ANTI-DISCRIMINATION LEGISLATION IN UKRAINE – BOX TICKING FOR THE EU OR REAL REFORMS TO ENSURE EQUALITY FOR UKRAINE’S CITIZENS?

POLICY REPORT

SUMMARY

Ukraine’s long movement towards ensuring equality and protection against discrimination in all spheres of social life has had positive developments, including the adoption of a framework law prohibiting discrimination on all grounds, which to a great extent complies with the minimum standards set by the EU Equality Directives. Moreover, various provisions aimed at ensuring special protection of certain groups, such as women and persons with disabilities, can be found in a number of legislative acts. Finally, the National Human Rights Strategy 2020 is the first ever national-level policy document that sets out tasks for all actors to ensure real protection from discrimination in Ukrainian society.

However, there is still a need to introduce legislative amendments to ensure that the legal system is comprehensive, mechanisms of redress are adequate and non-discrimination policies are implemented in all spheres. A number of gaps were identified in the course of monitoring individual complaints and court decisions. More specifically, there is: a lack of legal certainty and consistency (definitions and grounds for discrimination should be unified across all laws); a lack of comprehensiveness of anti-discrimination legislation, especially in preventing discrimination and introducing positive actions; a lack of effective mechanisms for punishing violators and remedying victims; poor implementation of anti-discrimination policies and action plans; and, finally, failure of the state to provide effective needs analysis before introducing certain changes. In addition to addressing these gaps, there is a need to develop mechanisms to evaluate the effectiveness of state anti-discrimination programs and action plans.

Most of the abovementioned shortcomings can be effectively eliminated by improving cooperation between the National Equality Body and other state actors dealing with development and implementation of anti-discrimination policy and introduction of positive actions. The Action Plan of the National Strategy for Human Rights 2020 is a first step in that direction as it identifies areas for improvement and shows where appropriate positive actions should be introduced.

This policy report focuses on the achievements, shortcomings and perspectives of Ukrainian anti-discrimination policy.
INTRODUCTION

Ukraine has a long history of denying discrimination as an issue and ignoring the need to introduce legislative changes to ensure protection from discrimination on various grounds. This was characteristic not only of the state, but also of the civil society organizations (CSOs), who backed only a few social groups, namely, women, people living with HIV (PLHIV), and persons with disabilities. Moreover, before 2011, the CSOs did not even consider the need for joint efforts and campaigns to stand up for equality and protection from discrimination. As a result, for many years the legislation lacked clarity on what is prohibited conduct amounting to discrimination and what are the measures for preventing discrimination and holding perpetrators accountable.

Although Article 24 of the Constitution of Ukraine states that all citizens are equal and no distinction in treatment should be allowed, its general wording prevented it from becoming a sufficient tool for protection from discrimination on all grounds. Since 2005 Ukrainian lawmakers have adopted a number of laws aimed at prohibiting certain types of discrimination (based on gender or disability), but the first framework anti-discrimination law was adopted only in 2012 as part of the EU-Ukraine Visa Liberalization Action Plan (VLAP) implementation. However even today, almost 5 years later, anti-discrimination legislation still has a number of gaps and needs further improvement. Additionally, it is high time to move from formal introduction of legal norms to their effective implementation, which is discussed in the analysis below.

ANALYSIS

Evolution of national anti-discrimination legislation – current state and areas for further improvement

For years Ukrainian state officials argued that there was no discrimination in Ukraine and thus no need to work on special anti-discrimination laws. The main argument, which was regularly used, stated that equality is guaranteed by the Constitution and no complaints on inequality were reported then. Another widely used argument was that actions, positive from the view of the state, were already embedded in the Ukrainian legislation – e.g. Labor Code included norms on protection of women with children, etc. However, the lack of complaints is easy to explain, as it is impossible to complain about a breach of the law that does not have a name or definition. It is also important to take into account that the current mechanism of the Constitutional Court complaints does not allow people to directly address the Court in order to protect their constitutional rights.

