expressly listing them, the situation is more problematic in relation to separate spheres and the application of the principle of non-discrimination to the private sector. The field most adequately covered is that of employment relationships, both in the private and public sector; here, in the Labour Law all prohibited grounds for discrimination required by the Directives, with the exception of sexual orientation, are expressly listed. Unfortunately, there is no express prohibition of discrimination in the law governing employment in the State civil service, and the relevant provisions of the Labour law do not apply.

Access to vocational guidance and training, as well as issues of education in both public and private sectors (with the exception of the civil service) are covered by the Labour Law which refers to “occupational training” (without express reference to sexual orientation) and the Law on Education, which also applies to both public and private sectors. The problem with the latter, however, is that it contains an exhaustive list of grounds which does not include age, disability (although it could be argued that the latter can be subsumed under the “health” heading) and sexual orientation.

The respective laws on membership and involvement in organisations of workers, employers or professional organisations do not always contain anti-discrimination clauses. Thus, the requirements of the Directives have not been complied with in this sphere.

In the field of social protection, including social security and healthcare, even if a non-discrimination clause is included in a law, which is not the case with all laws in this field, it does not expressly list all grounds (notably, age, disability and sexual orientation are missing), and in some cases there is no equality clause at all. Thus the requirements of the Racial Equality Directive are not currently fulfilled in relation to either the public or private sector.

Access to goods and services is a completely neglected field, without any express prohibition of discrimination. It must, however, be noted that discrimination on the grounds of religion in any sphere, and both in the public and private sectors, is outlawed by Article 150 of the Criminal Law.

Thus, the problem in the public sector is that in many instances the prohibition of discrimination and the prohibited grounds are not provided for expressly, while in the private sector in some instances discrimination is either insufficiently prohibited, not encompassing all the required grounds, or not prohibited at all.

4. Equality bodies

The body most closely corresponding to the requirements of the specialised body required by Article 13 of the Racial Equality Directive is the National Human Rights Office (NHRO), although it does not have a special mandate in the field of anti-discrimination. The NHRO is an independent ombudsman-like institution entrusted with the task of promoting the observance of human rights.

According to the relevant law, the NHRO has the following functions: (1) to provide information and raise public awareness on human rights; (2) to inquire into any individual complaint related to a human rights violation; (3) to take immediate measures in cases of human rights violations and to identify situations causing human rights violations on its own initiative; (4) to monitor the human rights situation in the country, to prepare and promote programmes for the promotion of observance of human rights; (5) to carry out analyses of legislation; and (6) to report annually to the Parliament. It can be said that the functions of the NHRO correspond to those required by Article 13 of the Racial Equality Directive and include dealing with discrimination on any grounds, even if it has no specific mandate in the field of discrimination.

The NHRO is entitled to review individual complaints, to acquire the necessary information and to strive for friendly settlements through conciliation. If this fails, the NHRO advises the parties of its opinion and proposals in the form of recommendations, and also presents its suggestions and recommendations for the prevention of human rights violations to the relevant institution or official; however, it cannot enforce its recommendations, nor can it levy any fines. If the problem is in the law itself, the NHRO may submit a constitutional complaint to the Constitutional Court, and has done so on a number of occasions. This leaves the NHRO with a quite limited mandate, and its role in enforcing the principle of non-discrimination is further undermined by frequent changes of personnel, insufficient funding and a heavy workload.

5. Enforcing the law

While there are legal avenues for addressing cases of discrimination, so far only two cases alleging discrimination have been decided by the courts. Aside from the courts of general jurisdiction, other notable avenues include the possibility to submit a complaint to the same public institution that has treated the person differently, or a higher institution. This, however, only applies to cases concerning public institutions. If discrimination has occurred in the framework of labour relationship, the person may address the State Labour Inspection which could impose a fine. However, no complaints about discrimination have been received by the Inspection, which may be explained by the fear of victimisation and also by the lack of awareness. Thus, the normal avenue for redress would be a court of general jurisdiction; however, the recent amendments to the Civil Procedure law have virtually removed the possibility to be represented in a court by anyone but a sworn advocate. In the absence of a state-sponsored legal aid in civil cases this raises serious problems related to access to justice and is being challenged in the Constitutional Court. Even if there are associations willing and able to support the victims of discrimination in their complaint, the Civil Procedure Law currently does not permit them to engage formally in the proceedings; the only thing they could do is to pay for the services of a sworn advocate. The only exceptions to this are the members of the trade unions which have the right to represent and defend the rights and interests of their members in the State institutions, including bringing a case in the court. The same applies to voluntary organisations, if it is so provided in their regulations, and only in relation to the members of the organization. The nearly complete lack of case law certainly should be taken to indicate that problems with access to justice, lack of trust in institutions, as well as insufficient awareness exist, and should not lead to the conclusion that there is no discrimination in Latvia.

The provision on the shift of the burden of proof has been included in the recent Labour Law, which only applies to employment relationships. It does not exist in any other sphere, and it has not been tested according to Labour Law as no cases under it have been decided yet. The lack of case law also means that it is difficult to evaluate the application of sanctions: the provisions of Criminal Law providing for criminal penalties of up to ten years of deprivation of liberty in some very limited cases of serious discrimination have never been applied, nor have the provisions of the Labour Law that would permit the awarding of moral damages in some cases of discrimination. Thus, their character of being “effective and dissuasive” depends on their application in the future, while under the current interpretation of the relevant provisions of

the Civil Law it is only possible to claim pecuniary, not moral, damages, which is clearly not sufficient as in many cases of discrimination there will be no actual damages sustained. In addition to legislative (or possibly judicial, by changing the interpretation of the law) change to remedy this problem, the gaps in legislation could be filled in by providing for administrative punishment in cases not coming under the provisions of Criminal Code; there is no evidence, however, that any consideration has been given to these possibilities, thus leaving the issue of sanctions, in addition to that of actually applying and enforcing the existing anti-discrimination law, extremely problematic.

Lithuania – Executive Summary

Introduction

Lithuanians make up 83.4% of the total population of 3.5 million. The largest ethnic minorities are the Poles (6.7%) and the Russians (6.3%), while the Roma community comprises approximately 2500 people. The most practiced religion is Roman Catholic.⁶³

In 2002, the Lithuanian Parliament initiated the development of a new law on anti-discrimination. The wide process of consultation with the civil society revealed the general support for more focused measures to combat discrimination on different grounds, except for the ground of sexual orientation. Homosexuality was a criminal offence under the Soviet legislation. The entrenched stereotypes result in intolerance from society towards homosexuals that has been decreasing throughout the last decade, but still remains widespread. The Roma remain the most vulnerable ethnic minority. Although the Government is implementing a Programme for the integration of the Roma (2001-2004), further sustained efforts are needed in order to overcome the numerous social challenges and prevent discrimination against the Roma community. Observers have pointed to the need to involve the Roma community more closely in drawing up and implementing the measures and to strengthen the administrative capacity of the Department of National Minorities. The period of transition from planned to market economy increased disparities within society and rendered certain social groups, including the elderly and the disabled, more vulnerable. Thus, significant further efforts are needed in order to prevent discrimination on the grounds of age and disability.

The Government maintains a regular dialogue with NGOs representing different vulnerable groups, albeit at varying degrees of intensity. However, the issues relating to non-discrimination are not yet on the agenda of discussions among social partners.

Lithuania has already adopted specific anti-discrimination provisions and is in the process of taking further actions (in particular the expansion of the competence of the Ombudsman for Equal Opportunities). Nonetheless, further action seems required in order to ensure full conformity with the Racial Equality and Employment Equality Directives.

⁶³ Data of the 2001 Population and Housing census. Website of the Department of Statistics to the Government of the Republic of Lithuania: www.std.lt

1. Main legislation.

There is a general and ground-specific legal framework concerning the principle of equal treatment in Lithuania. The general legal framework consists of Lithuania's obligations under international treaties, the Constitution, judgments of the Constitutional Court and legislation. Lithuania is a state party to major international and regional human rights treaties. Under the Lithuanian legal system, international treaties ratified by the Parliament are directly applicable. The Lithuanian Constitution establishes the principle of equal treatment on the basis of sex, race, nationality, language, origin, social status, religion, convictions or opinions. The new Labour Code, in force from 1 January 2003, provides a more comprehensive list of grounds than the Constitution, including sexual orientation. According to the Labour Code, disabled persons are entitled to "additional support". The principle of equal treatment is addressed by a number of laws regulating various aspects of social life, e.g. education, public service, unemployment benefits, elections, and others.

The ground-specific legal framework consists of legislation specific to each ground. There are no specific legal acts providing for the principle of equal treatment on the grounds of age or sexual orientation. However, it is relevant to note that the new Criminal Code, which entered into force on 1 May 2003, abolished the difference in the age of consent for heterosexual and homosexual relations. The level of protection on different grounds of discrimination varies. Whilst the grounds of racial or ethnic origin and religion or belief enjoy constitutional protection, disability, age and sexual orientation do not. The legal framework covering disability, which consists of the Law on the Social Integration of the Disabled and specific provisions in other laws, is more elaborate than the provisions regarding age and especially sexual orientation. Most sanctions for discriminatory behaviour are contained in the Criminal Code, which makes their application difficult.

79

The current legal framework is not sufficient to comply with the Directives. The general framework will be significantly strengthened if the new Law on Equal Opportunities is passed by the Parliament. One of the objectives of the draft is to fulfill the requirements of both the Racial Equality and Employment Equality Directives. The draft Law expands the mandate of the Equal Opportunities Ombudsman from only gender-based discrimination to a number of additional grounds, including racial or ethnic origin, religion or belief, disability, age and sexual orientation. The draft was at an advanced stage of consideration at the Parliament at the time of drafting this report.

2. Main principles and definitions.

Although the principle of equal treatment is not new to the Lithuanian legal system, its effective application in the defence of people's rights is not yet part of the tradition. Legal regulation is abstract, and there is no case law to put it in practice. The situation would improve if the new Law on Equal Opportunities were passed as it was drafted along the lines of the provisions of the Directives.

