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Judicial Protection from Discrimination in Bosnia and Herzegovina

Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field

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Adrijana Hanušić

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Author:
Adrijana Hanušić

Editor:
Edin Hodžić

Reviewer:
Goran Selanec

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Translator:
Kanita Halilović

Proofreading:
Zlatko Čustović

Cover design:
Vanesa Prodanović and Tarik Hodžić

Inside design:
Branka Ilić

DTP:
Jasmin Leventa

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Open Society Fund B&H Anti-Discrimination Program

The report is produced in the framework of the Open Society Fund B&H Anti-Discrimination Program, which brings together partner organizations across B&H divided into four teams committed to key activities in the field of combating discrimination: monitoring, documentation and reporting, strategic litigation, policy analysis, and advocacy.

For more information on the Open Society Fund B&H Anti-Discrimination Program, please visit the website www.diskriminacija.ba.

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1. Introduction

With the passing of the Law on the Prohibition of Discrimination in 2009, Bosnia and Herzegovina (B&H) took a big step on the charted course of advancing the protection of human rights. Three years after the day the normative prerequisite for protection from discrimination was established, however, judicial practice regarding this matter remains very scanty. Statistics kept by the organization Vaša prava, which among other things deals with legal representation of victims of discrimination and strategic litigation, are certainly telling. At the time of finalizing this report, in December 2012, only three claims approved by applying the Law on the Prohibition of Discrimination of B&H (LPDB&H) were known of – a final judgment by Mostar Municipal Court[1], a first-instance judgment by Livno Municipal Court[2], and a first-instance judgment by Mostar Municipal Court[3]. Meanwhile, five claims were rejected and lawsuits in two cases were dismissed[4]. Considering the above, it is difficult at this time to draw firmly substantiated conclusions on the application of many legal institutes and innovations prescribed by the Law, as well as on problems that may appear in this regard in future court practice. The judiciary in Bosnia and Herzegovina yet faces the important and challenging task of their interpretation and proper application. In the absence of developed case-law, as a Livno Municipal Court judge who conducted one of these cases pointed out, judges are struggling to "resolve their dilemmas in line with the acquired experience and practice from other types of proceedings, in the spirit and meaning of the legal provisions"[5].

In the meantime, it is precisely for this reason that it is worth making an analysis primarily of the procedural legislative institutes specific for judicial protection from discrimination which were introduced by the Law on the Prohibition of Discrimination of B&H, with particular focus on those whose application has already shown to be problematic, or may yet, based on comparative experience and the

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1 Mostar Municipal Court, Judgment No. P 58 0 P 056658 09 P, July 6, 2010, upheld March 24, 2011.

2 Livno Municipal Court, Judgment No. 68 0 P 017561 11 P, December 7, 2011.

3 Mostar Municipal Court, Judgment No. 58 0 Ps 085653 11 Ps, April 27, 2012.

4 In these cases, either appellate proceedings are pending or a lodged appeal has been approved and a retrial ordered. Vaša prava, *Pregled slučajeva Antidiskriminacionog pravnog tima NVO Vaša prava* [Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team], December 5, 2012, available in the archives of Analitika.

5 Sofija Vrdoljak, Livno Municipal Court judge, e-mail correspondence, February 2012.

nature of the procedural rules in this field in Bosnia and Herzegovina, shown to be problematic. In this report, the key anti-discrimination procedural institutes and their application in Bosnia and Herzegovina are examined from the perspective of relevant standards established through European Court of Human Rights case-law and European Union standards, as well as legislative solutions and experience from other countries. The main purpose of such an analytical framework is to offer guidance on potential advancement and proper treatment of certain specificities introduced by the LPDB&H in the legal system of Bosnia and Herzegovina, with the goal of ensuring the attainment of their purpose – privileged protection of individuals who find themselves in the position of victims of discrimination.

We are proceeding from the assumption that conclusions may already be reached from an analysis of the legislative framework and initial examples of court practice on some of the key challenges that may pose an obstacle to efficient judicial protection of individuals from discrimination. The report is based on an analysis of the specificities of the LPDB&H, available data on the situation in the area of combating discrimination in practice in Bosnia and Herzegovina (such as relevant statistics and information on the course and outcome of certain court cases), analysis of relevant court judgments and interviews with several competent interlocutors. It is important to point out that comparative research was carried out as well, with the goal of identifying examples of good practice in particular problem areas and identified obstacles to efficient implementation of the LPDB&H from the perspective of judicial protection. Countries included in the comparative research are mainly European Union countries and countries in the region that share our problems. Additional interesting cases were also included if required by the analysis of specific issues covered by this study. Based on the identification and analysis of the challenges and problems that have already appeared in the processing of discrimination cases before courts in Bosnia and Herzegovina, and based on a contextualized analysis of current legislative solutions in Bosnia and Herzegovina and comparative experience, we attempted to come up with recommendations on how to advance the efficiency of judicial protection of victims of discrimination in Bosnia and Herzegovina.

This report is certainly not exhaustive and comprehensive, but it is focused on the key problems that we have identified, based on available sources – primarily the first anti-discrimination court cases – in this field in Bosnia and Herzegovina. Of course, we hope that future research projects will give due attention to those aspects of judicial protection from discrimination that we could not, due to conceptual and technical limitations, cover in this study.

We conceived and presented the analysis in line with the different stages of the proceeding – from the identification and reporting of discrimination to the final judgment. After introductory considerations on judicial protection from discrimination in Bosnia and Herzegovina, the report analyzes the various specific elements of this form of protection and related characteristic problems and ends with concluding observations and recommendations aimed at their elimination.

2.

Judicial Protection from Discrimination in B&H – Key Elements and Problems

2.1. Introductory Considerations: Types and Actors of Judicial Protection from Discrimination

2.1.1. Civil Proceeding

The vast majority of countries in the world give victims of discrimination an opportunity to combine different types of court proceedings with non-judicial protection mechanisms.[6] Although judicial protection may be exercised through civil, criminal, administrative or labor proceedings, in a comparative perspective protection is most commonly stipulated through civil proceedings. In addition, specific sectoral adjudication mechanisms also exist in comparative practice. For example, with regard to the employment field, in some countries, along with regular courts, discrimination claims are decided upon by relevant labor courts or employment tribunals.[7] In rare cases, there are also courts specifically set up to handle discrimination cases, such as, for example, the Equality Tribunal in Ireland[8]. Similarly, in Canada, in all federal units but Quebec, special tribunals specializing in human rights were traditionally exclusively in charge of adjudicating discrimination-related cases. However, over time administrative courts also started adjudicating claims of violations of human and constitutional rights, including discrimination.[9]

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[6] For example, equality bodies or labor inspectors.

[7] Thus, for example, in the United Kingdom, special tribunals, so-called Employment Tribunals, handle labor disputes, including claims of discrimination in the employment field. See, for example, Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law: Synthesis Report* (Brussels: Milieu, 2011), pp. 56–57.

[8] *Ibid,* p. 8.

[9] See Belinda M. Smith and Dominique Allen, "Whose Fault Is It? Asking the Right Questions When Trying to Address Discrimination," *Alternative Law Journal, Vol.* 37, No. 1 (2012).

With regard to judicial protection of victims of discrimination in Bosnia and Herzegovina, protection in the civil proceeding has the primary role. The Law on the Prohibition of Discrimination gives special attention to the civil proceeding aimed at anti-discrimination protection, for which, compared to the general rules for civil proceedings, it stipulates certain procedural specificities. The aim of these specific provisions is to strengthen the procedural role of the victim of discrimination, who by definition has a weaker position than the perpetrator.[10] Along with these rules, which derogate the general rules of procedure as *lex specialis*, the Civil Procedure Law is also applied.[11]

Protection from discrimination through litigation stipulated by the LPD is reflected in two ways:

- as protection of rights in the framework of existing judicial and administrative proceedings
- as protection of rights by instigating a special civil proceeding for protection against discrimination.

This division of types of protection through litigation in Bosnia and Herzegovina, following the model of Croatian anti-discrimination legislation[12], is generally determined as a division into incidental protection from discrimination and protection offered in special anti-discrimination lawsuits in which the decision on discrimination is a decision on the main issue.[13]

In the incidental proceeding, it is alleged that violation of a particular right (e.g. an employment right) whose protection is claimed occurred as a result of discrimination and thus the existence of discrimination is deliberated as a preliminary issue, i.e. an issue on whose preliminary settlement depends the decision in the specific case. However, that decision is not part of the dispositive part, but of the reasoning of the judgment. A practical consequence of this nature of the decision is that it is not final and binding, which allows another separate proceeding to be conducted, simultaneously or subsequently, on the existence of discrimination as the main issue. In contrast, a final decision made in a proceeding on the existence

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[10] Special rules of procedure characterize a considerable number of EU member states. For specific examples, see Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law in Europe. The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared* (Luxembourg: Publications Office of the European Union, 2011), pp. 66–67.

[11] "Zakon o zabrani diskriminacije" [Law on the Prohibition of Discrimination], *Official Gazette of B&H* 59/09, Article 12, para. 4.

[12] See Alan Uzelac, "Postupak pred sudom" [Proceedings before the Court], in *Vodič uz Zakon o suzbijanju diskriminacije* [A Guide to the Anti-Discrimination Act], ed. Tena Šimonović Einwalter (Zagreb: Office for Human Rights of the Government of the Republic of Croatia, 2009), pp. 95–96.

[13] See Supreme Court of the Federation of Bosnia and Herzegovina Judge Goran Nezirović's contribution to Seminar on the Law on the Prohibition of Discrimination, "Proceedings for Protection from Discrimination," 2012.

of discrimination as the main issue will also obligate the body that subsequently decides on it as a preliminary issue.[14]

The special prescription of the incidental form of anti-discrimination protection is also explained by practical reasons and reasons of better coordination. As commentators point out, the intention of the lawmaker is to avoid a situation which would – if discrimination is claimed in an existing proceeding as the cause of violation of another right or if the LPDB&H is invoked – lead to "refering to the need to file special anti-discrimination lawsuits"[15]. In this way, despite the prescription of special anti-discrimination protection, a victim of discrimination keeps the possibility to claim discrimination as the cause of violation of a specific right, for example in a proceeding on employment rights.

