

# Religion and discrimination law in Poland

## DRAFT

### **I. Historical, Cultural and Social Background**

I. The religious freedom has been for centuries one of the fundamentals of the Polish law. The preamble to 1921 Constitution begun with words: “In the name of the Almighty God”, which was acceptable to all three monotheistic religions, as a sign of tolerance of a newly reborn Republic. While the religious tolerance has been well established for centuries, it was only in the beginning of 21<sup>st</sup> century, that the term and concept of equal treatment and non-discrimination came into use.

I.1. a) Poland ratified the ECHR on 19 January 1993, which was also the day of entry into force for Poland. Prior to the ratification of the ECHR, until 1989, Poland was under the rule of communist regime, which was underlining rather the freedom from religion than freedom of religion. Art. 70 of the 1952 Constitution stated i.e. that nobody can be forced to participate in religious services. Although there was a very small pro-Christian association represented in the parliament, persons publicly admitting their faith faced a number of problems, in particular in 50, with the situation getting milder in 60. and 70s. The persons practising any faith/denomination (Catholic, Orthodox, Lutherans and others) were equally discriminated. Nevertheless, unlike in some other countries of the Soviet block, the Poles did not stop attending the religious services. The situation came back to normal in 1989/1990, when the statute on the guarantees of freedom of conscience and religion was adopted (19 May 1989), and the communist regime following election of 4 June 1989 was replaced with democratic one. The statute of 1989 is still in force, with slight amendments (cons. text published in Dz.U.2005, No. 231, item 1965).

I.1.b) The non-discrimination was (and probably still is understood by a vast majority) as identical with religious freedom and religious tolerance. As noticed in the introduction, the notion of equal treatment and non-discrimination appeared in the media and in the legal system in early 21<sup>st</sup> century, accompanying the Polish accession to the EU.

I.1.c) The ratification of the ECHR in 1993 was perceived as a (well deserved) come back to the European family, as it was only 4 years after 1989. There was no in-depth discussion. The Catholic church, the main player on the side of churches and religious communities, was mainly involved in questions relating to the concordat and struggling with issues concerning abortion.

I.2. Both UN-Covenants were ratified by the People’s Republic of Poland in 1977, but did not play any role in the legal system.

I.3. The deadline for transposition of the directives 2000/43 and 2000/78 was 1 May 2004, thus the day of the accession to the EU. They were transposed in 2003, as a part of *acquis communautaire*, and they were not subject of major interest or discussions. The 2000/78 directive was transposed in a number of legal acts, starting with 2003 amendment to the Labour Code till amendment passed on 3 December 2010.

The (Catholic) Church did not intervene directly in discussions related to discrimination based on religion and the transposition of directives. On the other hand, the Church was very active during

discussion on the Charter of Fundamental Rights and on the Constitutional Treaty, underlining the lack of reference to God and criticising too broad wording concerning non-discrimination, which could eventually lead to recognition of same sex marriages in Poland (see letter of Deputy Secretary General of the Bishops' Conference, point II.1, below).

Mr Konrad Szymański, MEP, in October 2010 asked to the European Commission a question (P-8168/2010), concerning interpretation of the directive 2000/78, and in particular, whether a catholic school may refuse employment of a homosexual teacher. The Commission answered indirectly, referring merely to its answer to the question P-7979/2010, asked by MEP Michael Cashman, thus not giving clear answer.