There are no definitions of direct and indirect discrimination for the grounds covered by the Directives. The draft Law on Equal Opportunities introduces the definitions for all the grounds,

which are similar to the definitions of the Law on Equal Opportunities of Women and Men relating to gender-based discrimination. Although the definition of the direct discrimination as contained in the draft in its presently available form differs from the definitions of the Directives, it is being revised in order to comply.

There is no definition of harassment in Lithuanian law that would be fully compatible with the definitions of the Directives. Some forms of harassment on a number of grounds are punishable under the Criminal Code and the Code of Administrative Violations, but there is no specific protection against harassment linked to sexual orientation, disability or age.

There is no specific prohibition of giving instructions to discriminate in the national law. The Criminal Code contains provisions that would encompass "giving instructions to discriminate" on a number of grounds; however, those provisions have never been applied in this context in practice. The definition of victimisation does not exist in national law, except for in the gender-based equal opportunities legislation.

There are no specific provisions for exceptions in national legislation. The duty to provide reasonable accommodation for people with disabilities is not established in Lithuanian law.

3. Material scope.

The new Labour Code, which entered into force in January 2003, provides a specific prohibition of discrimination in employment on various grounds, including racial or ethnic origin, religion or belief, age, disability and sexual orientation.

Discrimination on grounds of racial or ethnic origin is expressly forbidden in several areas outside employment. In particular, some aspects of legislation governing social protection and education prohibit this form of discrimination. In relation to access to goods and services, including housing, there is no specific legislative provision, however, general constitutional and civil law principles could be invoked as a potential source of protection.

4. Equality bodies.

Responsibility for national policy on developing and implementing harmonious relations between various national groups lies with the Department of National Minorities and Lithuanians Living Abroad under the Government. The Department may accept and consider complaints within the field of its competence. However, it is not authorised to impose administrative sanctions. In order to protect better the rights of victims of discrimination through non-judicial procedures, the draft Law on Equal Opportunities proposes that issues concerning discrimination on the basis of ethnic and racial origin, as well as religion or belief, disability, age and sexual orientation, should be added to the mandate of the Ombudsman for Equal Opportunities of Women and Men.

The Ombudsman for Equal Opportunities of Women and Men currently investigates complaints relating to gender-based discrimination and sexual harassment. The Ombudsman may also initi-

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1987

ate investigations at his/her discretion. Upon completion of investigation, the Ombudsman may take a decision: to refer the material to investigative bodies if indications of an offence have been established; to address an appropriate person or institution with a recommendation to discontinue the actions violating equal opportunities or to repeal a legal act relating to that; to hear cases of administrative offences and impose administrative sanctions; to dismiss the complaint if the violations mentioned in it have not been corroborated; to discontinue the investigation if the complainant withdraws the complaint or if objective evidence about an alleged offence is lacking; to warn about the committed offence; to temporarily suspend the investigation if the person who submitted the complaint or the person whose actions are investigated is ill or absent.

Each year, the Ombudsman submits to the Parliament an annual report on the activities of the Office of the Equal Opportunities Ombudsman in the preceding calendar year. The report is considered by the Parliament and is subsequently publicised. In addition, the Ombudsman reports on the implementation of the Law on Equal Opportunities of Women and Men and submits recommendations to State institutions for the revision of legal acts and the priorities in the policy of the implementation of equal rights.

If the draft Law on Equal Opportunities will be adopted, all the tasks listed in Article 13 of the Racial Equality Directive will be fulfilled, namely: providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; conducting independent surveys concerning discrimination; and publishing independent reports and making recommendations on any issue relating to such discrimination, both in the public and the private sectors.

5. Enforcing the law.

The legislation of the Republic of Lithuania guarantees everyone the equal right to defend his/her rights and lawful interests in court. There are no existing special judicial, administrative or conciliation procedures for cases of discrimination under the Lithuanian law. In cases of discrimination, victims must rely on the general procedures established by the constitution and legislation. The settling of work-related disputes, including those related to discrimination, is the competency of Labour Disputes Commissions and the courts. Persons who believe that their rights have been infringed in the sphere of public administration by specific administrative acts or the actions (or omissions) of individual civil servants or municipality employees have the right to file a complaint with an Administrative Disputes Commission or Administrative Courts. This would include areas relating to the provision by the state of social protection, social advantages, education or goods and services. In practice, there are no known cases of discrimination brought before courts or non-judicial bodies.

There is no direct entitlement under the national law for associations and other entities to engage in either judicial or administrative procedures as a party of the case in support of the complainant. The new Civil Procedure Code may indirectly allow the engagement of non-governmental organisations; however, there have been no known cases, nor judicial interpretation of the provision (although it is important to note that the new Code only entered into force on 1 January 2003). There are no specific provisions for shifting or easing the burden of proof in cases of discrimination.

A range of penalties are available under the Criminal Code, including imprisonment, fines, and deprivation of the right to perform certain duties or jobs or to engage in certain activities. The Labour Code does not provide for any sanctions for workplace discrimination. Since only severe workplace discrimination would be punishable under the Criminal Code, such legal regulation of sanctions is not effective.

It is considered that, following the example of gender discrimination, infringement of the principle of equal treatment on the basis of racial or ethnic origin, religion or belief, disability, age or sexual orientation could be prohibited by the Code of Administrative Violations. A draft Law amending the Code has been registered at the Parliament. There is no provision for payments of compensation to victims in national legislation. In the absence of discrimination cases being heard by the courts, the existing sanctions are not being applied.

Malta - Executive summary

Introduction

At the end of 2002, the Maltese population was estimated at 386,938 of which 191,975 were males and 194,963 were females. In addition, the resident foreign population in Malta in the same period amounted to 10,358 persons (National Statistics Office News Release, 22 April 2003).

Mention of the need for tolerance within Maltese society can be traced back as far as the Maltese Declaration of Rights of 1802. In spite of this, over the years there have been instances of discrimination within Maltese society on the basis of the grounds mentioned in Article 13 of the EC Treaty and the Racial Equality and Employment Equality Directives.

84

This is also evidenced by the fact that various organisations, both governmental and non-governmental, have been set up to combat discrimination on various grounds. These organisations include the National Youth Council, the National Council for the Elderly, the Alliance of Pensioners Organisations, the National Commission for Persons with Disability, the Commission for the Advancement of Women, The National Council of Women and the Malta Gay Rights Movement. Most of these organisations are also active within the Civil Society Committee set up within the Malta Council for Economic and Social Development. There are also other non-governmental organisations that have, on various occasions, taken a stand on matters of discrimination, even though they were not specifically set up with the purpose of combating discrimination.

Malta has introduced a number of specific legislative acts to combat discrimination, including the Employment and Industrial Relations Act 2002. However, the existing legislation does not reflect all elements of the Racial Equality and Employment Equality Directives, for example with regard to the grounds of discrimination or the definition of discrimination. Therefore, further action will be needed to comply fully with the Directives.

1. Main legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution in 1964 which, under Article 45, specifically caters for the protection from discrimination on the basis of race, place of origin, political opinions, colour, creed or sex

and also provides that no law shall make any provision that is discriminatory either of itself or in its effect. Since then, many steps have been taken by the Maltese State authorities to combat discrimination in all its forms.

In 1987, the protection against discrimination was further enhanced by the enactment of the European Convention Act which provides that the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms have become and are enforceable as part of the Law of Malta. The importance of this legislation lies in the fact that whereas the grounds of protection from discrimination contained in Article 45 of the Constitution are exhaustive, through the European Convention Act, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms can also be invoked before and enforced by the Maltese Courts in the event that a person is hindered in the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination. In fact, there have been various cases of alleged discrimination that have been brought before the Maltese Courts on the basis of Article 14 of the Convention, as they deal with grounds which are not provided for in Article 45 of the Constitution.

In addition to this general protection, various other specific legislative enactments provide protection from discrimination, the most relevant of which are the Equal Opportunities (Persons with Disability) Act, 2000; the Employment and Industrial Relations Act, 2002, which relates to employment in the private sector; the Equality for Men and Women Act, 2003; and the Criminal Code which, under its Article 82A criminalizes incitement to racial hatred.

Besides the national legislation, which affords protection against discriminatory treatment, Malta is also a party to various international human rights instruments that provide for the protection against discrimination. These include: The European Convention for the Protection of Human Rights and Fundamental Freedoms and various protocols thereof (but not Protocol 12 thereof), The European Social Charter, The Framework Convention for the Protection of National Minorities, The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and ILO Convention 111 on Discrimination in Employment and Occupation. It is to be noted that Malta should shortly be ratifying the Revised European Social Charter of the Council of Europe.

2. Main principles and definitions

With respect to the prohibition of direct and indirect discrimination, whereas reference to direct discrimination is found in the aforementioned legislation, the only legislation that makes express reference to indirect discrimination is the Equality for Men and Women Act, 2003. This is unlikely to be sufficient to comply fully with the Racial Equality and Employment Equality Directives.

Protection from harassment under Maltese legislation is, to date, restricted to sexual harassment (that is, those instances wherein a person is subjected to acts of physical intimacy or is requested to grant sexual favours or is subjected to acts or conduct having sexual connotations) and harassment based on gender (that is, those instances wherein a person is harassed because of his/her

gender) under the Employment and Industrial Relations Act, 2002 and the Equality for Men and Women Act, 2003. With respect to instructions to discriminate, there is no express prohibition of this conduct in Maltese legislation.

Victimisation is forbidden under Maltese law, but only in the field of employment. Article 28 of the Employment and Industrial Relations Act, 2002 provides that if any person (a) files a complaint to the lawful authorities or initiates or participates in proceedings for redress on grounds of alleged breach of the provisions of the Act, or (b) discloses information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests, it is unlawful to victimise such person for having so acted.