In the scope of a special anti-discrimination judicial proceeding, an action may, separately or cumulatively, contain multiple claims in one lawsuit[16]:

1. Declaratory anti-discrimination claim – an action to determine discrimination, which may claim both the determination that a violation of an individual's right to equal treatment has already occurred, as well as the determination that a certain action or failure by the defendant, although it has not done so hitherto, may directly lead to a violation of this right.

2. Prohibitive anti-discrimination claim and restitutional claim – action for prohibition of acts that violate or may violate the right to equal treatment; action to carry out acts for the elimination of discrimination or its effects (e.g. removal of placards with discriminatory content).[17]

3. Reparational anti-discrimination claim – action seeking pecuniary and non-pecuniary damages caused by a violation of rights protected by the law.[18] Pecuniary damage, under the general rules of the Civil Obligations Law, may refer to reduction in someone's assets (ordinary damage) or loss of profit from assets that

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[14] Nezirović, "Proceedings for Protection from Discrimination," pp. 3–4; Uzelac, "Proceedings before the Court," p. 95.

[15] Uzelac, "Proceedings before the Court," p. 95; Nezirović, "Proceedings for Protection from Discrimination," p. 3.

[16] Provided all claims are mutually related, i.e. based on the same factual and legal ground, and that the same court has subject-matter jurisdiction over each of these claims.

[17] A known example in Bosnian and Herzegovinian judicial practice is a Mostar Municipal Court final judgment (Judgment No. P 58 0 P 056658 09 P, July 6, 2010), which determined discrimination against a child with special needs, ordered measures to be taken with the aim of refraining from further violation of the right to equal treatment in education and further education to be facilitated following a special curriculum adapted to the child's special needs, whereas the Livno Municipal Court first-instance judgment (Judgment No. 68 0 P 017561 11 P, December 7, 2011) determined discrimination against a nun in the employment field and ordered that the appointment of the discriminated plaintiff to a particular position be approved and confirmed.

[18] The above mentioned Livno Municipal Court judgment orders compensation of non-pecuniary damage for violation of the right of personality and honor in the amount of 4,000 KM.

the discriminated person may have expected if the discrimination had not occurred – i.e. assets whose increase was halted by discrimination (loss of earnings).

4. Publicational anti-discrimination claim – action for the publication of a judgment determining the violation of the right to equal treatment in media, at the expense of the defendant. Although the legal wording is somewhat clumsy, actually implying that it refers to media of any kind in which the judgment may be published, this possibility, taking into account comparative legal experience, is to be interpreted as publication that is not limited to discrimination committed through media, but to discrimination "of any kind".[19]

2.1.2. Protection in Other Proceedings and Specificities of Administrative Protection from Discrimination

Along with mechanisms of direct anti-discrimination judicial protection of individuals, in Bosnia and Herzegovina there is also the possibility of sanctioning perpetrators of discrimination through a misdemeanor and/or criminal proceeding.[20] They are conducted in line with the general rules envisioned for these proceedings. Although they primarily have the function of sanctioning the perpetrator, they may indirectly offer protection to the victim. Thus, for example, continued discrimination, as a result of failure to act in line with the Ombudsman's recommendation or court order in Bosnia and Herzegovina, is a misdemeanor act carrying a fine. Penalization of the discriminator in a misdemeanor proceeding may potentially eliminate discrimination in the particular case.[21] Comparing it with a civil proceeding, in which the prejudice, stands or intent of the discriminator are not important[22], higher standards of proof are applied in these proceedings, which are tied to the discriminator's intent and awareness of consequences. In addition,

[19] For this type of classification of claims, see, for example, European Network of Legal Experts in the Non-discrimination Field, *Enforcing the Law,* http://www.non-discrimination.net/content/enforcing-law-25 (Accessed on December 5, 2011).

[20] In penal codes in Bosnia and Herzegovina, discrimination is not determined as an independent criminal act. However, criminal liability which is tied to specific situations in which discrimination occurs is envisioned for example for torture and other forms of cruel, inhuman and humiliating conduct under "Krivični zakon Bosne i Hercegovine" [Penal Code of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10, Article 190 or for maltreatment in discharge of duty under "Krivični zakon Federacije Bosne i Hercegovine" [Penal Code of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of B&H* 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 and 42/11, Article 182.

[21] The Law on the Prohibition of Discrimination prescribes a strict mechanism of misdemeanor liability, stipulating it both for direct and indirect discrimination and victimization, with fines ranging from 550 to 10,000 KM, depending on the misdemeanor act in question and who the perpetrator is (natural person, legal person or responsible person in the legal person). For comparison's sake, in Croatia misdemeanor liability is only stipulated for two forms of discrimination (harassment and sexual harassment), as well as for victimization.

[22] See Section 2. 5. 3.

the responsible public body – Prosecutor's Office or Institution of Ombudsman – in both proceedings ultimately decides on initiating the proceeding, whereas the victim, other than reporting the discriminatory action, cannot directly influence it. Courts in Bosnia and Herzegovina have so far, based on requests filed by the Ombudsman of B&H to initiate misdemeanor proceedings, passed two first-instance judgments declaring specific persons responsible and fining them for violation of provisions of the LPD.[23]

With regard to protection from discrimination resulting from the conduct of administrative bodies, the LPD introduces two important innovations. Namely, Article 11, paragraph 2, of the Law prescribes that if violation of the right to equal treatment results from an administrative act, a complaint in an administrative proceeding, as well as a lawsuit instigating an administrative dispute on grounds of protection from discrimination and seeking the annulment of the particular administrative act, poses no obstacle to instigating a special civil proceeding for protection from discrimination. From such legal wording, it ensues primarily that in an existing administrative proceeding – in a complaint against a particular administrative act or a lawsuit bringing an administrative action – it is possible to seek the annulment of a particular administrative act on grounds that the act (e.g. a vacancy notice setting a specific age limit for a particular position) caused discrimination. The exercise of this type of protection in an administrative proceeding/dispute is an important novelty as it indirectly expands the list of grounds for annulment of an administrative act.[24] At the same time, the Law does not stipulate an attempt to exercise protection through administrative proceedings as an obstacle to instigating a civil proceeding through a special anti-discrimination lawsuit seeking the court to determine that discrimination has occurred, eliminate it or prohibit its further conduct, to order the perpetrator to compensate the damage or to order that the judgment passed in the proceeding be published in media.[25]

It is still uncertain, however, how much a victim of discrimination who seeks an administrative or incidental form of protection from discrimination will benefit from the innovations to the Law on the Prohibition of Discrimination. It follows from the

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[23] See press releases by the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, Filozofski fakultet i dekan kažnjeni zbog nepoštovanja preporuka ombudsmana [Faculty of Philosophy and Dean Penalized for not Respecting Ombudsman's Recommendations], (Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, October 3, 2012), and Prva sudska odluka u Bosni i Hercegovini za mobing po prijavi Ombudsmana BiH [First Court Decision in Bosnia and Herzegovina on Mobbing upon Ombudsman of B&H Report], (Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, July 13, 2012).

[24] Laws on administrative procedure or administrative disputes usually list reasons for disputing an administrative act – typical reasons are incompletely or incorrectly established facts, violated rules of procedure that significantly impacted the resolution of a matter or incorrect application of material law.

[25] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 11, para. 2.

wording of the LPD that indirectly, as *lex specialis,* it does expand the traditional list of possible grounds for annulment of an administrative act. As the Law on Administrative Procedure, however, has not been amended in this regard, it remains in the coming period, primarily through a strategic approach, to test the conduct of administrative bodies and acting judges in administrative disputes in cases when this type of protection against discrimination is sought. On the other hand, a dilemma that may arise with regard to incidental protection from discrimination is related to the question of whether specific procedural rules (e.g. rules on urgency of procedure and burden of proof) also apply in this type of proceeding.[26]

2.2. Who May File a Lawsuit: Active and Passive Standing in the Anti-Discrimination Proceeding

The plaintiff may be a natural as well as legal person. Due to discrimination grounds which primarily concern personal characteristics of individuals, the plaintiff is usually a natural person, whereas a legal person may be the plaintiff, for example, in case discrimination occurs on grounds of racial or ethnic origin of its members or owners.[27]

In most European Union member states, both groups of persons are protected and if there is no explicit provision to that effect, such protection is presumed.[28] Exceptions are Sweden, Austria, Estonia and the Czech Republic, where legal persons as such do not enjoy protection from discrimination.[29] The law in Bosnia and Herzegovina accords also protection to all persons, irrespective of their

[26] More on this in analysis of individual procedural institutes stipulated by the LPD for special anti-discrimination lawsuits. See particularly sections 2. 5. 6 and 2. 5. 7.

[27] See in this regard Article 16 of the Preamble to the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Directive on Racial Equality”) – Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Union,* L 180/2000. Legal persons also enjoy fundamental rights and freedoms, as well as other rights and legitimate interests.

[28] For example, in Bulgaria, Greece and Latvia. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 42.

[29] For more information, see *Ibid.*

citizenship,[30] which is also the case, with certain restrictions[31], in European Union member states[32]. Practice, however, shows that claims of discrimination committed against legal persons are relatively rare. Thus, for example, a representative of the Ombudsman of B&H points out that reported cases of discrimination of legal persons are very rare, although he says that the Institution did have, for example, a case of persons "dissatisfied with the outcome of a tender procedure, who claimed they were discriminated against on one of the prohibited grounds".[33]

The defendant may as well be a natural as well as legal person, in the private and in the public sector. The proceeding upon discrimination claims is identical for both sectors.[34] An interesting question that remains to be answered through court practice is how liability, for example, for harassment and mobbing in the area of employment will be understood in our legal tradition and before our courts – whether persons who committed the acts are personally liable[35] or the employer will be considered liable[36]. Bearing in mind the provisions of the LPD, which envision misdemeanor liability both for the natural and the legal person, as well as for the responsible person in the legal person, it may be expected that both will simultaneously be considered liable in this regard.[37]

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[30] In this regard, however, one should bear in mind an exception to the principle of equal treatment under Article 5, paragraph 1, subsection e) of the LPD, which refers to measures of adverse distinction or different treatment – when based on citizenship in a way prescribed by the law.