## **II. The Duty not to Discriminate: The Prohibition against Discrimination**

II.1. The office of the Plenipotentiary of the Government for Equal Treatment of Women and Men was created for the first time in 2001. As of 2005 it was also dealing with discrimination other than based on gender. The plenipotentiary was secretary of State in the Prime Minister's Chancellery. The office was abolished in November 2005, following remarks of the plenipotentiary (Ms. M. Środa), that the Catholicism contributes to the violence at home. The prime-minister at the time, K. Marcinkiewicz (Party of Law and Justice), did not deny the link between this statement and abolishment of this office. The office of plenipotentiary was re-established in March 2008, under PM Donald Tusk (Ms. E. Radziszewska). The new statute of 3 December 2010 on transposing certain EU-provisions in the area of equal treatment (OJ 2010 No. 254 it. 1700) creates in Art. 18 an office of the "Plenipotentiary of the Government for Equal Treatment", thus no longer mentioning women and men in its name. The plenipotentiary is appointed and dismissed by the Prime Minister and has rank of secretary of state within the Chancellery of the Prime Minister. This chancellery provides administrative, technical and legal support. The tasks of the Plenipotentiary include monitoring and evaluation of drafts submitted by various ministries, cooperation with social organisations, trade unions, raising awareness, etc. The Plenipotentiary has no real power vis-à-vis entities violating the principle of non-discrimination – it may merely send a letter pointing out the findings. Plenipotentiary presents yearly to the Sejm (lower chamber of Parliament) a report, describing the way the discrimination is combated in Poland. The last report (for year 2009) consists of 160 pages (document 2395) and relates only and exclusively to the discrimination based on sex. The Plenipotentiary called a number of advisory committees, dealing with different aspects of discrimination, but none of them relates to discrimination based on religion. One of rare examples of the Plenipotentiary activities: she intervened in city of Szczecin where new members of the city guard after taking oath had to participate in the Holy Mass; the plenipotentiary in its letter expressly asked the City Council to separate the ceremony of taking the oath and the Holy Mass (October 2009). Ms. Radziszewska is often criticised personally for not fulfilling her tasks correctly.

Another body dealing with the non-discrimination is the Ombudsman (Ombudsperson, currently female – Prof. I. Lipowicz), existing in the Polish legal system as of 1987. The above mentioned statute of 3 December 2010 added to its tasks the monitoring of non-discrimination and the right “to

take up action, if he is informed about the violation of human rights and freedoms, incl. principle of equal treatment". The statute introducing these new area of responsibility does not mention the directive 2000/78; it mentions directives 2000/43, 2004/113 and 2006/54. The powers of the Ombudsperson are described in a more precise way: in case of a violation of the principle of non-discrimination by an organ of public authority, she may take an action; if this principle is violated by a private entity, the Ombudsman may suggest a control to be carried out by the State Labour Inspection. Recently, she addressed the Minister of Justice asking whether the Ministry gathers or intends to gather statistics concerning the crimes relating to violation of the non-discrimination principle.

In September 2009, the parliamentary club of the Alliance of Democratic Left submitted to the Sejm a draft statute (doc. 2808), aiming at creation of the Ombudsman for Combating the Discrimination. It was supposed to deal with various areas of discrimination, incl. private life, and referred to discrimination based on a variety of reasons, incl. religion. The government presented its negative opinion on the project, which was prepared by the office of the Plenipotentiary for Equal Treatment, suggesting that many provisions concerning scope and modus operandi were unclear. Also the Bishops' Conference of the Catholic Church got involved; the letter by the Deputy Secretary General, sent in summer 2010 to the government, became public. It stated that there is no need to create a special office and that following adoption of such a bill "Poland could get under unspecified influence". The bill was refused in first vote of the Sejm on 26 November 2010. It was not clear from the draft, whether the new Ombudsman for Combating the Discrimination was supposed to replace the current Plenipotentiary for Equal Treatment, as the bill did not refer to this question – neither as abolishment of the other, nor in terms of co-operation between two of them.

To sum up: currently, the Plenipotentiary for Equal Treatment is rather a one-person body, not having extensive competences; so far there is no advisory body dealing with religious discrimination. The Ombudsperson is second institution in charge of non-discrimination, with fewer tasks, but more precisely described.

## II.2. Sources of law:

The preamble to the current 1997 Constitution alludes to religious tolerance and non-discrimination: "We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources".

The general prohibition of discrimination is in Art. 32 para. 1 of the Constitution: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities"; the individual freedom of religion is anchored in Art. 53.

As stated before, the prohibition of discrimination in working environment was introduced by a statute amending the labour code in 2003, shortly before the Polish accession to the EU. The most important

statute on non-discrimination is the one adopted on 3 December 2010, extensively discussed within various sections of this paper.

The philosophical convictions (Polish “światopogląd” is very close to the German notion of Weltanschauung) are also protected, as of 2010. One has to underline that the notion of religion itself is not legally defined in the Polish legal system. As minister of interior is responsible for registration of churches and religious communities, in few cases he denied the registration on the basis that there is no religious element in the application. According to the procedures laid down in the 1989 statute, the applicant addressed the Chief Administrative Court, which confirmed that the application lacked a "supernatural" element.