With respect to exceptions, there are no laws, rules or regulations on the national level providing for exemptions in relation to occupational requirements as laid down in the Racial Equality Directive. With regards to the occupational requirements laid down in the Employment Equality Directive, the Employment and Industrial Relations Act, 2002, as well as the Equality for Men and Women Act, 2003, contain provisions in this respect. Maltese law also provides for the provision of reasonable accommodation under subsidiary legislation issued in terms of the Occupational Health and Safety Authority Act, 2000 as well as under the Equal Opportunities (Persons with Disability) Act, 2000. Article 7 of the latter Act provides that employers must provide reasonable accommodation for employees with disabilities and includes a non-exhaustive list of what is meant by reasonable accommodation.

86

It is to be noted, however, that not all the grounds mentioned in the Racial Equality and Employment Equality Directives, are specifically provided for under Maltese law. Protection against discrimination on the grounds of race, place of origin, colour, and disability is specifically provided for under the Constitution of Malta, the European Convention Act 1987, the Equal Opportunities (Persons with Disability) Act, 2000 and the Employment and Industrial Relations Act (EIRA), 2002. Article 2 of the EIRA describes "discriminatory treatment" as "any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association". The use of the term "colour" in the EIRA appears to be a more restrictive notion than racial and ethnic origin. There is no provision of law in Malta that expressly prohibits discrimination on the basis of age and/or sexual orientation. The Maltese Government contends that, as drafted, the definition of 'discriminatory treatment' implicitly covers also age and sexual orientation. However, not everyone shares this view and the European Commission has expressed concerns at the lack of an explicit reference to all of the grounds covered by the Directives.

3. Material Scope

As stated above, protection against discriminatory treatment under Maltese law is provided for both by general and specific laws. The Constitution of Malta and the European

Convention Act, 1987 contain a general prohibition against discrimination that could be taken to include all the fields of application listed in Article 3 of both Directives.

The more specialised legislation contains specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex and discrimination against disabled persons). In this case, the protection afforded by these laws extends to both the public and private sectors. In fact, the Employment and Industrial Relations Act, 2002, provides for the prohibition of discrimination in a general manner by providing that an employer should not subject his employees or prospective employees to any discriminatory treatment on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership of a trade union or an employers' association. Furthermore, it is to be noted that the situations that are deemed to constitute discriminatory treatment under Article 26(2) of the Act are merely illustrative and therefore not exhaustive. Consequently, the Courts could decide that other situations that may arise may constitute discriminatory treatment.

The Employment and Training Services Act 1990 makes it unlawful for a person to, *inter alia*, show favour to, or to discriminate against, any person for employment with any employer on the grounds of race, colour, sex, creed or on the grounds of his party or other political beliefs or associations. Maltese law, however, does not specifically provide protection against discrimination by professional bodies and associations of workers or employers against their members or against persons who would wish to become members of such bodies or associations.

The Employment and Industrial Relations Act, 2002, as well as the Regulations issued thereto, prohibit discrimination in matters concerning vocational training and guidance and remuneration for work of equal value.

In cases of alleged discrimination in respect of the areas outside employment covered by the Racial Equality Directive (namely social protection, social advantages, education, access goods and services, housing), there is no specific anti-discrimination legislation. The alleged victim can seek to protect his or her rights by invoking the right to protection from discrimination under the Constitution, and under the European Convention Act, 1987. They can also seek redress under the Ombudsman Act 1995. However, these measures are unlikely to be regarded as constituting full transposition of the relevant provisions of the Racial Equality Directive.

4. Equality Bodies

As yet no body has been designated by the Government to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin. However, it is being considered that the National Commission for the Promotion of Equality for Men and Women, set up by the Equality for Men and Women Act, 2003, will be designated to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin as well as to address issues of multiple discrimination.

Furthermore, as explained hereunder, there are various entities that are entrusted with the defence of human rights or the safeguard of individual rights.

5. Enforcing the law

Maltese legislation lays down various courses of action that one may follow should an individual believe that they were subjected to discriminatory treatment. Apart from recourse to action before the Civil Court, First Hall, sitting in its Constitutional jurisdiction or the Constitutional Court, there exist other bodies where an alleged victim can address his or her complaint, depending on the nature of such complaint. These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission for Persons with Disability (under the Equal Opportunities (Persons with Disability) Act, 2000), the National Commission for the Promotion of Equality for Men and Women (under the Equality for Men and Women Act, 2003), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act, 1995), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta).

As a rule, actions before such authorities are brought by the victim as the law does not permit one person to bring an action on behalf of another, unless the former can prove that he has a legitimate interest in the action. However, there is nothing in law that prohibits an association or other entity from intervening with the administrative authorities on behalf of a person complaining that he has been subjected to discriminatory treatment.

88

The National Commission for Persons with Disability is also empowered to provide, where and as appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Equal Opportunities (Persons with Disability) Act, 2000. The Commission issues regular press communications in respect of such matters and includes detailed information in its annual reports.

Furthermore, in cases of alleged unfair dismissal or in cases of alleged breaches of any obligation under Title I of the Employment and Industrial Relations Act 2002 (thus including discriminatory treatment) or any Regulations prescribed thereto, such matters are to be referred to the Industrial Tribunal either by the worker alleging the breach, or by some other person acting in the name and on behalf of the worker.

Also, the Commissioner for the Promotion of Equality, with the assistance of the National Commission for the Promotion of Equality for Men and Women, is empowered to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing their rights under the Equality for Men and Women Act, 2003.

The general principle under Maltese law is that the burden of proof lies on the person making the allegation. A shift in the burden of proof has been introduced in the Equality for Men and Women Act 2003 as regards cases of gender discrimination. Similar provisions are not included in the Employment and Industrial Relations Act, 2002 with regard to discrimination on other grounds.

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1969

Should it be determined that a person has suffered discriminatory treatment, the Civil Court, First Hall, sitting in its Constitutional jurisdiction or the Constitutional Court could condemn the perpetrator of the discriminatory act to the payment of compensation for the damages suffered. In the case of a decision by any of the other bodies mentioned above, whereas in the majority of cases the perpetrator of the discriminatory treatment can be ordered to pay a fine to the State, there are very limited instances where the victim can be awarded compensation. As a further deterrent, the Employment and Industrial Relations Act, 2002 provides that in cases of victimisation and harassment, a Court can order the imprisonment of the perpetrator of such acts.

Poland – Executive Summary

Introduction

Currently, Poland is inhabited by representatives of 13 national and ethnic minorities, whose population is estimated at approximately 1 million people, which accounts for 2-3% of all the inhabitants. Some people belonging to national and ethnic minorities live in communities, whilst others are dispersed. The following national and ethnic minorities are present in Poland: Germans (300-500,000), Ukrainians (200-300,000), and Byelorussians (200-300,000), Lemks (60-70,000), Lithuanians (20-25,000), Slovaks (10-20,000), Russians (10-15,000), Jews (8-10,000), Armenians (5-8,000), Tatars (5,000), Czechs (3,000) and Karaites (200). The Roma population numbers around 20-30,000, of which a significant proportion live in Malopolskie Voivodship.⁶⁴

The great majority (over 95 %) of Polish society declares itself as Roman Catholic. The people who belong to the Orthodox Church make up about 1.43% of the population, while less than 0.5 % Poles are Protestant and of Protestant tradition. In comparison, around 0.14% people are attached to the Old Catholic Church.⁶⁵

12-15% of Polish people are disabled. The great majority of disabled people are of working age (72% of disabled men and 50% of disabled women). Only 3.7% of disabled people have a university education and 16.8% of disabled people are unemployed. The disabled account for 4.6% of the unemployed.⁶⁶

Poland has begun the process of integrating into its legal system the EU legislation on counteracting discrimination based on race, ethnic origin, religion, age, disability or sexual orientation. In particular, a new office (General Inspector for Counteracting Discrimination) was established with a view to preparing the legislative proposals needed to combat discrimination. However, it should be taken into account that this intention results partly from a strong political will to prepare for Poland's membership in the EU. The issue of sexual orientation is not given prominence in public and political debate. Before the accession referendum, a part of the political class which is inter-

⁶⁴ Report to the Secretary General of the Council of Europe on the Realisation by the Republic of Poland of the Provisions of the Framework Convention of the Council of Europe for the Protection of National Minorities, Warsaw 2002, p. 7-8.

⁶⁵ Data from the web page on Polish Official Statistics, www.stat.gov.pl and www.archiserwis/database/g/u/s/gus.htm.

⁶⁶ Data from the web page of the Ministry for Economy, Labour and Social Policy, http://www.mpips.gov.pl/_praca.php?dzial=509&PHPSESSID=e9c8c99e017b87af79e38c537417aee8.

ested in promoting this issue gave up these attempts in order not to discourage Polish society, mostly Catholic, from the EU.

Poland has recently reinforced its anti-discrimination provisions by, *inter alia*, amendments to the 1994 Law on Employment and Countering Unemployment, and the 1997 Law Vocational and Social Rehabilitation and on Employment of Disabled Persons. Additional amendments to the Labour Code were being considered by the Polish parliament at the time of drafting this report. However, further action seems to be required in order to ensure full conformity with the Racial Equality and Employment Equality Directives.

1. Main legislation

Polish anti-discrimination law consists of the provisions of the 1997 Constitution of the Republic of Poland, as well as the resolutions contained in international conventions ratified by Poland, and domestic legislative acts and ordinances.

The general principles of equality before the law, the right to equal treatment by public authorities and the prohibition of discrimination in political, social, and economic life for any reason are enshrined in the 1997 Constitution. Aside from the general anti-discrimination clause, the Constitution contains specific regulations, which stipulate additional protection of the interests of selected social groups. With the exception of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter for Regional or Minority Languages, Poland is party to most of the important anti-discrimination international agreements.