[31] See European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, "Who receives protection under European non-discrimination law," in *Handbook on European non-discrimination law* (Luxembourg: Publications Office of the European Union, 2011), pp. 58–59.

[32] Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 42.

[33] Predrag Raosavljević, Head of the Department for Elimination of Discrimination/Assistant Ombudsman of Bosnia and Herzegovina, interview with the author, February 6, 2012.

[34] However, for example, if discrimination occurred as a result of an administrative act, which by definition is adopted in the public sector, the victim will have an opportunity to conduct an administrative proceeding, i.e. an administrative dispute, with the goal of annulling the act.

[35] In Spain, for example, only that person, either natural or legal, may be liable, but not the person's employer. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 43.

[36] For example, in Sweden, Holland and Bulgaria. *Ibid,* pp. 42–43.

[37] An interesting example of liability for structural discrimination is a case that regards discrimination against children in schools divided along ethnic lines, in which passive liability was determined for Herzegovina-Neretva Canton – Ministry of Education, Science, Culture and Sport, which has jurisdiction over elementary education policy, and the Stolac and Čapljina elementary schools, which conduct and carry out the policy, but which also independently organize their work. See Mostar Municipal Court, Judgment No. 58 0 Ps 085653 11 Ps.

2.3. Role of Third Parties in Anti-Discrimination Proceedings

With the goal of strengthening the position of the victim, the LPD introduces two specific mechanisms – the possibility of intervention in the proceeding by third parties, as well as the possibility of instigating a so-called collective lawsuit.[38] The mechanism of the collective lawsuit involves the possibility of the lawsuit being instigated by an association, body, institution or other organization registered in compliance with the law, which in the scope of its activities deals with protection against discrimination of a particular group of persons or has a justified interest in protecting a particular group of persons. The admissibility requirement for this kind of lawsuit is that a specific organization makes plausible that the respondent's conduct violated the right to equal treatment of a large number of persons predominantly belonging to the group whose rights the plaintiff is protecting.[39] In this case, the organization instigates the lawsuit in its own name and the injured victims thus do not have the status of a direct party in the proceeding.[40] In addition, the plaintiff, with his consent, may be joined in the role of an intervener, at their expense, by a "body, organization, institution, association or another person dealing with protection from discrimination of a person or group of persons whose rights are being decided upon in the proceeding"[41]. This gives an opportunity to intervene in a court proceeding even to the Ombudsman, as well as some other groups of persons who do not have legal standing for the sole reason that they are not registered. The point of all these solutions is to strengthen the position of the victim of discrimination in the civil proceeding, who is no longer alone in combating discrimination

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38 "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Articles 16 and 17.

39 In Croatia, the county court has jurisdiction over this matter and it is prescribed that they may file all claims with the exception of indemnification claims.

40 Margarita Ilieva, "Legal Standing of Organisations" (Discussion Paper for Workshop 5 of the Legal Seminar on Approaches to Equality and Non-discrimination Legislation inside and outside the EU, Brussels, October 4, 2011). Along with the possibility of instigating a collective lawsuit, under general procedural rules, associations that provide free legal aid in a proceeding may represent individual persons, as their authorized agents, the same way as lawyers. The best-known non-governmental organization of this kind in Bosnia and Herzegovina is the NGO "Vaša prava," which focuses its activities on strategic litigation and which, in the role of representative of the victim, or using the described possibility of instigating a proceeding in its own name (well-known case of segregation of children in schools), has so far conducted all litigation proceedings which the public is familiar with and in which discrimination was established.

41 "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 16, para. 1.

and who is thus provided with expert assistance, often required for successful completion of the proceeding, i.e. for efficient protection from discrimination.[42]

2.4. Revision in Anti-Discrimination Proceedings

The law also stipulates a procedural specificity for anti-discrimination proceedings with regard to revision of court decisions passed in these proceedings. The Supreme Court of the Federation of B&H and the Supreme Court of the Republika Srpska are competent for revision, with the application of a 3-month deadline from the day of delivery of the second-instance judgment.[43] However, with the aim of protecting the victim of discrimination, it is stipulated that it is admissible in all anti-discrimination proceedings[44], abandoning for these proceedings the principle of the standard means test (10,000 KM) as the criterion of admissibility of appeals to the entity supreme courts.[45] This is an expression of the legislator's determination to ensure, through revision in all anti-discrimination proceedings, "the harmonization of application of the law and the equality of citizens before the law"[46], as the primary role of supreme courts. The possibility of developing harmonized stands and case-law guidelines regarding the application of this law as soon as possible is particularly important in light of the recency of the law and the innovations it introduces.

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[42] For a detailed elaboration of this matter in the context of practice in Bosnia and Herzegovina, see Boris Topić, *Unused potential: The Role and Importance of Non-Governmental Organizations in Protection against Discrimination* (Sarajevo: Analitika – Center for Social Research, 2012).

[43] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 13, para. 4.

[44] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 13, para. 2.

[45] "Zakon o parničnom postupku Federacije BiH" [Civil Procedure Law of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of Bosnia and Herzegovina* 53/03, 73/05 and 119/06, Article 237, para. 2.

[46] Uzelac, "Proceedings before the Court," p. 102.

2.5. Specificities of Judicial Protection from Discrimination under the LPDB&H and Key Problems

2.5.1. Insufficient Legal Aid and Costs of Proceedings - An Obstacle to Protection from Discrimination

Limited legal aid available to victims of discrimination may seriously jeopardize the implementation of the LPD. If an individual lacks the necessary expert know-how to protect their rights before the court and other bodies, which is usually the case in the context of the characteristic complexity of anti-discrimination law[47], they will need the help of an expert. Expert legal aid, however, requires considerable financial expenditures. This is particularly a big problem for poor citizens and marginalized groups, such as members of the Roma ethnic group, who are most commonly victims of discrimination. In this regard, it is important to ensure that a further form of discrimination in access to a legal instrument is not added to the initial discrimination due to the individual's economic status.[48]

The availability of legal aid to the victim of discrimination is very important already in the first phase – recognition and initiating a proceeding. Individuals in Bosnia and Herzegovina often do not know what the term discrimination stands for, identifying it with general violation of (human) rights, as a result of which they are not aware of the fact that they are discriminated against.[49] Moreover, Bosnian and Herzegovinian citizens are often not familiar even with the existence of the LPD, and thereby also with its content, the rights resulting from it and the mechanisms it stipulates, and above all they do not believe that this law can be efficient in battling discrimination.[50] Therefore, the existence of a place where an individual who is aware of having a problem may come for help is often the first and key step toward recognizing that some form of discrimination has been carried out

[47] This is recognized as an obstacle in EU member states as well. Lilla Farkas, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives* (Luxembourg: Publications Office of the European Union, 2011), p. 61.

[48] Amnesty International, *Dealing with difference: A framework to combat discrimination in Europe* (London: Amnesty International, 2009), p. 44.

[49] See in this regard the public discussion Vaša prava BiH, "Borba protiv diskriminacije – sadašnje stanje i izazovi u BiH" [Battling Discrimination – The Current Situation and Challenges in B&H] (Mostar, hotel "Bristol," October 31, 2011), Vaša prava BiH. http://www.vasaprava.org/?p=1194#more-1194 (Accessed on October 6, 2011).

[50] For detailed data, see Open Society Fund of Bosnia and Herzegovina research, *Izvještaj o ispitivanju javnog mnijenja o percepciji i iskustvu diskriminacije* [Report on Public Opinion Poll on Perception and Experience of Discrimination] (Sarajevo: Open Society Fund of Bosnia and Herzegovina, 2012), pp. 35 and 37.

against someone. Even in case a person has recognized that he/she is a victim of discrimination, that person needs to summon a lot of courage to seek protection. If they are also limited by the financial factor or do not have access to organizations and bodies that would offer them legal aid, it is little likely that they will ever, especially within the short time limits provided, decide to reach for some kind of protection from discrimination.

Limited legal aid may even jeopardize the application of the ideal legal scenario. Legal aid may be obtained from a small number of non-governmental organizations specializing in protection of human rights, governmental bodies for provision of legal aid, as well as equality bodies.[51] Beside the obligation of paying a fee to lawyers for the cost of providing legal services, an additional burden is posed by the fact that according to a principle applied in civil proceedings in Bosnia and Herzegovina, the party that loses the case bears, proportionately to the success achieved in the case, the necessary costs of the proceeding of the other party.[52] In case of instigating a judicial proceeding, the individual in Bosnia and Herzegovina, as the person in whose interest the actions in the proceeding are undertaken, is also supposed to pay fees for the lawsuit, court decisions, motions for enforcement, as well as covering the costs of expert evaluation[53].

The obligation to pay the court fee, which is determined based on the value of the lawsuit, has so far often jeopardized the efficiency of judicial protection from discrimination. *Vaša prava* points out the problematic practice of some courts which take further action only upon receiving proof of payment of the court fee, contributing to prolonging the proceeding and not uncommonly to the victim of discrimination deciding not to pursue it further. In addition, the organization warns of the danger of application of a legislative solution which involves returning the petition for failure to pay the court fee – in that case it is considered not filed at all[54], which may mean for the party that the statute of limitations for seeking further

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[51] For a detailed elaboration of this matter, see Adrijana Hanušić, *The Ombudsman in the System of Protection against Discrimination in Bosnia and Herzegovina: Situation Analysis and Characteristic Problems* (Sarajevo: Analitika – Center for Social Research, 2012), p. 39.