Such rhetoric of public officials became possible because of low level of engagement of civil society actors in fighting against discrimination, as well as lack of comprehensive data or surveys demonstrating the existence of discrimination in Ukraine. The CSOs were often representing only certain groups of people and campaigning not for equal rights, but rather for particular services, i.e. protection from domestic violence for women, work opportunities for persons with disabilities, and healthcare for PLHIV. The first concrete attempt to define and prohibit certain types of discrimination took place only in 2005, when the Law “On Ensuring Equal Rights and Opportunities of Women and Men” was adopted. This Law defined gender discrimination and sexual harassment, and created...
a framework for further actions to prohibit and counter gender-based discrimination. Despite this law, further actions on its implementation remained ineffective and rather formal. Moreover, according to 2016 data, in the ten years since the law’s adoption, only 145 court rulings mentioned this law, and most of these cases were state initiated claims on gender discrimination in advertisements, etc.\(^4\) rather than private prosecution of gender-discriminatory acts. From our view, this should not be perceived as an indicator of absence of gender-based discrimination in Ukraine. What it does indicate is a very low level of understanding on how to use this law by both professionals and wider public.

Several state programs on gender equality introduced positions of gender consultants at local and state authorities; draft laws and bylaws must go through a gender expertise; numerous gender trainings for state officials and judges were held. Yet, all these efforts have not made fundamental changes in the situation and many public officials still see the issue of gender equality as unimportant or secondary. At the same time, it is worth stressing that in less than ten years of gender policy reform some tangible results have been achieved, among which is the effective introduction of a gender quota\(^5\) for women representatives in the Parliament\(^6\).

Since ratification of the Convention on the Rights of Persons with Disabilities in 2009, Ukrainian legislation against discrimination on the grounds of disabilities was amended and improved. More specifically, in 2009 a legal definition of discrimination on the ground of disability and the term “reasonable accommodation”\(^7\) was introduced, and in 2012 a quota was established, obliging employers to ensure that persons with disabilities make up 4% of all employees.

The next step on the path of fight against discrimination was taken by Ukraine when it committed to the VLAP, which required the state to introduce complex anti-discrimination law. From 2010-2012 public officials continued to deny the existence of discrimination, explaining that protection from discrimination was provided by the Constitution and the two abovementioned laws\(^8\). Eventually, however, VLAP obligations succeeded in becoming a real driver of comprehensive anti-discrimination policy reform — the first framework law\(^9\) defining and prohibiting discrimination on various grounds was adopted by the Parliament in late 2012 and amended in 2014. This proves the thesis that, despite internal resistance to anti-discrimination reform, Ukraine’s international obligations are the most effective tools for ensuring that human rights protection is embedded into Ukrainian legislation.

Anti-discrimination law contains a number of much needed definitions of discrimination, establishes the National Equality Body\(^10\) and introduces the shift of the burden of proof\(^11\) in the Civic Code. The latter action was aimed at helping claimants bring cases of discrimination to courts and ensure fair justice. In practice, analysis of court decisions shows that this tool is rarely used. The main reason for this is poor wording of this very needed provision and the fact that it is part of the Civic Procedural Code rather than of the anti-discrimination law itself. Another reason is that shift of the burden of proof is a new concept for Ukraine and judges do not know how to use it.

Although a crucial step forward, this framework law, drafted by the Ministry of Justice and mainly inspired by the EU Directives prohibiting discrimination, has a number of shortcomings. Among them are: unclear definitions of forms of discrimination (was corrected in 2014), non-inclusive list of grounds for discrimination\(^12\), and, most importantly, mechanisms of punishment for acts of discrimination are missing.

\(^6\) Currently there are 52 women MPs in the Parliament, accounting for 12% of all MPs and establishing a record high number in all 8 convocation of the Ukrainian Parliament. The number of women in the executive branch (the Cabinet of Ministers) is three and it is the highest number in the whole history of independent Ukraine.

\(^7\) “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. Article 2 of the UN Convention of the Rights of Persons with Disabilities is available in English at: http://www.un.org/disabilities/convention/conventionfull.shtml

\(^8\) These are Laws “On Ensuring Equal Rights and Opportunities of Women and Men” and “On Persons With Disabilities”.


\(^10\) This role was assigned to the Parliament Ombudsman whose mandate was broadened accordingly.


\(^12\) There was strong opposition from MPs, showing a lack of understanding of human rights values. For example, the claimed reasons for not mentioning sexual orientation and gender identity explicitly were the ‘traditional nature of Ukrainian society’ and ‘premature broaching of such an issue’. There is also a need to include health as a protected right of PLHIV.
Similar problem overshadows another important step in anti-discrimination legal framework — while discrimination on all grounds in job advertisements was prohibited in 2013\textsuperscript{13}, there is no effective complaint mechanism as the law does not stipulate sanctions. In addition, there is no single agency responsible for monitoring advertisements and bringing guilty parties to responsibility — seven different state bodies\textsuperscript{14} can perform these functions, and in the end, no one is doing the job.