At the level of ordinary legislation the method accepted by legislators is to include anti-discrimination clauses within the scope of other laws (e.g. in the field of employment, education, social security, personal data protection, public media, religion). The area with the most detailed anti-discrimination provisions remains the field of employment.

Discrimination cases have been brought to court extremely rarely, despite their existence in practice. This results in part from the low legal awareness of Polish people. The conviction that bringing a case to court will not bring the desired results in any case is very common, because court trials are exceedingly long and ineffective, and court fees are significant.

The adaptation of Polish labour law to the requirements of both directives is to be achieved in part by the passing of a law amending the Labour Code Act, as well as modifying several other laws, which will supplement the principle of equal rights in the treatment of employees. The proposed changes refer directly to all the grounds indicated in the Racial Equality and Employment Equality Directives. In addition, Chapter II(a) of the Labour Code, currently devoted to the principle of equal treatment of men and women in employment, will be broadened. The first hearing of the bill took place in the Polish Parliament in January 2003.

The draft bill establishing the institution of a General Inspector for Discrimination Affairs is an attempt at an integrated approach to confronting the phenomenon of discrimination. However,

the Inspector's future field of activity has been defined vaguely. The initial draft bill also contains significant gaps from the perspective of both Directives. The draft bill has not yet reached the parliamentary stage.

2. Main principles and definitions

The principle of equal treatment and the prohibition of discrimination have been incorporated into the Polish legal tradition but the difference between "direct and indirect discrimination" is introduced only in the Labour Code, in the context of the principle of equal rights of men and women in employment. Definitions of "direct and indirect discrimination", replicating those contained in both Directives, are introduced by the bill amending the Labour Code and the draft bill on the General Inspector for Discrimination Affairs.

The provisions of Polish criminal law do not contain a separate type of crime which could be described as "harassment"; they cover only the most serious varieties of the actions conveyed by this concept. The catalogue of violations of a worker's rights does not directly mention actions motivated by discriminatory intentions. This kind of violation is also not anticipated by the law amending the Labour Code. However, it is an offence to refuse to employ a candidate for a vacant position or a pre-employment training programme for discriminatory reasons as well as non-compliance with the ban on discrimination for these reasons when running an employment agency.

Under the proposed change to the Labour Code Act, the scope of protection against victimisation, until now limited to the principle of equal treatment of men and women, will extend also to the remaining criteria of discrimination. The lack of a clear reference in the draft bill on the General Inspector for Discrimination Affairs may in future hinder protection against "victimisation" in the non-employment situations covered by the Racial Equality Directive. The draft bill also does not contain the concept and definition of harassment.

In the context of conducting employment services, the ban on discrimination for the reasons mentioned, among others, in the Racial Equality and Employment Equality Directives encompasses both public employment services and private agencies. Due to the planned amendments to the labour law, the term discrimination will also cover actions, which encourage another person to violate the principle of equal treatment in employment. The draft bill on the General Inspector for Discrimination Affairs does not mention "instructions to discriminate".

Labour law does not define the concept of "genuine and determining occupational requirements". The existing provisions relate to the requirements which are needed to perform specific occupations. The provisions of Polish law do not oblige the employer to provide reasonable accommodation in order to employ a specific disabled individual.

3. Material scope

There is no single law forbidding discrimination, instead there are scattered anti-discrimination clauses in legislation covering different fields. These are underpinned by the constitutional equality clause.

The Labour Code already provides legal protection against discrimination on the grounds of racial or ethnic origin and religion or belief. The Law on Vocational and Social Rehabilitation and Employment of Disabled Persons contains provisions to combat discrimination on the ground of disability in the workplace. The Labour Code does not currently prohibit discrimination on grounds of age or sexual orientation, however, this will change if the proposed amendments are adopted by Parliament. Nonetheless, it should be mentioned that the Law on Employment and Countering Unemployment forbids employers from making discriminatory requirements with regard to vacancy information supplied to job placement services. This includes positions for pre-employment training. The prohibited grounds of discrimination in this law include all grounds found in the Racial Equality and Employment Equality Directives.

Outside employment, there is an inconsistent range of anti-discrimination clauses in various laws. The 1998 Law on the Social Security System does not provide for equal treatment irrespective of racial or ethnic origin. There is no specific protection against discrimination on grounds of racial or ethnic origin in education, healthcare, access to goods and services or housing.

4. Equality bodies

In Poland, the following bodies deal with various aspects of discrimination at the national level: Commissioner for Civil Rights Protection (the national Ombudsman), Government Plenipotentiary for Disabled Persons' Affairs and General Inspector for Counteracting Discrimination.

The Ombudsman defends human rights and civil freedoms enshrined in the Constitution and other legal instruments. Everyone has the right to lodge a motion with the Commissioner for assistance in the protection of freedoms or rights. The Ombudsman carries out their task of defending human and civil rights by investigating whether a violation of law or the principles of community life and justice occurred through the action or failure to act of a government organ, organization or institution obliged to abide by and realize human and civil freedoms. The Ombudsman may also become involved in cases against non-public sector actors, in which either the explanatory procedure may be conducted, or the investigation of the matter may be referred to the appropriate bodies. The Ombudsman can examine individual cases, conduct independent surveys, publish reports and make recommendations. A case may be directed simultaneously to a court and the Ombudsman, and in such situation both institutions remain independent while examining the case. However, the Ombudsman can neither assist, nor represent a person before other institutions nor can issue sanctions.

The Government Plenipotentiary for Disabled Persons' Affairs has the following principal functions: drafting government programmes concerning the improvement of conditions of social and professional life of disabled people; defining the direction of policies for employment and vocational and social rehabilitation for disabled people; and coordinating activities with the aim of limiting the effects of disability and barriers making the functioning of disabled people in society difficult.

Initially the scope of competences of the General Inspector for Counteracting Discrimination encompassed countering discrimination on the grounds of sex (as Government Plenipotentiary for the Equal Status for Women and Men). However, this has been extended by law since 1 July 2002 and now it includes countering discrimination for reasons of race, ethnic origin, religion and belief, age and sexual orientation. The General Inspector is responsible for preparatory work for the establishment of an office to deal with discrimination including the development of legal acts outlining the functioning of this office. The General Inspector's tasks include promoting, initiating, implementing or coordinating the implementation of government programmes aiming to counter discrimination for the reasons mentioned above.

5. Enforcing the law

As was mentioned before, discrimination cases have been brought to court extremely rarely, despite their existence in practice. The question of access to court procedures is also tightly bound to the need for an effective system of legal aid to disadvantaged people and the continued reform of the judiciary.

In cases where the discriminatory act has taken on the gravity of a crime, the prosecuting organ is obliged to initiate and conduct a preparatory procedure.

The initiation of civil proceedings can occur, for example, on the basis of damages incurred due to an illegal action or due to a demand to cease and desist from actions threatening the personal welfare of a person. There is also the possibility of initiating compensation proceedings in the case of an infringement of personal welfare, the principle of equal rights of an employee, or the prohibition of discrimination in employment. Moreover an employee has the possibility of resorting to legal recourse in the form of labour courts which resolve disputes arising from individual claims related to the employment relationship, for example, in connection with a discriminatory termination of an employment contract. The employer and the employee are encouraged to aim towards an amicable resolution of the dispute in the employment relationship. Conciliation commissions can be instituted to resolve disputes over employees' claims relating to the employment relationship. Proceedings in cases concerning an employees' claims relating to the employment relationship are free from court fees.

In penal court proceedings appearance is open to representatives of social organisations in the event of a need to protect social interests or material interests of individuals when they are relevant to tasks spelled out in the Charter of such organisation(s), and in particular when such interests relate to protection of freedom and rights of the individual. In proceedings before civil courts participation of social organisations is allowed in some selected types of cases only, inter alia child/spouse support payments and consumer protection disputes. According to the Administrative Procedural Code a social organisation may, in a case concerning another person, institute a proceeding or to intervene in a proceeding, if it is justified by statutory objectives of the organisation and if such appearance is in the interest of the public interest. It should be noted that there is no information available on the extent of involvement of NGOs in discrimination related cases, nor is there any data on outcomes of such involvement, if any.

The distribution of the material burden of proof in civil proceedings is laid out by the rule that the burden of proving a fact rests with the person who due to this fact draws legal effects. In labour law, a shift in the distribution of the burden of proof takes place in the case of gender-based discrimination. Such a shift in the context of equal treatment in employment is also planned in the amendments to the Labour Code, although the shift of the burden of proof will not apply to the non-employment situations mentioned in the Racial Equality Directive.

Polish legislation does not contain an integrated formulation of a system of sanctions, penalties and remedies. The most important sanction, aside from punishments and punitive measures for crimes such as hate crime or hate speech is the possibility of seeking compensation by way of civil proceedings, or a demand to cease and desist from actions violating the personal welfare of a person.



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Romania – Executive summary

Introduction

Romania is a country of several national, linguistic and religious minorities. This diversity was confirmed by the last census, of 2002, according to which in Romania live more than 25 national minorities,. According to the census, the Hungarian community represents 6,6% (1,434,377) of the population, followed by Roma who represent 2,5% of the total population (535,250)⁶⁷, the Ukrainian, 0,3% (61,091), the German, 0,3% (60,088), the Russian-Lipovans, 0,2% (36,327), the Turkish, 0,2% (32,596). The other minorities represent less than 0,1% each. These minorities speak more than 25 languages and share more than 15 religious beliefs. During the years, discrimination has occurred against individuals and communities on various grounds, such as national belonging, mother tongue, religion, sex, political opinion, sexual orientation, although not documented nor sanctioned. Most recently this situation has begun to change.

98

Romania has adopted legislation on combating discrimination, most of it issued in cooperation with various NGOs. However, further efforts are required to ensure effective implementation of these laws, for example, training of civil servants and judicial authorities. Information campaigns are needed in order to understand the necessity of public policy addressing the roots of discrimination. Some argue that positive action is also essential in order to address the challenges faced by some categories of people that have been discriminated against for centuries, such as Roma, women or disabled people. It is worth mentioning that some non-governmental organisations have already taken up the role of a driving force in this respect, by themselves or in co-operation with authorities, documenting discrimination cases, challenging them in the courts, training lawyers on how to handle them, disseminating information to the public and the authorities, and standing up against discrimination whenever it occurs.