[52] "Civil Procedure Law of the Federation of Bosnia and Herzegovina," Article 386, and "Zakon o parničnom postupku Republike Srpske" [Civil Procedure Law of the Republika Srpska], Official Gazette of the Republika Srpska 58/03, 85/03, 74/05, 63/07 and 49/09, Article 386, and "Zakon o parničnom postupku Brčko Distrikta BiH" [Civil Procedure Law of Brčko District of Bosnia and Herzegovina], *Official Gazette of Brčko District of Bosnia and Herzegovina* 5/00, 1/01, 6/02, 8/09 and 52/10, Article 119.

[53] If they suggest it during the proceeding as evidence (e.g. costs of expert evaluation by a psychologist or psychiatrist in case of mobbing).

[54] Vaša prava, *Sprječavanje diskriminacije strateškim parničenjem, bh. antidiskriminacioni tim: narativni izvještaj* [Preventing Discrimination through Strategic Litigation, The B&H Anti-Discrimination Team], 30 July 2012, available in the archives of Analitika. An example that is mentioned is Article 4 of the Sarajevo Canton Law on Court Fees.

protection against discrimination takes effect[55]. Bearing in mind that the Constitutional Court of B&H recently assessed this solution as being in contravention of the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1, of the European Convention[56], this financial obstacle to anti-discrimination protection certainly restricts the efficiency of judicial protection from discrimination.

Comparative analysis points to similar problems, but also to good practice in addressing them. Namely, complicated procedures for accessing free legal aid and insufficient funding are big obstacles to efficient protection from discrimination in comparative practice as well[57], due to which measures to overcome them have been introduced in some countries. Thus, for example, anti-discrimination proceedings in Sweden and Romania are exempted from payment of court fees, and in Ireland and Finland there is no obligation at all to pay fees for proceedings before the Equality Tribunal and Discrimination Tribunal, whereas in Slovenia that is the case with lawsuits involving persons with disabilities in the employment field[58]. In Spain, natural persons, non-governmental organizations, associations for protection of public interest and small associations are exempted from paying court fees when acting with the goal of protecting fundamental rights[59]. Further, in a number of countries a considerable number of individuals are exempted from paying court fees if they meet specific material criteria, such as, for example, in Hungary, where everyone earning less than 1,500 EUR gross a month is exempted from paying fees. As this is twice the average salary in Hungary, in practice virtually all victims of discrimination are exempted from paying court fees[60]. In Kosovo, the Anti-Discrimination Law stipulates a Free Legal Aid Fund, into which all material resources collected from fines pronounced against a specific person for violations prescribed by the Law on the Prohibition of Discrimination are channeled.[61]

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[55] *Ibid.*

[56] Constitutional Court of Bosnia and Herzegovina, Judgment No. U 8/12, November 23, 2012.

[57] See Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* pp. 67–68. Negative examples that are specifically pointed out are the Czech Republic, Lithuania and Slovakia.

[58] Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law,* p. 31.

[59] *Ibid.*

[60] *Ibid.*

[61] "Zakon br. 2004/3 protiv diskriminacije" [Anti-Discrimination Law No. 2004/3], *Official Gazette of the Provisional Institutions of Self-Government in Kosovo* 14/07, Article 9. 4.

2.5.2. Protection from Victimization

2.5.2.1. Legislative Solution

The LPDB&H prescribes protection from victimization[62], meaning that persons who report discrimination or in another way participate in an anti-discrimination legal proceeding must not suffer any consequences thereof.[63] This solution was introduced pursuant to European Union non-discrimination directives[64] with the goal of protecting the position of the discrimination victim who reported the discrimination, as well as persons who may help them in that regard, but also with the goal of encouraging individuals to report such experiences. Violation of the prohibition of victimization, under the LPD, is a separate misdemeanor as well, and the issue of misdemeanor liability of the victimizer may consequently be raised.

Ensuring effective protection of persons from victimization is a very important, if not key aspect of protection of individuals from discrimination, and thus of effective implementation of the LPD. Victimization is essentially "the discriminator's reaction and its purpose is to make the persons abandon the proceeding or participation in the proceeding by denying some of their rights, as a result of which victimization has the characteristics of inadmissible pressure or retaliation"[65]. The vast majority of victims of discriminatory conduct will out of fear of victimization not dare to take any steps to seek protection, as a result of which all other stipulated protection measures cannot be applied in practice. This is particularly pronounced in the field of employment relations where, for reasons of an existential nature, there is a pronounced fear of the consequences of the employer finding out about any form of report that would point to his unlawful conduct.

The law also provides an outstanding platform for protection of potential witnesses of discrimination that has been committed, stipulating that any person

[62] Victimization may be described as any adverse measure (treatment or consequence) taken by an organization (including employers and public authorities) or by an individual in retaliation for efforts to enforce the right to equal treatment. The most common example is where an employee complains about unequal treatment and the employer responds by dismissing or failing to promote the employee, or a threat of such consequences if the victim does not abandon such efforts. Farkas, *How to Present a Discrimination Claim*, p. 39. Another example known in case-law is refusal by a former employer to give a recommendation/opinion to potential new employers for an employee who filed against him a lawsuit for discrimination on grounds of sex. See European Court of Justice, *Coote v Granada Hospitality Ltd*, C-185/97, September 22, 1998.

[63] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 18.

[64] Council of the European Union, Council Directive 2000/43/EC, Article 9; Council of the European Union, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *Official Journal of the European Union*, L 373/2004, Article 10; Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal of the European Union*, L 303/2000, Article 11.

[65] Nezirović, "Proceedings for Protection from Discrimination," pp. 20–21.

who participates in an anti-discrimination legal proceeding enjoys protection from victimization. This is especially important bearing in mind that discrimination is usually difficult to prove. Participation in the proceeding may be reflected in giving testimony or providing information or documents that are needed in the anti-discrimination proceeding.[66] This legislative solution, coupled with the fact that protection from victimization is provided in relation to all discrimination grounds and areas, may be assessed as especially positive, particularly taking into account the fact that such broad protection is not provided even in some European Union member states.[67]

2.5.2.2. Key Dilemmas and Problems

In many areas, especially in the fields of employment, healthcare and education, in which the fear of negative consequences of initiating anti-discrimination protection is particularly pronounced, the mechanism of judicial protection is the last option chosen by victims of discrimination. Therefore, it is crucial to ensure protection of their efforts to first try to resolve the case using out-of-court means by giving them protection from the discriminator's negative reactions, even in case of reporting discrimination to other bodies. This solution is also stipulated in anti-discrimination legislation in countries such as the United Kingdom[68] and Australia[69], even going a step further – not only providing protection to persons who have already taken steps toward protection from discrimination, but also to persons who yet intend to do so or who the victimizer thinks have done or may yet do so, due to which he subjects them to negative consequences. In Croatia, for example, the law prescribes prohibition of victimization of persons even for the mere fact that they were present during a discriminatory act or witnessed it.[70]

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[66] In anti-discrimination legislation in the United Kingdom and Australia, these acts are explicitly cited as acts with regard to which protection against victimization is provided. Moreover, with regard to these acts, protection from victimization is prescribed even in case of just an intention to provide information, documents or other evidence.

[67] It is certainly questionable whether such solutions may be considered harmonized with EU law, which could lead to instigating a proceeding for their assessment before the European Court of Justice. Farkas, *How to Present a Discrimination Claim,* p. 40.

[68] "Human Rights Act 1998" (HRA), Article 27, protects from victimization not only in case of bringing proceedings and giving evidence or information in connection with proceedings conducted under this act, but also in case of any other proceedings brought by someone in connection with this act, as well as in case of making an allegation – whether or not expressly – that another person has contravened the HRA.

[69] "Age Discrimination Act 2004" (Section 51); "Disability Discrimination Act 1992" (Section 42); "Sex Discrimination Act 1984" (Section 94); "Racial Discrimination Act 1975" (Section 27(2)).

[70] "Zakon o suzbijanju diskriminacije Republike Hrvatske" [Law on the Suppression of Discrimination of the Republic of Croatia], *Official Gazette of the Republic of Croatia* 85/08, Article 7.

Considering that the important innovation of protection from victimization in our legal tradition had been completely unknown until now, a potential problem exists with regard to its proper understanding and application that will ensure efficient protection of victims of discrimination. Thus, for example, it is conceivable that terms such as "report of discrimination" and "legal proceeding for protection from discrimination" could be interpreted in a restrictive way, as categories that only refer to a lawsuit and judicial proceeding. In comparative practice, namely, protection from victimization is also provided with regard to reports to other bodies, for example the employer.[71]

Dilemmas may further arise with regard to the question of whether protection from victimization is available regardless of whether the individual proved discrimination or not. It is conceivable that the individual does not succeed in proving discrimination in a judicial proceeding, but at the same time their victimization is more than obvious because of the fact that they initiated such a proceeding. Restrictive application of this institute by conditioning protection from victimization on prior success in proving discrimination would contradict its purpose and totally deprive it of its effectiveness. At the same time, one way to prevent abuse of this kind of protection is conditioning it on taking steps to report discrimination or taking part in the proceeding in good faith, which is stipulated, for example, in the United Kingdom, France and Croatia.[72] It should also be pointed out that under European Union law[73], proving victimization does not require identifying comparators – other persons compared to whom the victimized person would be treated less favorably for reporting discrimination or another form of participating in the proceeding, a requirement for proving most forms of discrimination. It is enough that the person suffered adverse consequences as a result of the described actions.[74]

It is also unclear from the legal wording whether the victimized individual is given the option to instigate and conduct a special civil proceeding for protection from

[71] In this regard, an indicative case is related to an air stewardess who complained to the airline's management that she had been discriminated against on the grounds of race. As she had not been informed of the outcome of the disciplinary procedure or measures taken against the offender, and as her refusal to mediate with the offender was seen as a refusal to cooperate and a reason not to renew her employment contract, the Danish Equal Treatment Commission concluded it was a clear case of victimization. See Farkas, *How to Present a Discrimination Claim,* p. 39.