II.3. The prohibition of discrimination based on religion relates to professional training, economic or professional activities, joining and functioning within trade-unions, access to the unemployment agencies and their services, social security, health system, education and higher education, access to housing, goods and energy, if offered publicly.

II.4. The criminal code of 1997 states that "who limits human rights of another person due to their religious or non-religious affiliation, shall be punished by limitation of freedom or imprisonment up to 2 years" (Art. 194). Moreover, the 1997 code states that violence based on national, ethnical or racial background, on political, religious or non-religious views, shall be punished by imprisonment from 3 months up to 5 years. The same refers to person who incites to commit such a crime (Art. 119 para. 1 and 2). If, due to the reasons mentioned above, a murder or significant deterioration of health is committed, the offender shall be imprisoned for not less than 12 years, 25 years or life-long imprisonment (Art.118 para. 1). The preparation for such a crime shall be punished: imprisonment for no less than 3 years.

### **III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition**

III.1. The amendment to the Labour Code passed in 2003 included also an exemption for churches, according to which unequal treatment would not constitute discrimination. It read as follows:

"Differentiation of employees based on their religion or denomination does not violate the principle of equal treatment in employment, if in connection with the character of activities carried out within churches and other religious communities or organisations, whose aim of activity remains in a close connection with religion or conviction [German would be: Religion und Bekenntnis], religion or conviction constitute an important, reasoned and justified professional requirement".

The new statute, adopted on 3 December 2010 (see II.1, II.2), confirms this principle, slightly changing the scope of this provision by adding to churches and religious communities also the organisations, which ethics is based on philosophical convictions. On the other hand, it requires from employees of such organisations to act in good faith and loyally towards the ethics of the church, other religious community or organisations, whose ethics is based on religion, denomination or philosophical convictions.

III.2. The churches, religious communities or organisations whose ethics is based on a religion, conviction or belief (German would be: Religion, Bekenntnis oder Weltanschauung) may differentiate. The text of the statute of 3 December 2010 in current wording does not refer to an individual as an employer, who could discriminate/differentiate employees.

III.3. The religion, conviction or belief (Religion, Bekenntnis oder Weltanschauung) must constitute a real and decisive professional requirement vis-à-vis employee, and must be proportionate in order to achieve an aim of differentiation, which is conform with the law. It does refer also to the requirements, that the employees act have to act in good faith and loyally towards the ethics of the church, religious community or organisation, whose ethics is based on religion, conviction or belief.

#### Conclusions:

Since 1945 the population of Poland has been one of the most homogenous in Europe, in terms of both national and religious minorities. There are over 150 registered churches and religious communities, but one has to bear in mind, that religious minorities (Orthodox, Lutherans, even major part of Muslims) have lived for centuries in Poland. According to the constitution, the public authorities must not ask the citizens questions concerning the religion or belief of individual (Art. 53 para. 7). Therefore, a discrimination based on religion is possible when the person interested reveals their denomination, for example by asking a day off on religious holiday which is not a state (Catholic) holiday. The statutes on relations with churches and religious communities (e.g. with the Orthodox Church) do foresee such exemptions, and following such a request of an interested person a (unlawful) discrimination could take place.

According to the Eurobarometer research "Discrimination in Europe" (January 2007), Poles referred mainly to physical disability, homosexuality, age, but discrimination based on religion was mentioned on one of last places. The issues of discrimination based on religion relate mainly to the choice of the religion or alternatively the ethics in schools, whereas ethics is provided very rarely. Among few cases in this area, one reached the European Court for Human Rights in Strasbourg (Grzelak v. Poland, case 7710/02). There are no significant cases concerning the discrimination based on religion in working environment. Other cases based on Art. 14, which reached to Strasbourg, related to other aspects of discrimination:

Kozak v. Poland (application no. 13102/02), succession to tenancy of a flat denied to homosexual after his partner's death in breach of the convention

Bączkowski and Others v. Poland (application no. 1543/06), freedom of assembly, Foundation for Equality (march for support of rights of various minorities)

Luczak v. Poland (no. 77782/01) – the French national whom he access to farmer's pensions scheme was refused as he was not Polish.

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