Romania possesses an elaborate legal framework for combating discrimination, which complies with many aspects of the Racial Equality and Employment Equality Directives. However, some differences remain that will demand further action in order to ensure full compliance with the Directives.

⁶⁷ Unofficial estimates (Minority Rights Group, London) put the figure for the Roma community much higher at over 10% of the population.

1. Main legislation

During the last 13 years Romania adopted several legal provisions that either directly or implicitly addressed the issue of equality and prohibited discrimination. The Constitution explicitly prohibits “discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin”. One can easily note that from this list of discriminatory grounds some are missing, such as disability, age, or sexual orientation. The explanations are different but they all relate to Romania’s stage of democratic development in 1991 when the Constitution was adopted. For example, the issue of sexual preference was controversial at that time, when homosexuality was considered a crime and sanctioned by the penal code. People with disabilities and their requirements were ignored before 1989, and immediately afterwards their rights were not conceived in “equality” or “equal opportunities” terms but rather as special needs addressed in specific ways, often leading to separation from the rest of society.

Other laws were later adopted prohibiting discrimination in some specific areas; this was the case for laws on social insurance, social assistance and the 2003 collective labour agreement. The 2003 Labour Code is also quite broad in this respect. So far, the most comprehensive legal document is Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination which prohibits and sanctions any discrimination based on “race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion”. Its drafting, in 2000, by the Department for National Minorities in cooperation with some representatives of the civil society, was evidently influenced by the discussions that had taken place within the European Union, therefore it reflected many of the provisions of the Racial Equality and Employment Equality Directives. Afterwards, when discussed and adopted by the Government and the Parliament, some provisions of the legislation were amended.⁶⁸

In addition, it has to be mentioned that Romania has ratified practically all international documents adopted under the aegis of the United Nations and the Council of Europe on human rights and minority rights protection, including the right to individual complaint, on women’s rights and on the rights of the child. According to the Constitution all international treaties once ratified become part of domestic legislation over which they take precedence in the case of inconsistency.

Therefore, it can be stated that the present Romanian legislation prohibits and sanctions discrimination against persons whose rights are specifically protected by the Racial Equality and Employment Equality Directives in a manner that, although not identical to the two Directives, is quite similar. If properly enforced, the existing set of laws would make a major contribution to achieving equality and combating discrimination. However, the implementation of this legislation does not appear to have been sufficiently effective to date.

⁶⁸ The Ordinance adopted by the Romanian Parliament as the Law No 48 of 16 January 2002, and was published in *Monitorul Oficial al României* (the Official Gazette) No. 69 of 31 January 2002.

2. Main principles and definitions

Although several laws adopted over the years, the Constitution included, had forbidden discrimination, until 2000 no legal definition of various types of discrimination existed. Since 2000, three separate laws have employed three slightly different definitions both for direct and indirect discrimination. Ordinance 137 was the first, defining **direct discrimination** as “any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion, aiming at or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.” According to the Law on Equal Opportunities between Women and Men, adopted in 2002⁶⁹ as “direct discrimination shall be considered a difference in the treatment of a person, which is less favourable due to that person’s appurtenance to a certain sex or due to pregnancy, child delivery, maternity or paternal leave.” The third definition is provided for by the new Labour Code which entered into force in March 2003 and states that “it shall be considered direct discrimination the acts and facts of exclusion, differentiation, restriction or preference based on one or several criteria” such as “sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union belonging or activity” which “have as a purpose or effect not granting, restricting or not recognising the use or the enjoyment of the rights provided for by the labour law.”

100

Similarly there are three definitions of **indirect discrimination**. Ordinance 137/2000 states that “any active or passive behaviour that generates effects liable to favour or disadvantage, in an unjustified manner, a person, a group of persons or a community, or that subjects them to an unjust or degrading treatment, in comparison to other persons, groups of persons or communities, shall trigger administrative liability”. According to the Law on Equal Opportunities as “indirect discrimination shall be considered the enforcement of apparently neutral provisions, criteria or practice, which through the effects generated have an effect on persons belonging to a certain sex, unless the enforcement of such provisions, criteria and practice may be justified by objective factors not related to sex.” In turn, the Labour Code states that “it shall be considered indirect discrimination the acts and fact based apparently on other criteria (than those mentioned above) but which have the effect of a direct discrimination”.

The existence of three different definitions produces an unfortunate lack of coherence in the legal framework for combating discrimination in Romania. However, although none of the three definitions on direct or indirect discrimination are legally worded in the same way as those provided for by the Racial Equality and Employment Equality Directives, their spirit is the same and, if constantly applied by administrative and judicial authorities, they could fulfil their objectives.

⁶⁹ The Law No. 202 of 19 April 2002 was published in *Monitorul Oficial al României* (the Official Gazette) No. 301 of 8 May 2002

The situation in relation to **harassment** is somehow simpler, which is a new and not entirely accepted concept for the Romanian legal system. The only law mentioning harassment is the Law on Equal Opportunities, which is concerned with sexual harassment.

Currently, no Romanian law prohibits **instructions to discriminate**. It must be noted that Ordinance 137/2000 had such a provision for almost two years. It was however repealed by the Parliament in 2002 when the Ordinance was debated and amended.

The concept of reasonable accommodation is practically unknown to the Romanian legal system. The standards laid down by the current legislation regard only persons with severe disabilities and are rather high, requiring important financial investments on behalf of employers. The law requires their implementation before the end of 2003, but is hardly feasible having in view that only in very few cases have employers started to work on such adjustments.

Regarding **positive action**, if considered literally, the 1991 Constitution forbids it. However, the approach has changed over the years and more recently the idea of special measures or supportive action has been more discussed and accepted, and such measures have been taken on several occasions, even in the absence of specific laws. The most notable examples relate to Roma children who benefited from a quota system set up on an ad hoc basis by various educational institutions. From a legal perspective it must be noted that the Governmental Decision on the Organisation and Functioning of the National Council for Combating Discrimination provides among the competencies of this institution the drawing up of "affirmative actions on preventing discrimination deeds".

3. Material scope

Discrimination in employment is forbidden on a range of grounds through a number of instruments. Ordinance 137/2000 forbids discrimination in this area on the grounds of racial or ethnic origin, religion or belief, disability and sexual orientation. The 2002 Labour Code includes all these grounds, as well as age. Moreover, disability is stated more clearly. The 2003 National Collective Agreement forbids discrimination on grounds of racial or ethnic origin, religion or belief and sexual orientation.

Ordinance 137/2000 applies to a wide range of areas outside employment. It covers the areas mentioned in the Racial Equality Directive (social protection, education, goods and services, housing), as well as further fields, such as political rights. As mentioned above, the Ordinance complies with the Directive in forbidding discrimination on the grounds of racial or ethnic origin, but its provisions also apply to discrimination based on religion or belief, sexual orientation and disability.

4. Equality bodies

The institution in charge of administrative sanctioning of discriminatory conduct and preventing future discrimination is the National Council for Combating Discrimination, set up by Ordinance 137/2000. This is a specialised body of the central public administration, subordinated to the

Government and its organisational structure and other responsibilities are regulated by Governmental decision. However, there are a few provisions that aim to ensure the institution's autonomy. For example, the Ordinance states that "for the period of exercising its competencies the Council shall act independently, without any restriction or influence of its activity by other public institutions or authorities". At the same time, the Council is a legal entity with its own budget and it is allowed to manage its funds. Its board members have a seven-year mandate that may be renewed only once. They may be dismissed only by the Prime Minister in a few situations clearly provided for by the law. Although originally this Steering Committee was the governing body of the Council, its role was reduced by the end of 2002, with a corresponding increase in the powers of the President of the Council. The Steering Committee assists him or her only "in the field of establishing and sanctioning the discrimination deeds". The NCCD's competencies are quite broad, from sanctioning discriminatory conducts to issuing studies and research, drafting laws, drawing up public policy, carrying out programmes and national campaigns, etc.

The institution became functional in October-November 2002 therefore it is too soon to speak about a strong jurisprudence. According to data provided by NCCD on 4 August 2003, in the first half of 2003 it received 243 petitions. Most sanctions were on discrimination grounds such as age (36), ethnic belonging (28), and sexual orientation (15). Several cases decided by NCCD regarded the "right to dignity", namely speeches that were considered offensive particularly towards Roma. So far the NCCD case-law has not been made public, neither in a print form nor on the institution's website, although this would be very helpful for victims and NGOs providing assistance in discrimination cases as well.

5. Enforcing the law

According to the existing legislation, there are two categories of procedures relating to discrimination cases. One is of an administrative nature: certain discriminatory conduct can be considered as an administrative offence and punished. The National Council for Combating Discrimination can initiate investigations into discriminatory acts and in such cases it acts as an investigatory body. In other cases the alleged victim may complain to the NCCD, although which procedure the institution uses in such situations is rather unclear, since thus far it has rejected several such complaints, requiring the victims to prove the discrimination in a procedure similar to the one enforced by the courts.

Judicial remedies provide the second procedure, namely civil actions. In such cases it is for the alleged victim to prove that they were discriminated against, as the Romanian legislation does not allow the shift or the easing of the burden of proof. It is important to note that the draft of Ordinance 137 provided for the shift of the burden of proof, in accordance with the Directives, but the Government and Parliament rejected it. New to the Romanian legal system and very helpful to the victims is a rule that actions for compensation due to discrimination are exempt from judicial stamp tax, a particularly important provision since the court tax on other cases is 10% of the claimed value, which quite often renders access to justice almost impossible. In close relation to the judicial remedy is the possibility of the judge to require the withdrawal of the functioning license of the company that acted in a discriminatory manner.