[72] "Equality Act 2010," Article 27, para. 3; France's "LOI n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations," Article 3; and "Law on the Suppression of Discrimination of the Republic of Croatia," Article 7.

[73] See footnote 64.

[74] In the United Kingdom, only the recently adopted Equality Act 2010 abolished the obligation of comparing such a person with someone else, which had until then been required in the procedure of protection from victimization.

discrimination under the provisions of the LPD.[75] If that is the case, the person would be accorded all options stipulated for protection from discrimination, for example seeking the annulment of a decision on termination of an employment contract which resulted from reporting discrimination and compensation of pecuniary damage in the form of payment of salaries that the victim would have earned in the meantime in their job and/or claiming compensation of non-pecuniary damage suffered as a result of threats, pressure or other form of adverse treatment of the person.[76] In addition, application of a specific rule on burden of proof would be ensured. This understanding is supported by the fact that the European Union has pointed out that effective compliance with the principle of equality would be advanced if rules on sharing the burden of proof in civil and administrative proceedings are expanded to cover victimization as well.[77] Thus, for example, in Croatia the rule on burden of proof is not excluded for proving victimization and harassment[78], whereas in the United Kingdom, for example, under the Equality Act (2010), and also in Germany[79], the application of this rule to the procedure of proving victimization is explicitly prescribed.

2.5.3. Forum for Adjudicating Anti-Discrimination Lawsuits

2.5.3.1. Current Legislative Solution

The court with general territorial jurisdiction is responsible for acting on anti-discrimination lawsuits.[80] There are no specialized courts in Bosnia and Herzegovina that would adjudicate discrimination (which is understandable from the aspect of development of the legal system in Bosnia and Herzegovina after the war – which

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[75] This would be particularly justified if one agrees with the view that victimization may be considered a specific form of discrimination. See in this regard Farkas, *How to Present a Discrimination Claim,* p. 40. The “Australian Human Rights Commission Act 1986” in Section 3, under the definition of “unlawful discrimination,” includes victimizing conduct.

[76] An interesting example and conceivable situation is a case conducted in the United Kingdom, in which a victimized, but lawfully dismissed employee was rewarded damages for hurt feelings, but not for lost income (Court of Appeal, *Lisk-Carew v Birmingham City Council,* [2004] EWCA Civ 565, April 23, 2004).

[77] European Parliament, European Parliament resolution of 27 September 2007 on the application of Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Strasbourg: European Parliament, September 27, 2007), 2007/2009(INI), H.

[78] Lovorka Kušan, Croatia – Country Report 2010: *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: State of affairs up to 1 January 2011.* (European Network of Legal Experts in the Non-Discrimination Field, 2010), p. 56.

[79] “Allgemeines Gleichbehandlungsgesetz (AGG),” BGB l. I S. 1897, August 14, 2006, Article 16, para. 3, in conjunction with Article 22.

[80] “Law on the Prohibition of Discrimination of Bosnia and Herzegovina,” Article 13, para. 1.

brought the abolishment of specialized courts, such as labor courts). This means that the municipal court and basic court have subject-matter jurisdiction over disputes upon anti-discrimination lawsuits in the first instance, while the cantonal court and district court have subject-matter jurisdiction in the second instance.

2.5.3.2. Misunderstanding Subject-Matter Jurisdiction

The first problem that may arise in this regard is potential confusion in understanding subject-matter jurisdiction in adjudicating discrimination disputes, in relation to the jurisdiction of the Ombudsman to "receive individual and group complaints related to discrimination".[81] A blatant example of misunderstanding court jurisdiction in acting on anti-discrimination lawsuits, namely, arose in recent case-law. Goražde Municipal Court, despite the clear provisions of the law, dismissed a lawsuit for protection from discrimination in the employment field on grounds of political belief and political opinion, finding that the Ombudsman of B&H is competent to act on the case, "who had earlier already received the plaintiff's complaint, had not instructed the plaintiff on the option of judicial protection, but had rather conducted an investigation procedure and as a result delivered a recommendation" to responsible government bodies, and concluding that it is not in the court's jurisdiction to establish the existence of discrimination in that particular case.[82] It ensues from the text of the judgment that the acting judge, besides breaching the provisions of the LPD and the right to court access guaranteed under Article 6 of the ECHR, incorrectly assessed anti-discrimination proceedings before the Ombudsman and before the court as mutually exclusive proceedings.[83]

2.5.3.3. Inadequate Territorial Jurisdiction of the Court

As general territorial jurisdiction means jurisdiction of the court according to the place of residence or seat of the respondent – in this case the alleged discriminator – this legislative solution does not protect the victim of discrimination. The victim and the alleged discriminator often have residences, or seats, in different locations. Taking into account potential travel that pressing discrimination charges would require in such cases and the additional costs that may arise as a result, physical access to the court may thus be hampered or even completely denied to the victim. It is also to be expected that for a large number of victims even finding out about the need to travel and sustain related costs in case of using the

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[81] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 7, para. 2, subsection a.

[82] Goražde Municipal Court, First-instance judgment No. 45 0 P 021035 11 P, June 8, 2012.

[83] For a more detailed elaboration of this matter, see Hanušić, *The Ombudsman in the System of Anti-Discrimination Protection in B&H,* section "Problems in the relation between the ombudsman and court protection," p. 42.

judicial anti-discrimination protection mechanism would have a deterring effect. That would pose a particularly aggravating circumstance for socially vulnerable victims or persons with disabilities as members of marginalized groups, who may be expected to often find themselves in the role of plaintiffs. A legal expert of the OSCE to B&H[84] also points out that the rule on territorial jurisdiction in this field in Bosnia and Herzegovina is a procedural rule that does not offer sufficient protection to the victim because it does not reflect the very idea and spirit of the Law – easing the road to protection for the victim of discrimination.

Neighboring countries have adopted different solutions. Thus, for example, in Croatia[85], Serbia[86] and Montenegro[87], elective territorial jurisdiction is ensured for the plaintiff in these proceedings, which means that the lawsuit may be filed with the court that has territorial jurisdiction either over the respondent or the plaintiff.[88] In addition, in Croatia, territorial jurisdiction of the court is also stipulated according to the location where the discrimination took place or damage occurred. In that light, implementation of the general rule on territorial jurisdiction of courts in Bosnia and Herzegovina, without taking into account the specific needs of victims of discrimination, evidently jeopardizes the principle of efficiency of the mechanism of judicial protection from discrimination.

2.5.4. Time Limits for Filing Anti-Discrimination Lawsuits

2.5.4.1. Current Legislative Solution

For filing an anti-discrimination lawsuit the law prescribes an objective one-year time limit, and within it a subjective three-month time limit.[89] These are preclusive limits, after which the plaintiff loses the right to file a lawsuit and in case a lawsuit is filed after these time limits pass, it would be dismissed, pursuant to Article 67, paragraph 1, subsection 2, of the Civil Procedure Law[90]. However, in many situations

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[84] Lori Mann, Legal Advisor on Combating Discrimination, OSCE Mission to Bosnia and Herzegovina, interview, March 12, 2012.

[85] “Law on the Suppression of Discrimination of the Republic of Croatia,” Article 18, para. 2.

[86] “Zakon o zabrani diskriminacije Republike Srbije” [Law on the Prohibition of Discrimination of the Republic of Serbia], *Official Gazette of the Republic of Serbia* 22/09, Article 42.

[87] “Zakon o zabrani diskriminacije Republike Crne Gore” [Law on the Prohibition of Discrimination of the Republic of Montenegro], *Official Gazette of Montenegro* 46/2010, Article 25.

[88] Among European Union member states, an interesting example is Italy, where anti-discrimination proceedings are conducted solely in the place of residence of the victim of discrimination, an exception to the general principle of suing in the court in the territorial jurisdiction of the defendant. See Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 66.

[89] The former is calculated as of the day the violation of the right was committed and the latter as of the day of finding out about the committed violation.

[90] Nezirović, “Proceedings for Protection from Discrimination,” p. 12.

the court will have to address the merits in order to determine when exactly the discrimination occurred. If it is determined later that the time limit had passed, a decision to dismiss the lawsuit may still be made, even during the proceeding.[91]

2.5.4.2. Restrictiveness of Limits and Need for Better Protection of Victims

The legislative time limits for addressing the court in Bosnia and Herzegovina in discrimination cases are too short and as such do not allow for efficient protection of discrimination victims. The objective one-year time limit and the subjective three-month time limit upon learning about the discrimination committed are too restrictive and not in line with best practice in this field. Taking into account the social reality reflected in the fact that many individuals have a problem recognizing incidents of discrimination, more than a year may pass before the victim realizes or finds out that they experienced discrimination.[92] The fact that there is no efficient system of free legal aid, which would give victims a better chance of taking appropriate legal action within such short time limits, additionally complicates the situation.[93]

In addition, a well-known fact is that even individuals who are aware that they are victims of discrimination take a long time to summon the courage to initiate a proceeding. In that context, even when it is possible to comply with the objective time limit, the subjective three-month time limit appears too short for efficient protection of victims of discrimination, because often, in practice, it denies them *a priori* the chance to succeed. The NGO "Vaša prava" anti-discrimination team points out that many discrimination victims are late coming to it to seek protection.[94] The OSCE B&H legal advisor also qualifies these time limits as too short and stresses that it is unclear why, for example, a subjective time limit of one year is not prescribed.[95] The problem becomes especially relevant taking into account the fact that discrimination victims may often be persons who have difficulty understanding the official languages in Bosnia and Herzegovina, persons with literacy disabilities or persons with certain types of invalidity, all of which, on a case by case basis,

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[91] Sofija Vrdoljak, judge, Livno Municipal Court, e-mail correspondence, February 2012. See in this regard Mostar Municipal Court, Judgment No. 58 0 Ps 085653 11 Ps, on a case concerning discrimination of children in schools divided along ethnic principles.