Since anti-discrimination provisions of the current Labor Code were quite outdated, it was necessary to update them and this was done in November 2015 with persuasion by the EU and the civil society. Ukraine introduced two new points to the list of protected grounds from discrimination in the sphere of labor — sexual orientation and gender identity\textsuperscript{15}. Aligning this list with the minimum standards of EU’s Employment Equality Directive 2000/78 was the first and only step forward in implementing Ukraine’s obligations under the Association Agreement. This historical vote\textsuperscript{16} was marked by tense and homophobic discussions in the Parliament and amongst the general public. However, the new version of the Labour Code currently being developed in the Parliament does not contain sexual orientation and gender identity in the list of protected grounds, demonstrating that achievements in this sphere require further monitoring and evaluation.

On the basis of the abovementioned analysis, the following drawbacks of the anti-discrimination policy in Ukraine can be suggested:

• lack of comprehensiveness of anti-discrimination legislation, especially concerning redress and introduction of positive actions;
• lack of legal certainty and consistency – discrimination definitions and grounds differ from law to law;
• poor implementation of anti-discrimination policies and action plans.

These shortcomings should be eliminated, the approach to anti-discrimination policy should be changed from formal to proactive and introduce compulsory needs assessment and consultations with civil society. In addition, it is important to ensure that anti-discrimination policies become part of local development policies within decentralization reform. This will enable local self-government bodies to draft effective and focused local plans based on research and evidence rather than wait for national plans from the ministries.

FROM TICKING BOXES TO IMPLEMENTING LAW AND POLICIES

As mentioned above, Ukraine needs real and effective policies not only in combating discrimination, but also in preventing it instead of hiding behind the lack of statistics. Effective and comprehensive legislation is only part of the issue. It is also important to start developing and implementing policies and positive actions without further delay.

The first step to develop a policy on prevention and prohibition of discrimination was an Action Plan 2013-2017, drafted and adopted by the National Equality Body\textsuperscript{17}. Each year Equality Body’s staff reviews the Strategy, prepares an action plan for next year and evaluates the results of the previous year\textsuperscript{18}. Additionally, ministries are required to perform certain tasks; including developing and implementing their own anti-discrimination action plans.

\textsuperscript{13} Full text is available in English at: http://www.wipo.int/wipolex/en/text.jsp?file_id=187714.
\textsuperscript{14} These are: State Body in Charge of the Consumer Rights; Antimonopoly Committee of Ukraine; National Council of TV and Radio Broadcasting in Ukraine; Ministry of Finance; National Securities and Stock Market Commission; State Executive Body in Charge of Architecture and Construction in Ukraine; State Executive Body Responsible for Labor Market and Employment Control in Ukraine.
\textsuperscript{15} There was a long debate concerning whether to introduce sexual orientation and gender identity as protected grounds. Civil society insisted that they should be explicitly mentioned in the framework anti-discrimination law itself, but the MPs argued that as the EU legislation only mentions sexual orientation and gender identity in one labor directive, it should be a minimal requirement for Ukraine.
\textsuperscript{16} This is the first time that sexual orientation and gender identity are included in Ukrainian legislation.
\textsuperscript{17} In Ukraine the Ombudsman serves at the National Equality Body. The timeframe for the Action Plan was based on the term for which the current Ombudsman was appointed. In 2017 Ukraine will elect a new Ombudsman.
\textsuperscript{18} There is a recommendation to the National Equality Body to make such reports public and easy to read.
The second step in shaping anti-discrimination policies was to include issues of discrimination and gender inequality into the National Strategy on Human Rights 2020 and, consequently, into its Action Plan. The latter contains several sections that set out anti-discrimination tasks in Ukraine, and it can be considered the first national policy document on preventing and prohibiting discrimination. These sections are:

- "Prevention and counteraction to discrimination" (contains nine points of expected results, from "ensuring complex and consistent legislation" to "implementing programmes that increase the level of citizens' understanding of the issue of discrimination");
- "Ensuring equal rights and opportunities for women and men" (contains five expected results, from "international standards on gender equality are introduced in Ukraine" to "complex measures to counteract gender stereotypes in society");
- "Provision of rights for national minorities and indigenous people" (contains four expected results, from "effective mechanism to provide for the rights of national minorities and indigenous people" to "policy on interethnic tolerance").