The judicial procedure is conceived as an alternative for those who are discriminated against: a person may choose to either require a certain discriminatory action to be considered an administrative offence and sanctioned as such by NCCD, or to go to the court and seek judicial remedies, including financial remedies for the damage he or she suffered due to that discriminatory action.

Another novelty is the possibility granted to human rights non-governmental organisations either to assist an individual victim who has been discriminated against or to act on behalf of a victim whenever the discrimination concerned a community or a group of persons. Thus far, only very few cases have been brought before the courts. On the one hand, this is due to a general lack of trust in non-discrimination provisions and a lack of appropriate training for practicing lawyers, judges and law students. On the other hand, it is due to the difficulties encountered by the victims. Those generally discriminated against are vulnerable categories of persons, particularly in terms of financial means, who do not have money and time to spend on legal actions. At the same time, it would be unrealistic to believe that in a field where lawyers themselves do not know exactly how to approach such cases, ordinary people - victims of discrimination – would have enough confidence in themselves and knowledge to convince judges who do not know much about this topic. Therefore, the role of the NGOs in assisting victims of discrimination is crucial, indeed those few cases that have already been brought to justice were supported by NGOs.

Slovakia - Executive summary

Introduction

According to the 2001 census, the Slovak Republic has around 5 million inhabitants, of which approximately 70 % are Catholics and the majority are of Slovak origin. Quite a significant number of persons belong to national minorities, most of them being Hungarians (around 500,000; 10 %) or of Roma origin (official census figures indicate 1.7% of the population but unofficial estimates are much higher at almost 400,000; around 9 %).⁷⁰ Coexistence of the majority with minorities might be considered as peaceful, however, there are some serious signals which indicate quite high level of prejudices especially towards Roma people and towards sexual minorities.

104

The situation of the large majority of Roma people is considered to be very complicated from various points of view. More than 80 % of them are segregated from other communities. Where segregation is greater, there tends to be a higher incidence of poverty. The level of their education is very low. Most Roma children study at so-called special schools, even though these children are socially deprived rather than mentally handicapped. There are settlements in the country with 100% unemployment. 80% of Roma people are dependant on the State social network system. A significant number of the members of this community have experience with either latent or visible discrimination, and many have been victims of physical attacks.⁷¹

The government and civil society are trying to address this issue and the situation of the Roma community has become a topic of public debate. There are number of attempts to improve the situation, with relevant projects focusing either on training members of the Roma community or on sensitisation of the majority in order to accept differences. With financial support from the EU, the government is trying to improve the housing of Roma people and is focusing interest on social guidance, education and human rights.

Discrimination generally has become an issue of public debate. There is dialogue among all sectors of society, although opposition to some aspects of anti-discrimination law can be found within the Catholic Church and members of Christian Democratic Movement (current coalition party). The main argument of opponents of a dedicated anti-discrimination law is that this does

⁷⁰ M Vašečka, "A Global Report on Roma in Slovakia", (Institute of Public Affairs: Bratislava, 2002) + Minority Rights Group.

⁷¹ Ibid.



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1932

not have tradition in the country and that the legal system already ensures, through various provisions, effective and adequate remedies in discrimination cases. Moreover, some Christian politicians argue against the introduction of the term "sexual orientation" into the legal language, maintaining that such expression belongs only to private life, there is no discrimination in this field, and there is no special need to protect people against this type of discrimination.

A revised Labour Code entered into force in 2002, which contains a general prohibition on direct and indirect discrimination in employment. This covers all the grounds found in the Racial Equality and Employment Equality Directives, with the exception of sexual orientation. Further amendments to the Labour Code reinforcing these anti-discrimination provisions were approved on 21 May 2003. An initial attempt to adopt a general anti-discrimination law was blocked by Parliament in 2002. However, the Office of the Deputy Prime Minister has now prepared a new draft anti-discrimination law. The draft law, in conformity with the two Directives, enumerates discrimination grounds, including sexual orientation, gives definitions of direct, indirect discrimination, harassment, victimisation and instruction to discriminate, and permits the shift in the burden of proof to the defendant. It is difficult to assess whether this draft will be adopted or if, as an alternative, the state will review the whole legal system and amend the relevant laws. No political decision has been taken at the time of writing. Overall, it is clear that Slovakia currently needs to take further action in order to ensure full compliance with the Directives.

1. Main legislation

The Slovak Republic is a country with a statutory law system, its basic law being the Constitution which lays down the scope of guaranteed basic rights. International instruments concerning human rights and fundamental freedoms, ratified by the Slovak Republic and promulgated as prescribed by the law, take precedence over national laws. Slovakia is party to 15 international treaties and UN instruments on human rights including the European Convention on Human Rights and the International Convention on the Elimination of all Forms of Racial Discrimination.

The Constitution states that, "people are free and equal in dignity and rights" and "fundamental rights and freedoms are guaranteed in the territory of the Slovak Republic to every person regardless of sex, race, skin colour, language, faith, religion, political affiliation or conviction, national or social origin, nationality or ethnic origin, property, birth or any other status. No person shall be denied their legal rights, discriminated against or favoured on any of these grounds". Thus, one can say that the Constitution contains a general prohibition of discrimination. However, articles of the Constitution on equality are not perceived as an independent but merely as an accessory right. Therefore effective access to these rights (e.g. success at courts) depends on the quality of relevant laws.

As of now there is no legal instrument dealing specifically with the issue of discrimination, the relevant provisions being scattered through the whole legal domain. With the exception of the Labour Code, they provide for general protection from discriminative practices at various levels in rather general and declaratory terms. However, in many cases it is very hard to obtain an effective remedy, even in cases where discrimination is proven. The Slovak legal system relies more on the

controlling powers of State authorities, responsible for implementing the laws, rather than individual litigation. Whilst victims have the right to bring discriminatory practices to the attention of competent agencies, they often lack appropriate access to courts due to complicated legal standing requirements. Thus, an agency can take action and impose a fine on the perpetrator, but the victim does not receive any compensation. In all cases the plaintiffs must bring evidence of the violation of another substantive law as well, because proving discrimination per se is not sufficient to win the case.

2. Main principles and definitions

Amendments to the Labour Code approved in 2002 and 2003 apply to both employment and pre-employment. In conformity with the Directives, relevant provisions have introduced the possibility for victims to seek an effective remedy within the civil procedure in the case of discrimination. There is a possibility to ask for non-pecuniary damage and the burden of proof in these cases may be shifted to the defendant. As far as grounds of discrimination are concerned, section 13 paragraph 1 states that the "rights related to labour law relationships are accorded to all employees without restriction, that is to say, without direct or indirect discrimination on grounds of gender, marital or family status, race, colour, language, age, state of health, faith, religion, political or other opinion, trade union activities, national or social background, affiliation to a national minority or ethnic group, property, or any other status with the exception of cases stipulated by law or where there are substantive reasons resulting from job requirements or nature of work to be performed." It must be highlighted that sexual orientation is not expressly included within this list. The reference to "state of health" is considered to include disability.

107

Although harassment is not specifically forbidden, in certain forms it could qualify as a crime, a misdemeanour or be invoked as the ground for filing a civil defamation suit (action on the protection of personhood). The essential fact is that the dignity of a person is protected under the Constitution and the laws.

Giving instructions which have the effect of discrimination on account of racial or ethnic origin, or religion (such as the prohibition of entry into a pub for the Roma, which is quite common in some regions) could be, under certain circumstances, considered as the crime of incitement to racial and ethnic hatred. If such instruction is issued by a public authority (representative of a State or self-governing body), this act could be considered as the offence of abuse of power by a public authority.

Apart from the new Labour Code, the national legislation does not set out genuine and determining occupational requirements, except for age requirements concerning certain public officials (the President, judges, prosecutors, ombudsperson), and some indirectly stipulated requirements connected with health condition of applicants in certain occupations. As regards organisations with a special ethos, connected with their religion or belief, relevant legislation states that there shall be no right to interfere with the internal life of the church.⁷²

⁷² Act No. 308/1991 Coll. on Freedom of Religious Belief and Status of Churches or Religious Societies.

As far as the proposed anti-discrimination law is concerned, it would set out conditions under which justified differential treatment would be allowed and would not be considered as discrimination. Such justified differential treatment must be objectively substantiated by a legitimate objective, and the means to achieve this objective must be appropriate and necessary.

Concerning reasonable accommodation, employers' duties in this regard are prescribed by law. The Labour Code states that "employers shall be obliged to employ persons with disabilities in suitable positions, to enable them to receive training or to study with a view to acquiring necessary skills, and shall also be obliged to support the upgrading of these skills." As regards employees with disabilities who cannot be employed under usual working conditions, employers may set up for them sheltered workshops or sheltered workplaces. Moreover, "employers shall enable their employees with disabilities to receive theoretical or practical training (retraining) aimed at maintaining, upgrading, expanding or changing their qualification, or adapting it to technological progress with a view to safeguarding their employment." Employers thus are under a duty to provide reasonable accommodation for disabled persons. The failure to fulfil this duty could, depending on the circumstances of particular cases, be considered as direct or indirect discrimination.

3. Material scope

As mentioned above, the Labour Code forbids discrimination in employment, including in recruitment for employment, on all grounds covered by the Directives with the exception of sexual orientation. The Labour Code prohibition also applies to discrimination in access to vocational training or guidance.

As regards discrimination in the areas outside employment, anti-discrimination clauses can be found. However, these do not always mention ethnic and racial discrimination. The Social Insurance Act is an example of legislation that expressly forbids discrimination on grounds of racial or ethnic origin. The scope of these clauses depends on the scope of the legislation in which they are located. Discrimination is forbidden in some legislative acts governing social protection, education and access to goods and services.