[92] It is conceivable that a female employee finds out that she received a lower salary for a particular period than an equally or even less qualified male colleague and suspects discrimination on ground of sex, but more than a year has passed since that period.

[93] See 2. 4. 1. "Insufficient legal aid and costs of proceedings – an obstacle to protection from discrimination."

[94] Vaša prava, Preventing Discrimination through Strategic Litigation, The B&H Anti-Discrimination Team: A Narrative Report, July 30, 2012, available in the archives of Analitika.

[95] Lori Mann, interview, March 12, 2012.

requires special attention and must be considered in order to provide them with efficient protection from discrimination and effective access to justice.

The issue of excessively short time limits has been identified as a potential problem for addressing discrimination cases in court in European Union states as well.[96] Although European Union non-discrimination directives do not specify any time limits, in some circumstances time limits as short as 15 days, a month or even two months may not be appropriate in as much as they do not ensure in practice the right to access to a procedure prescribed by these directives, which could therefore be a subject of assessment before the European Court of Justice.[97] European Union law allows time limits for protection from discrimination provided they are not less favorable than time limits prescribed for similar domestic lawsuits and that they do not make it impossible in practice to enjoy the rights from the Directive.[98]

The legal time limits for judicial protection from discrimination in Bosnia and Herzegovina are unjustifiably restrictive compared to time limits in other fields. Namely, time limits applied in Bosnia and Herzegovina to other similar lawsuits are incomparably longer – the general statutes of limitations for indemnification claims take effect after three (subjective deadline) and five (objective deadline) years. Even in the employment field, e.g. in the context of a decision terminating an employment contract or other individual employer acts with a discriminating character, application of the rule on the subjective 3-month time limit would mean that the LPDB&H prescribes protection of the victim that is less favorable than the general time limit under the Labor Act, which is one year of the day of delivery of a decision, i.e. of the day of finding out about a violation.[99] Admittedly, this does not reduce the victim's chances of claiming protection from discrimination in an existing proceeding as a preliminary issue, in which case other time limits would apply, considering that according to the wording of Article 13, paragraph 4, of the LPD, the abovementioned time limits only apply to special anti-discrimination lawsuits. However, on the other hand, this may be interpreted as an implicit suggestion by the Law that it is actually better for victims to protect their rights in existing regular proceedings. That message has a number of implications on efficiency of protection, such as non-application of specific procedural institutes which the Law only ties to special anti-discrimination lawsuits and any possible decision on discrimination not having a final and binding effect. Short judicial protection time limits may also

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96 See Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 68.

97 Farkas, *How to Present a Discrimination Claim,* p. 62.

98 See European Court of Justice, for example cases: *Elsie Rita Johnson v Chief Adjudication Officer*, C-410/92, December 6, 1994; *Mary Teresa Magorrian and Irene Patricia Cunningham v Eastern Health and Social Services Board and Department of Health and Social Services*, C-246/96, December 11, 1997; *Theresa Emmott v Minister for Social Welfare and Attorney General*, C-208/90, July 25, 1991.

99 "Zakon o radu Federacije BiH" [Law on Labor of the Federation of B&H], *Official Gazette of the Federation of Bosnia and Herzegovina* 43/99, 32/00 and 29/03, Article 103, para. 3.

result in bypassing the anti-discrimination mechanism before the Institution of Ombudsman in fear of missing the judicial time limits afterwards, which does not create conditions for developing a constructive practice of previous addressing of this institution.[100] In any case, considering the previously mentioned requirement in European Union law, these time limits should not be less favorable than time limits prescribed for similar domestic lawsuits. This comparison corroborates the conclusion that time limits are too short and not adapted to the reality of the social phenomenon of discrimination and the often slow reaction to it.[101]

Legislative solutions pertaining to time limits in European Union member states are, nonetheless, varied. In the context of complaints in the employment field, time limits may be very short and legislative solutions in some countries appear even more unfavorable for the discrimination victim than those in Bosnia and Herzegovina[102]. This practice is assessed as problematic for all discrimination victims, especially people with literacy difficulties and people with inadequate command of the state's official language.[103] However, we may say that the practice of longer time limits is dominant. In Bulgaria and Hungary, time limits for protection of equality are as long as five years for filing an indemnification claim with the court[104]; in Greece the subjective time limit is five years and the objective time limit is as long as 20 years; while in France the time limit was recently reduced from 30 to five years[105]. In Norway and Finland, the time limit is two years, with one year for the employment field.[106] In Denmark, an objective time frame of five years is applied[107].

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[100] For a more detailed elaboration of this matter, see Hanušić, *The Ombudsman in the System of Anti-Discrimination Protection in B&H,* section "Deadlines, ombudsman and court protection," p. 44.

[101] To compare, in the latest European Commission progress report for Macedonia, a three-month time limit for submitting complaints to the Macedonian Commission for Protection from Discrimination was assessed as "too restrictive." European Commission, The Former Yugoslav Republic of Macedonia 2010 Progress Report (Brussels: European Commission, November 9, 2010), SEC(2010)1332, p. 52.

[102] Holland – two months from termination of employment; Hungary – for example, for dismissal from work 30 days of the injurious measure; in Sweden one month after termination of employment. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 99.

[103] *Ibid,* p. 68.

[104] "Закон за защита от дискриминация," *Държавен вестник* 86/03, 70/04, 105/05, 30/06, 68/06, 59/07, 100/07, 69/08, 108/08, 42/09, 74/09, 103/09, 97/10, 23/11, 39/11, 38/12 and 58/12, Article 75 (1); Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law*, Annex I C - time and length.

[105] Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law,* p. 27.

[106] Juhani Kortteinen, *Finland – Country Report 2010: Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: State of affairs up to 1 January 2011.* (European Network of Legal Experts in the Non-Discrimination Field, 2010), p. 95; Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law*, Annex I C - time and length.

[107] Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law,* Annex I C - time and length.

Interesting solutions to this issue are found in common law countries. The United Kingdom, Australia and Canada's province of Ontario, for example, prescribe discretion of the court, depending on the specific facts of the case, to admit a lawsuit filed beyond the time limit. In the United Kingdom and Australia, the court/tribunal has the right to consider an application filed beyond these time limits if the circumstances of the case indicate that doing so would be "just and equitable"[108]. Australian courts have in practice agreed to consider cases if the legal time limits were exceeded by ten days[109], but also by seven[110] or eight months[111]. The Ontario Human Rights Code prescribes a one-year time limit counting from the day of the claimed discrimination for addressing the Human Rights Tribunal. The Tribunal has thereby discretion to admit a lawsuit filed beyond the time limit if the delay was caused "in good faith" and if considerable harm will not be inflicted on the other party.[112]

Legislative solutions in the region also speak in favor of longer time limits. Countries in the region, in line with European Union law, apply general statutes of limitations applicable to other similar lawsuits. In Croatia, the law does not prescribe any time limits for bringing a lawsuit, as a result of which general statutes of limitations, depending on their nature, are applied to anti-discrimination claims. For example, an indemnification claim and other claims stipulated by anti-discrimination legislation may be filed within a subjective three-year time limit and an objective five-year time limit.[113] In Macedonia and Serbia as well, restrictive time limits are not prescribed for filing anti-protection lawsuits, which even commentators in Bosnia and Herzegovina consider a "more appropriate solution".[114]

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108 Aileen McColgan, *United Kingdom – Country Report 2010: Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: State of affairs up to 1 January 2011.* (European Network of Legal Experts in the Non-Discrimination Field, 2010), p. 141.

109 For example, in a Federal Magistrates Court of Australia (FMCA) case, *Drew v Bates,* [2005] FMCA 1221, August 17, 2005, in which an attorney from a small law firm who was working on the case was suddenly seriously injured in an accident, and there were sufficient well-founded claims pertaining to the case merits.

110 For example, in the case of a disabled applicant, under the age of 18, who was not familiar with the legal procedure and had a well-founded case. Federal Magistrates Court of Australia (FMCA), *Phillips v Australian Girls' Choir Pty Ltd,* [2001] FMCA 109, November 28, 2001.

111 The court, for example in this case, took into consideration special circumstances – the applicant lived in a remote location, announced to the opposing side that he would file a lawsuit against him, and his case could not be called unfounded. Federal Court of Australia (FCA), *Creek v Cairns Post Pty Ltd, [2001] FCA 923,* August 20, 2001. For more examples, see Australian Human Rights Commission, Federal Discrimination Law (Sydney: Australian Human Rights Commission, 2011 ed.), 6. 9. 3.

112 "Ontario Human Rights Code 1990," Section 34.

113 Kušan, *Croatia – Country Report 2010: Report on measures to combat discrimination,* p. 53.

114 Nezirović, "Proceedings for Protection from Discrimination," p. 12.

2.5.4.3. Calculating Time in Case of Continued Violations

A potential challenge in Bosnian and Herzegovinian judicial practice may regard taking a proper approach to the issue of calculating time in cases of continued violations of the right to equality. In comparative judicial practice, systemic discrimination by its very nature extends over time[115] and in case of continued, systemic violation, the legal time does not run[116]. An obvious example of continued discrimination is segregation which still exists in Bosnian and Herzegovinian schools.[117]

The LPDB&H, however, does not prescribe how time limits are calculated in cases of continued or systemic violations, such as mobbing or structural discrimination, whose specific characteristic is precisely reflected in the continuity of their duration. One of few judges in Bosnia and Herzegovina with experience in this field points out that in case of continued violation "the calculation of timeframes starts from the last action. Such practice exists in other proceedings and legal specification is not needed at all".[118] A representative of the Ombudsman Institution also says that the ombudsmen interpret time limits extensively, in favor of the parties. In case of mobbing, for example, that means calculating time from the last action that constitutes mobbing, regardless of when the mobbing started.[119]

Nevertheless, this issue might give rise to dilemmas among one part of the judicial community, even inconsistency in interpreting this standard.[120] Thus, in a first-instance Mostar Municipal Court judgment dismissing the charges[121] pertaining to structural violation of rights of new mothers in the Herzegovina-Neretva Canton, who, unlike most other cantons in the Federation of B&H, due to years of passive conduct, are denied the right to maternity benefits, the court established that the lawsuit was "filed beyond the time limits prescribed by Article 13 of the Law",

115 Canadian Federal Court of Appeal, *Bell Canada v. Communications, Energy and Paper Workers Union of Canada,* A-222-98, November 17, 1998.

