

Legal protection against sexual orientation discrimination in EU. Current state of play.

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POLSKIE TOWARZYSTWO
PRAWA ANTYDYSKRYMINACYJNEGO

Sexual orientation discrimination report

- International trends in legal protection against SO discrimination
- Current state of implementation of Directive 2000/78/EC into national systems. Lawmaking and application
- Challenges in practical and effective use of antidiscrimination laws
- Institutional protection
- Potential clashes of values
- Recommendations

International trends in legal protection against SO discrimination

UN system (slowly) recognizes LGBT rights, mostly by monitoring bodies (recommendations, conclusions). Less through the normative way.

Council of Europe system becomes more and more generous via ECtHR judgments, Committee of Ministers recommendations, Human Rights Commissioner papers. Committee of Social Rights recommendations.

Added value of abovementioned systems:

- judicial dialogue (CJEU and ECtHR)
- inspirational effect (EU and CoE)

Challenges in practical and effective use of antidiscrimination laws

- Sexual orientation as a **ground** of discrimination. Determination of the personal scope of prohibition of discrimination. LGBH (lesbians, gays, bisexuals, heterosexuals) only? What about trans and non-heteronormativity?
- What kind of victim's behaviour is protected? Coming out in a hostile environment. *Polish case*
- Very few CJEU judgments on sexual orientation and its specificities

Challenges in practical and effective use of antidiscrimination laws

Discrimination by association or assumed discrimination. Almost not present in the laws. Very rare use by national courts.

Polish case of A.T. (mix of discrimination by association and assumption)

Challenges in practical and effective use of antidiscrimination laws

- **Positive action.** Rarely used in terms of accommodating needs of individuals of a specific sexual orientation (especially in Central and Eastern Europe)
- **Sanctions.** Common lack of reference to effectiveness, proportionality and dissuasive function in national laws and its impact on court' activities. *National examples.*

Potential conflicts of rights/values/freedoms

Mostly between religion/belief and sexual orientation.

Result of incomplete implementation of EU law or courts' broad understanding of autonomy of churches

Lack of use of ECtHR instruments in religion cases („prohibition of privatisation of human rights”)

Institutional protection against sexual orientation discrimination

Lack of EU legal obligation to set up a body with mandate to combat sexual orientation discrimination.

Diversed equality infrastructure among Member States results in unequal protection against sexual orientation discrimination within EU territory.

However, impressive NEBs work on LGB(T) issues. Legal an promotional.
Good practices. Cooperation with NGOs.

Proposal of antidiscrimination horizontal Directive

Equalizes protection but:

- Lack of equality body for employment issues
- Explicit provision on marital status in the body of the Directive (previously preambles)
- Lack of legal definition of sexual orientation

Recommendations

- Careful monitoring of implementation of 2000/78/EC Directive by courts (e.g. sanctions, concepts of assumed and associated discrimination)
- Providing more opportunities of exchange of good practices of equality bodies
- Providing more trainings (both sensitizing and legal) for judges and other enforcement bodies
- More effective and common use of international human rights standards when applying the law

Thank you for your attention!

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