4. Equality bodies

A special body has not been created for the promotion of equal treatment of all persons without discrimination as yet. The bodies competent to deal with this issue (in addition to designated persons at certain ministries) include the Section of Human Rights and Minorities of the Office of the Government and the Government Plenipotentiary for Addressing Minority Problems. Their task is to look for the ways of improving the social situation of minorities and reducing their poverty. The ombudsperson institution is responsible for the general defence of rights, and has no special competencies for discrimination issues.

The proposed anti-discrimination law does not introduce a special body responsible for dealing with discrimination. However, the office of the Deputy Prime Minister for Human Rights pre-

pared a draft amendment to the Act on the Establishment of the Slovak National Centre for Human Rights, under which, inter alia, the Centre should be transformed into a special body responsible for the promotion of equal treatment. There was a suggestion that the competencies of the centre should include, for example, monitoring and evaluation of compliance with the principle of equal treatment, creation of national information network on racism, xenophobia and anti-Semitism, mediation of dispute resolution and provision of legal assistance to victims of discrimination. The relevant amendment has been passed in March 2003, however, the final text did not include the detailed competencies of this body. The law uses very general language saying that the centre works in the field of human rights, monitors and evaluates respect for human rights, provides research and educational activities, collects and spreads information, provides library and analogous services.

5. Enforcing the law

In cases of discrimination victims can bring complaints (non-judicial action) that will be dealt with by a higher (superior) public body. Complaints are brought mainly in order to challenge the actions of competent bodies and to seek remedial actions. Legal provisions do not prescribe any formal requirements for filing complaints. The authorities are obliged to deal also with anonymous complaints which contain concrete data indicating the breach of legal provisions. The complaint is deemed to have been processed when the complainant is notified in writing of the result of its processing, and when measures are taken to remedy the identified irregularities.

109

Victims can report unlawful treatment by public entities to the public prosecution office as well. Prosecutors then proceed on the report and examine the lawfulness of the procedures applied by the competent authorities. Prosecutors may take various measures in dealing with the matter. Thus, they file protests against competent authorities that issue decisions, legal regulations, generally binding municipal ordinances, guidelines or resolutions in violation of law. Furthermore, the Supreme Audit Office of the Slovak Republic has important control powers especially as regards public funds and the Office of the Government, which has control powers towards ministries and other bodies of State governance.

Besides the office of the prosecution and before-mentioned agencies, other agencies established by the State are also competent to perform checks on either public or private entities. They include the Slovak Trade Inspection in the field of consumer law, the National Labour Office and Inspectorates of Labour in the field of labour law. The aforesaid agencies mainly exercise their powers through self-initiated investigations, but nothing prevents them from acting also on petitions lodged by natural persons or legal entities.

In a particular administrative case where the prescribed procedure has already been initiated, the victim (or any party to the procedure) can use the "classical" appeal system. This means that he or she (or a legal entity) may file an appeal against the decision of an administrative authority. The appeal will be heard by its superior body. In most cases, it is also possible to lodge a further appeal with a court of general jurisdiction under the system of judicial control over administrative decision-making.

There is a system in the country guaranteeing general access to courts. Regarding access to the courts of general jurisdiction, petitions may be filed mainly to seek rulings on one's personal situation, fulfilment of a statutory obligation, obligation under a legal relationship or violation of the law, and establishment of the existence of a legal relationship or right, if there is an urgent legal interest to establish such facts. In discrimination cases it is possible to seek non-pecuniary damage as well. As mentioned above, with the exception of labour law in discrimination cases, the burden of proof is divided between the plaintiff and the defendant with the duty for all parties to prove their positive statements.

The Slovak legal system is not familiar with public interest litigation and non-governmental organisations dealing with issue of discrimination do not have the right to start judicial proceedings in favour of their clients. They can support any party of the procedure merely in an informal way; for example, writing letters or providing legal assistance.

Slovenia – Executive summary

Introduction

Slovenia gained independence in 1991. Its commitment to respect for diversity and equality is reflected in the Constitution and its provisions. The country consists of 83% ethnic Slovenians, 0.11% Italians, 0.32% Hungarians, 0.17% Roma people, 1.98% Serbs, 1.81% Croats and other national minorities, according to the population census of 2002. According to the same source, 57.8% of the population is Roman Catholic and 10% Atheist. As a result of decades of belonging to a federal state, there are members of various ethnic groups that moved to Slovenia, with some also representing distinct religious communities.

Some groups of people enjoy special benefits as a result of their position in Slovenian society as a whole. There are programmes and legislation to improve the situation of Roma people and statutes regulating the rights of members of the ethnic Italian and Hungarian minorities. The latter two are granted extensive rights by the Constitution and Statutes as a result of their autochthonous presence in Slovenia. Certain categories of employees enjoy special rights, too. Among those are juveniles, women, pregnant women, parents, elderly employees, disabled, etc. Juveniles *inter alia* are prohibited from working at night and performing certain jobs and are entitled to longer weekly rests.

The government consults with social partners within the Social and Economic Council, a tripartite organ composed of representatives of government, the employees and the employers, about issues that impact on the lives of employers and employees. Consultation with non-governmental organisations (NGOs) takes place, but at a slower pace. In recent years NGOs co-operated with the government in changing relevant legislation. In 2001 the Centre of Non-Governmental Organisations was established and recently the government established the Commission of the Government of the Republic of Slovenia For Non-Governmental Organisations in order to promote and develop co-operation with NGOs. As a result of civil society and government activities, the general public is becoming aware of the importance of equality and anti-discrimination.

Although there are already legal provisions combating discrimination in Slovenia, in particular the Employment Relationships Act, further action will be needed to comply fully with the Racial Equality and Employment Equality Directives.

1. Main legislation

The principle of anti-discrimination is contained in the Constitution in various Articles. Article 14 of the Constitution guarantees equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance. In addition to the general equality clause, there are Articles that stress equality in relation to rights in proceedings, the voting process, employment, participation in public affairs, marriage and family, parenthood, religious communities and criminal charges.

Statutes usually do not contain specific anti-discrimination norms, but the concept could rather be understood from criteria in those laws. Acts that expressly mention the prohibition of discriminatory treatment are the Law on the Legal Status of Religious Communities, the Associations Act, the Political Parties Act and the Media Act. Anti-discrimination provisions are also found in international treaties signed or already in force in Slovenia, including the International Covenant on Civil and Political rights, the International Convention on the Elimination of all forms of Racial Discrimination, and relevant International Labour Organisation conventions. Slovenia has signed Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, but has still to ratify it.

Explicit anti-discrimination clauses exist in legislation in the area of employment. Provisions of the Employment Relationships Act (ERA) do not appear to reflect fully the requirements of the Racial Equality and Employment Equality Directives, because they do not contain definitions of direct discrimination, harassment or instruction to discriminate. Nevertheless, the present ERA represents a step forward in the protection of most vulnerable groups against discrimination. The system of anti-discrimination regulations in this field could be described as improving, awaiting the development of case law by the courts in the future. The Penal Code sanctions the violation of equality and the stirring up of ethnic, racial or religious hatred, strife or intolerance among others.

2. Main principles and definitions

The principle of equal treatment is contained in the Constitution which devotes significant importance to the non-arbitrary application of legal provisions as a common value of the Slovenian legal system. State bodies are bound by this principle when enacting legal provisions, and the judiciary and administrative authorities have to issue decisions accordingly. Similar and equal relationships shall be treated in the same way; those that substantially differ from others shall be dealt with differently.

The Employment Relationships Act (ERA), which entered into force in January 2003, aims at granting equal status to all future and actual employees in respect of access to employment, working conditions and promotion in the workplace. Grounds of protection against discrimination expressly listed in the ERA are sex, race, age, health condition or disability, religious, political or other convictions, sexual orientation, or ethnic origin. The ERA contains the definition of indirect discrimination, while the prohibition of direct discrimination is not explicitly

Natalia
1985

mentioned but could be interpreted from the Act. Harassment is only defined in relation to gender discrimination, but not the grounds covered by the Racial Equality and Employment Equality Directives. The duty of the employer to respect and protect the employee's personality and privacy is guaranteed. The Executing Criminal Sanctions Act defines torture as the extreme variety of unlawful harassment. The definition of instruction to discriminate does not exist, but the prohibition of such behaviour could be derived from the Constitution and relevant Penal Code articles, although these do not represent sufficient protection.

Victimisation is also dealt with in the ERA. This protects trade union representatives and employees, but only after the end of the labour relationship in relation to certificates about the kind of work performed for the employer. There are a few exceptions to general anti-discrimination rules. These include specific regulations in employment in the police and judiciary. The employer is obliged to adapt the working place taking into consideration the disability of the workers in accordance with safety and health at work regulations.

3. Material scope

Discrimination on grounds of race, age, health condition or disability, religious, political or other convictions, sexual orientation, or ethnic origin is prohibited in the field of employment. This includes recruitment, the conditions of employment and termination of a contract of employment, in both the public and the private sector.

114

In relation to the other fields covered by the Racial Equality Directive, there are general provisions that prohibit discrimination in principle only and thus do not offer sufficient protection. These can be found in areas such as healthcare, housing and education.

4. Equality bodies

Equality bodies of the kind required by the Racial Equality Directive do not exist in Slovenia yet. Informal complaints in relation to violations of human rights and fundamental freedoms by an act or deed of State authorities, local self-government authorities and bearers of public authorities could be lodged to the Human Rights Ombudsman office. The Ombudsman office can obtain all data from State and other bodies and call witnesses for questioning. It can serve the Constitutional Court with constitutional complaints and proposals for the assessment of the constitutionality of regulations. The Ombudsman issues annual reports on the exercise of human rights in Slovenia, which are considered by the National Assembly. While dealing with individual cases the Ombudsman can propose amendments to legislation. The government will have to establish an equality body in order to comply with the Racial Equality Directive. It has suggested that the Government Office on Equality Opportunities could take on board this task, but there are some doubts as to the capacity of this Office to deal with these new duties independently.