116 Canadian Human Rights Tribunal, *CEP & CTEA and Canadian Human Rights Commission v. Bell Canada,* Ruling No. 1, November 29, 1999.

117 In this regard, the Mostar Municipal Court acting judge in case No. 58 0 Ps 085653 11 Ps, related to discrimination of children in schools divided along an ethnic principle, took the proper stand that the lawsuit was filed on time because the "discriminatory conduct of the defendants is repeated every day and is still going on."

118 Sofija Vrdoljak, e-mail correspondence, February 2012.

119 Predrag Raosavljević, interview with the author, February 6, 2012.

120 For example, arguments made by the respondents' legal council that the lawsuit was not filed in a timely fashion are evident in Mostar Municipal Court, Judgment No. 58 0 Ps 085653 11 Ps, pertaining to discrimination of children in schools divided along an ethnic principle,.

121 Mostar Municipal Court, Judgment No. 58 0 P 096359 11 P, April 3, 2012.

specifying as the beginning of calculation of these time frames the entry into force of the LPD as the day the right to protection was established.[122]

Comparative practice points to examples of explicit codification of the way time limits are calculated in situations of continued violation. For example, in Ireland, the Equal Status Act 2000-2004 prescribes for notifying the other party of the intention to initiate a proceeding a time limit that is calculated from "the incident or the day of the last incident", which seems to be a very good solution for protecting victims' rights. With regard to mobbing, it is always possible that the victim, despite continued and long repetition of certain actions with a degrading effect[123], was not aware that it was mobbing until someone pointed it out to her/him. In Bosnia and Herzegovina, especially in light of the recency of the LPDB&H, the absence of such explicit codification of the way time limits are calculated may create room for an acting judge, but also for potential legal representatives of discrimination victims, to interpret this matter restrictively, which might additionally jeopardize the efficiency of application of the judicial mechanism of protection from discrimination.

2.5.5. Inadequate Regime of Temporary Security Measures in the Anti-Discrimination Proceeding

Taking into account the often urgent character of protection from discrimination, the Law in its provisions points the discrimination victim to the option of determining temporary security measures.[124] Such measures would be, for example, "an order to the discriminator to take certain activities to prevent damage; reinstating the employee and compensating his/her salary during a labor dispute; prohibiting the conveying of property, as well as all other measures that temporarily regulate the disputed relations"[125]. Thereby, the LPDB&H points to the application of general rules of civil proceedings, and therefore also to the general procedural rules applied to security measures.

The regime of temporary security measures, therefore, is not adapted to specific anti-discrimination lawsuits. The law, proceeding from the vulnerable position of discrimination victims, only draws attention to the possibility of using this form of protection. In this regard, the way this issue is regulated in Bosnia and Herzegovina differs from the legislative solutions in Croatia and Serbia, which in their anti-discrimination acts prescribe special prerequisites for issuing temporary security measures, differing from the normal requirements prescribed for the regular civil

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[122] The court, thereby, found that the untimeliness of filing the lawsuit was an obstacle to passing a judgment on failure by the principal accused who had not delivered a response to the lawsuit within the legislative time limit.

[123] In the employment field, this kind of situation may go on for years.

[124] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 14.

[125] Nezirović, "Proceedings for Protection from Discrimination," p. 13.

proceeding. In Serbia[126], an applicant is required to establish the necessity of the measure to prevent the danger of violence as a result of discriminatory treatment, to prevent the use of force or irreparable damage. A similar solution was adopted in Montenegro[127].

Compared to such provisions, adapted to the purposes of judicial protection from discrimination, the application of general civil procedure rules on ordering security measures – which require to establish the credibility of "existence of a claim or right"[128], as well as the existence of the danger "that without such measure the security contester could prevent or hamper collection of the claim by selling, concealing, encumbering or otherwise disposing of his/her assets, or would in some way change the current status quo or adversely affect the rights of the security seeker"[129] – seems, to put it mildly, impeded in anti-discrimination proceedings in Bosnia and Herzegovina[130]. Therefore, some commentators have pointed out that, along with harmonizing the wording of this article with the Law on Civil Procedure, specific solutions, using other countries in the region as a model, should be prescribed by law in Bosnia and Herzegovina too.[131] In doing so, in line with the principle of urgent procedure stipulated by the LPD, a more precise time limit is needed for the court to act on a motion to order such measures, using as a model the Serbian solution that the court shall be obligated to decide on the motion "forthwith, or within three days of the day of receiving the motion at the very latest"[132]. Namely, in the absence of explicit legislative prescription of this matter, in a familiar example Sarajevo Municipal Court ruled on a motion to order a security measure in an anti-discrimination proceeding two and a half months later and even the Constitutional Court of B&H assessed it as prompt action[133].

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[126] "Law on the Prohibition of Discrimination of the Republic of Serbia," Article 44.

[127] "Law on the Prohibition of Discrimination of the Republic of Montenegro," Article 28. In Croatia (Article 19 of the Law on the Suppression of Discrimination), the applicant is required to make plausible that it is necessary to order a measure with a view to eliminating dangers of irreparable damage, particularly of serious violations of the right to equal treatment or with a view to preventing violence, additionally making plausible that his/her right to equal treatment was violated.

[128] "Civil Procedure Law of the Federation of Bosnia and Herzegovina," Article 269, para. 1, subsection 1.

[129] *Ibid,* Article 269, para. 1, subsection 2.

[130] See in this regard Constitutional Court of Bosnia and Herzegovina, Judgment number AP 1859/11, June 13 2012, on a proceeding for protection from discrimination of a child with special needs instigated by the NGO "Vaša prava."

[131] Nezirović, "Proceedings for Protection from Discrimination," pp. 12–13 and 22.

[132] "Law on the Prohibition of Discrimination of the Republic of Serbia," Article 44, para. 3. The general time limit to decide on a motion for a temporary security measure in Serbia is eight days.

[133] Constitutional Court of Bosnia and Herzegovina, decision number AP 1859/11, subsection 37, June 13, 2011, on a proceeding for protection from discrimination of a child with special needs instigated by the NGO "Vaša prava."

2.5.6. Rule of Urgency in Anti-Discrimination Cases

2.5.6.1. Current Legislative Solution

The law envisions another important measure for protecting discrimination victims – urgent procedure. While the Civil Procedure Law prescribes the obligation of urgency of procedure only for labor disputes and potentially, if the nature of the dispute requires it, for trespassing disputes, the LPDB&H prescribes that the court and other bodies conducting proceedings are to undertake actions in the proceeding urgently, ensuring that all claims of discrimination are considered as soon as possible.[134] The imperative of this rule is reflected in that discrimination victims often on a daily basis suffer particularly negative consequences of this kind of violation of rights and it is thus very important to ensure that adequate protection is provided as soon as possible. For example, children's resumption of regular education depends on the outcome of a proceeding[135], or individuals' jobs, as the main source of their existence, or even their physical integrity (if, for example, provision of medical services is denied to a person of a particular nationality as a result of discriminatory treatment), are often jeopardized this way. Urgency, for example in a civil proceeding compared to labor disputes, is reflected in that time limits for certain acts in the proceedings to be taken by both the court and the parties are shorter than the general time limits. For example, the court determines a 15-day time limit for the execution of an action ordered in the judgment, whereas the time limit for appealing a judgment or decision is 15 days instead of the general 30-day limit. Nezirović interprets urgency in this context as undertaking acts in the proceeding without delay and, specifically, giving advantage to acting on anti-discrimination lawsuits "over cases that are not urgent by law"[136]. Judges interpret urgency in a similar way – scheduling hearings as quickly as possible and considering decisive facts pertaining to the subject of the dispute, a shorter interval between hearings, as well as the court's power to decide that an appeal does not withhold the enforcement.[137]

Logically adding to the rule of urgency is the possibility of speeding up the process of enforcement of a court decision aimed at public condemnation and

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[134] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 12, para. 2.

[135] See Constitutional Court of Bosnia and Herzegovina, Decision No. AP 1859/11, on a proceeding for protection from discrimination of a child with special needs instigated by the NGO "Vaša prava."

[136] Nezirović, "Proceedings for Protection from Discrimination," p. 9.

[137] Sofija Vrdoljak, e-mail correspondence, February 2012. Application of this principle is interesting in Mostar Municipal Court's reasons in Judgment No. 58 0 Ps 085653 11 Ps for refusal to admit a countersuit filed by one of the respondents. It mentions, along with vagueness of the lawsuit and lack of supporting evidence, as an additional reason precisely the legal obligation of urgent action, which would be jeopardized by the factually vague counter claim, which would "certainly drag out this proceeding, for the purpose of which, in the court's opinion, it was filed in the first place."

redress of discrimination. The LPD, namely, explicitly gives the court discretion to decide, if its judgment orders redress of discrimination, prohibition of further discrimination or publication of the judgment on the established right violation in media, to determine a shorter time limit for undertaking the action ordered to the defendant (time limit for compliance). In these cases the court may also remove the suspensory effect of the appeal, i.e. it may decide that a lodged appeal does not withhold the enforcement until the second-instance judgment is passed, whereby that part of the judgment becomes final and enforceable with the expiry of the time limit for compliance.[138] This has multiple goals: deterring the defendant from using a legal remedy just to drag out the proceeding, timely elimination of the consequences of the established discrimination and prevention of its further negative consequences, and elimination of the possibility of deterioration of these consequences.[139] A judge with experience in these cases draws attention to the fact that this helps not only the discriminated person, but also "acts preventatively with regard to the community"[140]. The intention to achieve a primarily preventative effect of this discretionary option, both in relation to further discrimination against the individual, as well as the broader community, is also evident from the fact that it is not prescribed with regard to ordering damage compensation[141], whose primary function is to offer compensation in case of discrimination that has already been committed, rather than ending it.