The tasks within each section entail a large amount of work until 2020. Part of this work deals with changing the legislation; another part requires the integration of anti-discrimination agenda into the daily work of executive and local authorities.

Civil society monitoring of the Action Plan implementation during 2016 shows slow and uneven progress in this sphere. Some tasks are not accomplished due to lack of coordination and cooperation among ministries, some are openly ignored by the authorities, and others cannot be accomplished due to ignorance from the side of the Parliament.

Thus, the Ministry of Culture of Ukraine, responsible for the policy on national minorities, is trying to avoid all tasks from the Action Plan and has initiated a process within the Cabinet of Ministers to change the document and shift these responsibilities to another agency. The Ministry of Healthcare was ignoring the Action Plan tasks for the first half of the year without any explanations; however, with the appointment of a new Minister it started to work on it and is now implementing tasks regarding medical treatment for transgender people.

Some of the planned legislation changes are not implemented because draft laws are pending in the Parliament. For example, bill № 3501, aimed at changing the mechanism of responsibility for discrimination, is still waiting for its second hearing (the first one was held on February 16, 2016). Changes into the Criminal Code of Ukraine have been stalled because the Ministry of Interior still has not developed the draft.

Another concern about successful implementation of the Action Plan is its lack of backing from the State Budget. Up to now the tasks have been implemented using limited resources of each responsible ministry and supported by the donor organizations. Many activities are run by the CSOs with the help of international donors. For example, awareness-raising campaigns on gender equality and prohibition of discrimination are run by the CSO with support of the National Equality Body and financing from international donors. The State does not provide intellectual expertise, social advertisement quotas or any other resources to support such work, despite the fact that informational and educational campaigns are one of the tasks in the Action Plan. Case law monitoring shows that there is a need to inform people that discrimination is prohibited and encourage them to use mechanisms of complaints to protect their rights.
Thinking beyond introducing legislative changes, there are other important burning issues that significantly influence efficiency of their implementation:

1. Collection and analysis of data on cases of discrimination should be changed. The state should not rely only on the CSOs to collect and present data, but should be responsible for collecting data on discrimination in all spheres and ensuring its timely analysis. A glaring example of an approach ignoring the lack of data is the Strategy on Integration of Roma People in Ukraine, adopted in 2013. Its tasks are not clearly tailored, and figures are based on Ukrainian census of 2000, which showed only 40,000 Roma people living in Ukraine, when the CSOs and the minority group itself estimate around 300,000-400,000 Roma in Ukraine. Therefore, complete and segregated data is key for effective planning of actions to prevent discrimination and implement positive actions tailored for each discriminated group in each specific sphere.

2. Education of public officials on how to assess the needs of different groups and develop appropriate plans should be introduced. It took Ukraine almost ten years to start discussing gender aspects of budgets, with the first pilot being introduced in 2011. It was not until 2015 that five ministries agreed to participate in the project on gender oriented budgeting. So far, 12 regions have programs on gender budgeting in different spheres.

3. Quality of obligatory anti-discrimination expertise of the draft laws and bylaws should be improved, and the expertise should be conducted thoroughly, not just formally. In 2014 the Parliament adopted a law, which discriminates against internally displaced people — a mistake that has yet to be corrected.

4. Policy planning and implementation should be made more specific. Particularly, it is important to switch from developing national plans to designing tailored policies solving specific issues in a particular sphere. Instead of engaging all ministries to formulate one National Strategy on Human Rights 2020 and its Action Plan, we believe it would be more effective to mainstream prevention of discrimination into the work of each ministry within their respective sphere of responsibility. Such ministerial plans can contain tasks and obligatory checks for each sphere, including conducting anti-discrimination expertise to prevent such incidents as recently happened in the Ministry of Education, which recommended the use of a new school textbook that contained examples of sexism and case studies clearly showing incitement to gender discrimination.