5. Enforcing the law

Those who feel their right to non-discriminatory treatment has been violated have a variety of options. Civil proceedings can be initiated with a view to receiving damages. He or she can initiate criminal proceedings and can even take over the prosecution of certain criminal offences if the public prosecutor withdraws the charges. It is also possible to use administrative procedures, judicial review and the constitutional complaint mechanism. As described above, in the event of a violation of human rights or fundamental freedoms by the State or a State related body, informal proceedings can be initiated before the Human Rights Ombudsman.

The burden of proof in discrimination cases in the employment field is regulated by the ERA. Where prospective employees and employees allege facts that justify the assumption that unlawful discrimination has occurred, then the burden of proof shifts to the employer.

If it is ascertained that the violation was committed, sanctions are applicable, (criminal sanction in the area of criminal law, compensation in civil law procedures, etc). The employee could demand compensation where the employer is found to have breached the anti-discrimination provision according to tort law. Moreover, the termination of the contract in such event is not legally valid. There are procedures to vitiate or abrogate regulations that are contrary to anti-discrimination provisions. There are organisations that support victims of discrimination and provide legal counselling, such as trade unions and other NGOs.

Turkey – Executive Summary

Introduction

The current Constitution was accepted in 1982 during the last military regime. The military handed over power to an elected government in 1983. Efforts for the consolidation of democracy and rule of law have continued since that date. Attempts for reforms in all fields gained speed after the EU's decision to recognise Turkey as a candidate for EU full membership in 1999.

Turkish society reflects ethnic diversity: minorities include Kurds, Caucasians, Lazs, Arabs, Greeks, Armenians, Jews and Assyrians. Ethnic minorities are statistically invisible in official documents. Minority ethnic groups face grave problems especially in the fields of social and cultural rights.

116

Homosexuality has not been a criminal offence since the early days of the Republic. There are no anti-discrimination provisions relating to sexual orientation in the main legal codes, yet lesbian, gay and bisexual people face discrimination and harassment in public life.

There is no official statistical data on disabled people. Education and employment are the most important problems faced by disabled persons.

Members of religious groups face discrimination in education, vocational training and employment. Wearing headscarves is prohibited in universities. Women wearing headscarves cannot work as civil servants in administrative departments. Christians and Baha'is can face harassment.

The dialogue between State departments and NGOs on discrimination and human rights issues is very weak. In labour relations, tripartite social dialogue mechanisms have been established by law. However, discrimination has not been on the social dialogue agenda.

The amendments to the Labour Code in June 2003 constitute an initial step in strengthening the anti-discrimination law framework in Turkey. Whilst these amendments introduce some elements of the Racial Equality and Employment Equality Directives into Turkish law, further action will be necessary to ensure full compliance with the Directives. The Directives have been recently translated into Turkish by the Ministry of Labour and Social Security. It is also relevant to mention the Job Security Act of August 2002, which has introduced some provisions on equal treatment in cases of dismissals.

1. Main legislation

Article 10 of the Constitution includes provisions on equal treatment and prohibits discrimination. Language, race, colour, sex, political opinion, philosophical belief and religion are enumerated as grounds of equality in the Article. Individuals are equal before the law on “similar grounds” too. But, there is no clarity in the case law of the Constitutional Court as to whether ethnic origin, sexual orientation, age and disability fall into this abstract category.

Turkey has signed and ratified the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Cultural and Social Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the European Social Charter. The Revised European Social Charter and the Framework Convention for National Minorities have not been signed yet. Fundamental ILO conventions, including the two anti-discrimination conventions and the Termination of Employment Convention (No. 158), have been signed and ratified. International agreements enjoy all the qualities of a statute. If a contradiction arises between laws and international agreements, a subsequent statute may prevail over the agreement. The self-executing character of international agreements generally is accepted by the courts if it is possible to implement them directly without a national regulation. However, judges and bureaucrats need training on international instruments.

The Turkish Civil and Criminal Codes do not contain articles on discrimination.

A large part of the key employment legislation was enacted some years ago, just after the 1982 military intervention. Therefore, the provisions of these laws do not reflect contemporary understandings and values based on principle of equality, individual rights and rule of law. The reforms to the Labour Code in June 2003 have constituted positive steps towards the harmonization of the legal system with EU standards, as has the Job Security Act of August 2002. The amended Labour Code of June 2003 includes new provisions on discrimination, victimisation, unjust dismissals and the shift of the burden of proof.

2. Main Principles and Definitions

Article 5 of the amended Labour Code contains an anti-discrimination clause. Discrimination is forbidden on grounds of language, race, sex, political opinion, philosophical belief, religion, membership of a religious sect or similar grounds. Sexual orientation, disability, age and ethnic origin are not expressly mentioned, however, it should be noted that the list in Article 5 is not exhaustive. It is too early to evaluate the implementation of this recently enacted Code's provisions on discrimination.

Direct and indirect discrimination are not defined by law. Harassment, which also is not defined in the legal system, cannot be a ground in discrimination cases unless harassing behaviour is considered to be a criminal act, such as defamation. No provision forbids giving instruction to discriminate.

According to the Labour Code, application by an employee to administrative or judicial authorities to enforce his or her rights under statute of contract cannot be a legitimate reason for termination of employment. This provides a degree of protection against victimization, although it is less broad than the protection required by the Directives.

Disability is defined in the Regulation on Employment of Disabled Persons. This provides that only persons who are deprived of at least 40% of labour capacity are considered as officially disabled. The council of physicians determines whether or not a person meets this definition of disability after a medical examination. According to the Labour Code, every employer, public or private, employing more than 50 persons must ensure disabled employees make up 3% of the workforce. Monitoring employers who do not obey quota rules has however proved difficult. The Regulation on Employment of Disabled Persons requires employers to prepare the workplace according to the needs of disabled persons. However, these rules have been quite ineffective. The Turkish Employment Organisation operates vocational training and rehabilitation programmes for disabled persons, but these are only available to a small percentage of the total population of the disabled labour force.

3. Material Scope

Laws cannot infringe the principle of equal treatment anchored in the Constitution. However, when the secondary legislation is silent on discrimination, the constitutional protection may not be effective if the courts do not implement the constitutional principle directly to pending cases. Labour courts do not justify their decisions depending directly on provisions of the Constitution in the absence of relevant provisions in secondary legislation.

With regard to main legislation, only the Labour Code and the Job Security Act contains a provision on equal treatment. However, the provisions of the Code are not applied to certain categories, such as agricultural works. Beyond employment, there are some general provisions on equal access to education, irrespective of race or religion, which may offer potential protection in the areas of vocational training or education. There is no specific protection against discrimination in social protection, access to goods and services or housing.

4. Equality Bodies

No separate equality body exists at national level. Some preparations had been made by the Ministry of Justice to institute an ombudsperson's office in the past, but no draft legislation has appeared. Currently, there is no plan to establish an equality body.

5. Enforcement

As the Turkish public administration system does not have national bodies for combating discrimination, victims of discrimination can only address their complaints to human rights commissions established at province and district level. These commissions have no enforcement powers and no

right to start procedures at the national level. They may only inform individuals about procedures and communicate applications to higher administrative units.

Victims of discrimination may be assisted by trade unions. Trade unions have the capacity to act on behalf of employees in matters arising out of legislation, custom and collective labour agreements. They may act on behalf of consenting employees in matters concerning employment contracts. Trade unions may provide legal aid for their members. Associations may not act on behalf of their members in labour courts. In practice, trade unions most often file suits against employers on matters related to wages.

Discrimination cases have been rarely brought to the attention of the public. The units of central government and the other public bodies do not prepare regular reports indicating the situation in the country. The State departments are reluctant to bring the problems of ethnic minorities to the attention of the public.

Employees who are discriminated against in labour relations, victimised or whose labour contracts are unjustly terminated have the right to file suits in labour courts. However, according to the Labour Code, employers who employ less than thirty employees are not obliged to have a valid reason to terminate contracts. Contracts of employees who have been employed for less than six months can also be terminated without a valid reason. The provisions of the Labour Code on termination of contracts have come into force recently, therefore there is no case law to elaborate on yet.

A provision on the shift of burden of proof has been inserted in the Labour Code, but only for termination of contract and victimisation cases. In the other fields, a shift of the burden of proof may be accepted by judges if the plaintiff shows some facts strongly indicating the existence of discrimination. No case law has appeared on this conditional rule yet.

Civil servants have the right to bring cases to administrative courts according to general principles. All administrative decisions and regulations can be challenged in administrative courts. Military officials do not have the right to bring legal action in the Supreme Military Administrative Court against decisions of High Military Council on dismissals. There is no rule on the shift in the burden of proof in administrative judicial procedures.

All administrative regulations and decisions may be challenged in administrative courts if they infringe laws and the Constitution. Administrative courts do not have the authority to review laws for compliance with the Constitution.

The existing sanctions for discrimination cases are as follows.

According to the Labour Code, victims of discrimination may claim compensation and other rights of which they are deprived from employers in labour courts.

When unjust termination of employment contracts and the victimisation of employees is determined by the labour courts, the employer is obliged to re-employ the victims within one month. If the employer does not re-employ the victim he or she is obliged to pay compensation to the

affected individual. The provisions of the Labour Code on the termination of contracts came into force in June 2003, therefore no case law has appeared yet.

If an administrative court decides that a civil servant has been dismissed on invalid grounds, the administrative decision is repealed. The verdicts of these courts are retroactively effective. The State departments are obliged to re-employ the victim. Administrative courts, despite the lack of a general rule on discrimination in legislation on civil servants, may repeal administrative decisions found to breach laws and the constitutional principle of equal treatment.

- Administrative courts may repeal administrative decisions and regulations if they do not comply with the law. These decisions are binding for the administration. The Turkish Constitutional Court has the power to repeal laws infringing constitutional provisions. If administrative or labour courts find that the law or the decree having the force of law to be applied is unconstitutional, they refer the matter to Constitutional Court which will review the constitutionality of the law.

Criminal sanctions are not available for discriminatory actions in workplaces.



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