5. Effective mechanism of launching a discrimination complaint should be established. The only legal act that introduces criminal punishment for discrimination is article 161 of the Criminal Code of Ukraine (CCU). The criminal procedure involves complaining to the police, but prosecution does not provide space for the shift of the burden of proof, stipulated by the framework anti-discrimination law, and therefore requires proving motive to discriminate. These requirements make criminal procedure ineffective. Legal experts stress that further legislative changes need to be done – the CCU should be amended that therefore requires proving motive to discriminate. These requirements make criminal procedure ineffective. Legal experts stress that further legislative changes need to be done – the CCU should be amended so that the police, but prosecution does not provide space for the shift of the burden of proof, stipulated by the framework anti-discrimination law, and therefore requires proving motive to discriminate. These requirements make criminal procedure ineffective. Legal experts stress that further legislative changes need to be done – the CCU should be amended so that
discrimination (including so-called “hate speech”) should be punished within civic or administrative procedures. This consequently leads to the second necessary legal change – amendments to the Administrative Code of Ukraine to introduce mechanism of administrative punishment for discrimination. This can be done by assigning powers to the National Equality Body or establishing a system of responsibilities divided among state actors (e.g. powers to tackle discrimination in the sphere of labour can be assigned to the Ministry of Social Affairs and its subordinate units). These amendments are subject to further comparative analysis of different available models in the EU and transparent dialog between the CSOs, the National Equality Body and other state actors. Another issue that might bring attention to individual complaints on discrimination and also ensure representation of the most vulnerable is the possibility for the CSOs to bring complaints on systemic discrimination for the sake of safeguarding public interests.

6. State bodies and tools should be established to collect information on discrimination in each sphere of social life and to evaluate actions already taken to ensure the effectiveness of anti-discrimination policies. For example, either the Ministry of Social Affairs or another state body responsible for labor should analyse the effectiveness of compulsory quota for employment of persons with disabilities and propose solutions to the discovered problems. Potential proposals to resolve this issue can be: empowering people with disabilities, providing them with professional education, providing assistance to employers and educating them on how to introduce reasonable accommodations, establishing programs of attractive loans, etc.

CONCLUSION

Ukraine’s long way towards ensuring equality and fight against discrimination has brought a number of positive developments, including improvement of subject legislation. The National Human Rights Strategy 2020 is the first ever national-level policy document that sets out tasks for all actors to ensure real protection from discrimination in Ukrainian society.

However, a lot remains to be done to ensure sustainability of anti-discrimination reform. Strengthening the National Equality Body and cooperation between all state actors is crucial for effective implementation of anti-discrimination legislation and policy in Ukraine. Another urgent necessity is establishing sanctions for offenders and redress to victims. In addition, there is also a need for comprehensive training programs for professionals from different spheres to enable them to effectively identify, counteract and prohibit instances of discrimination.

The existing legal framework also provides for positive actions and it is the responsibility of each ministry and local government body to identify areas in which positive actions can be a solution and implement them. The Action Plan of the National Strategy for Human Rights 2020 is a first step in that direction, as it identifies areas for improvement and shows where appropriate positive actions can be introduced.

It is important to introduce periodic evaluation of the implementation of the Action Plan tasks and local research mechanisms to identify priority areas for anti-discrimination plans. Moreover, not adequate state funding can significantly undermine the efficiency of implementation of the Action Plan tasks.
RECOMMENDATIONS

In order to ensure further development of the anti-discrimination reform, following recommendations should be taken into account by the stakeholders.

The Ukrainian authorities:
- initiate and ensure further improvement of legislation to finalize the creation of an effective and comprehensive legal system of protection from discrimination (sexual orientation should be explicitly mentioned in the new Labour Code, amendments to article 161 of the CCU should be adopted, provision for administrative sanctions for discrimination should be included, etc.);
- provide the CSOs with the right to represent victims in courts and/or make claims in public interests;
- amend the Action Plan of the National Strategy on Human Rights in order to define a set of indicators and responsible actors, ensure transparent and consistent cooperation between public institutions and CSOs, include mid-term evaluations; allocate a sufficient budget for its implementation;
- develop and implement positive actions to protect ethnic minorities and people with disabilities and to ensure gender equality (can also be implemented within the Strategy Action Plan);
- organize and conduct national informational awareness-raising campaign on prohibition of discrimination (aiming at bringing anti-discrimination law and the system of protection from discrimination to its consumers, raising awareness to prevent discrimination in Ukraine as well as strengthening existing campaigns, led by the CSOS).

The European Union:
- continue monitoring Ukrainian progress in fighting against discrimination;
- evaluate not only formal achievements (such as adoption of new laws), but also their implementation and tangible changes, brought by these laws;
- assist state institutions with technical expertise and tools on how to mainstream anti-discrimination in all state policies.