2.5.6.2. Challenges in the Application of the Rule of Urgency in Anti-Discrimination Proceedings

Rule of Urgency and Incidental Protection from Discrimination

A potential dilemma related to the rule of urgency of procedure regards the question of whether it should also be applied in incidental anti-discrimination proceedings. As the requirement of urgent procedure is contained in Article 12 of the LPD, related to special anti-discrimination lawsuits, it may be concluded that the obligation of urgent procedure is envisioned only in relation to special anti-discrimination proceedings, but not to existing protection proceedings. In contrast to that solution, in Croatia, for example, urgency is also applied in proceedings in which discrimination is decided upon as a preliminary, not main issue, considering that this rule is stipulated in provisions related to both types of proceedings.[142]

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[138] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 13, para. 3.

[139] Nezirović, "Proceedings for Protection from Discrimination," p. 11.

[140] Sofija Vrdoljak, e-mail correspondence, February 2012.

[141] As Article 13, para. 3, of the Law on the Prohibition of Discrimination of Bosnia and Herzegovina envisions this option only for a claim under Article 12, subsections b) and d), an indemnification claim under Article 12, subsection c) is exempted.

[142] "Law on the Suppression of Discrimination of the Republic of Croatia," Article 16, para. 3.

Basically, there is no reason why a discrimination victim would be given a different form of protection only because it is claimed in the scope of another proceeding. Of course, even in that case there is the possibility of constructive effect of judicial practice. As a judge we talked to points out, it is important to also bear in mind an important principle from the Civil Procedure Law (CPL) according to which legal ground does not bind the court. This "concretely means if the court assesses that a specific case is about discrimination, the dispute will be dealt with pursuant to the Law on the Prohibition of Discrimination, regardless of what ground the plaintiff claims".[143] Nevertheless, a solution such as the one applied in Croatia removes all dilemmas in this regard and is thus in the best interest of discrimination victims, especially in this early phase of implementation of anti-discrimination legislation.

Non-Compliance with the Rule of Urgency of Procedure in Practice

The limited court practice in the field of discrimination shows that the rule of urgency of procedure in anti-discrimination cases is not complied with. A representative of the NGO "Vaša prava" estimates that anti-discrimination proceedings last as long as 1.5 to two years on average.[144] The Constitutional Court of B&H in an anti-discrimination case handled by this organization, in which the first-instance judgment was not passed even after one year and nine months, established a violation of the right to a fair trial under Article II/3.e) of the Constitution of B&H and Article 6, paragraph 1, of the European Convention on Human Rights, for failure to pass a decision within a reasonable time, and ordered Sarajevo Municipal Court to urgently complete the proceeding in this case.[145] Analysis of 13 cases handled by the organization's anti-discrimination team[146] indicates that not only is the rule of urgency specific for this type of proceeding not complied with, but the case processing period under the general rules of the Civil Procedure Law applicable to regular civil proceedings is not complied with either. Namely, under these rules,[147] around four months is supposed to pass from the moment a lawsuit is received by the court to the holding of the main hearing. Available statistical data, however, demonstrate that in practice even regular civil and commercial first-instance proceedings in Bosnia and Herzegovina last 781 days on average, i.e. more than two

[143] Nina Ćulanić, judge, Mostar Municipal Court, e-mail correspondence, March 2012.

[144] Emir Prcanović, Executive Director, and Nermin Hanjalić, employee of NGO "Vaša prava," interview with the author, February 21, 2012. In Slovenia they can even last as long as three years. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 68.

[145] Constitutional Court of Bosnia and Herzegovina, Decision No. AP 1859/11.

[146] Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* May 2012, available in the archives of Analitika.

[147] See parameters from "Civil Procedure Law of the Federation of Bosnia and Herzegovina," *Official Gazette of the Federation of Bosnia and Herzegovina* 5/00, 1/01, 6/02, 8/09 and 52/10, Article 69, Article 70, para. 1, Article 75, para. 4, Article 94, para. 2.

years, one of the poorest averages in European countries, whereas first-instance proceedings in labor disputes last 313 days on average, i.e. around 10 months.[148] By definition, urgent anti-discrimination proceedings thus fit into the average time needed to complete regular civil proceedings, while at the same time lasting much longer than the equally urgent proceedings on labor rights.

The first problem that stands out in this regard is the problem of untimely delivery of the lawsuit to the respondent for a response after it is received by the court.[149] Further, statistical processing of data submitted by the NGO "Vaša prava" Anti-Discrimination Team shows that on average 6.5 months passes from the day the lawsuit is filed to the scheduling of a hearing. To compare, the Civil Procedure Law of FB&H prescribes a mandatory 30-day time limit from the day the court receives a response to the lawsuit to the holding of the preparatory hearing.[150] In addition, while the CPLFB&H prescribes a mandatory 30-day time limit for holding the main hearing from the day the preparatory hearing is held[151], the time that passes from the day the preparatory hearing is concluded to the opening of the main hearing in anti-discrimination proceedings is three months on average.[152] In the first six completed first-instance proceedings handled by the NGO "Vaša prava", 11 months passed on average from the moment the lawsuit was filed to the handing down of the first-instance judgment. However, these were likely just examples of the "more expeditious" courts, as a considerable number of lawsuits filed back in 2010 remain unsettled.[153] In a recently completed first-instance proceeding conducted by Travnik

[148] Ljiljana Filipović and Rusmir Šabeta, Analiza 4. izvješća Europske komisije za efikasnost pravosuđa o europskim pravosudnim sustavima – izdanje 2010. godine [Analysis of Fourth Report of the European Commission for the Efficiency of Justice on European Judicial Systems – 2010 Edition] (High Judicial and Prosecutorial Council of Bosnia and Herzegovina, March 4, 2011), p. 10.

[149] Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* May 2012, available in the archives of Analitika. Article 69 of the Civil Procedure Law of the Federation of Bosnia and Herzegovina prescribes the obligation of providing the lawsuit to the respondent for a response within 30 days of the day of its receipt in court.

[150] "Civil Procedure Law of the Federation of Bosnia and Herzegovina," Article 75, para. 4.

[151] *Ibid,* Article 94, para. 2.

[152] Estimate based on Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* May 2012. In this regard, however, it is important to take into account that the estimated average time is related only to the fact of opening the main hearing, not its conclusion, because, in the vast majority of cases, main hearings are continued and are not concluded the same day they open.

[153] A blatant example of violation of both the Law on the Prohibition of Discrimination and Civil Procedure Law is a case in which Sarajevo Municipal Court a year after the lawsuit was filed returned the lawsuit to the plaintiff for consolidation and then, after an additional nine months upon receipt of the consolidated lawsuit passed, it declared it had no jurisdiction over the matter and sent it to Tuzla Municipal Court. The agony of the discrimination victim in this case continues, however, because a preparatory hearing has not been scheduled even an additional year after the day of delivery, despite insistence in this regard multiple times. Vaša prava, Internal data, 2012, available in the archives of Analitika.

Municipal Court, pertaining to segregation of children who attend classes in two schools under one roof, due to the dragging out of the proceeding as a result of postponement of hearings, manner of conducting the proceeding and presentation of all suggested evidence by both sides, a year and a half had passed from the filing of the lawsuit to the handing down of a verdict to dismiss the charges.[154]

The causes of untimely processing of these cases are multiple. On one hand, the general problem of the over-encumbered judiciary in Bosnia and Herzegovina, its slow work and inefficiency, negatively reflects on the efficiency of the mechanism of judicial protection from discrimination, despite its special significance and urgent character.[155]

In the initial period of implementation of the LPD of B&H, part of the problem was of a technical nature. Along with the fact that in the electronic Case Management System (CMS) special designations were not envisioned for numeration of discrimination cases, as has been done with labor disputes which are also urgent by their character[156], it was not possible to electronically register discrimination cases by designating the legal ground of discrimination in the provided space. In 2011 technical prerequisites were created for registering, already upon receipt of the lawsuit in the court's admissions office, the specific legal ground of discrimination as part of general case data entered into the CMS. This is important in the context of making the choice easier for judges when examining the cases to see which ones will be given mandatory advantage in handling, because that enables discrimination cases to be separated from other civil cases which are not urgent by their nature. However, a potential challenge that remains is inappropriate designation of the legal ground for the lawsuit by the applicant or their representative. The acting data entry officer in the court's admissions office records these designations and if the acting judge during the first or subsequent examination of the case does

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[154] Vaša prava, Internal data, 2012, available in the archives of Analitika.

[155] See in this regard also Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, Izvještaj o pojavama diskriminacije u Bosni i Hercegovini za 2011. godinu [Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011] (Banja Luka: Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, February 2012), p. 26. The length, as well as the complexity of proceedings, deters victims from filing action even in European Union countries, such as Portugal and Slovakia. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe*, p. 68. See also Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law*, pp. 27–29.

[156] Emir Prcanović, Executive Director, and Nermin Hanjalić, employee of NGO "Vaša prava," interview with the author, February 21, 2012. Thus, proceedings instigated under the LPD were designated in most cases as classical litigation cases, and sometimes, if the factual circumstances allowed it, as labor disputes. Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* May 2012, available in the archives of Analitika.

not change the designated legal ground[157], it is difficult to take into consideration urgency in handling discrimination cases.[158]

On the other hand, failure to process lawsuits filed under the LPD may also indicate problems that the courts have in treating such cases, in light of the new concepts introduced by the law (such as, for example, specificity of proving discrimination), as well as not being familiar with relevant international and comparative case-law in the field of anti-discrimination protection standards. Taking into account the mentioned factors, it should be pointed out that application of anti-discrimination law in practice is considered a particularly complex task in a comparative perspective too.[159] Therefore, it is possible that some judges, although such proceedings are urgent by their nature, nevertheless give advantage to handling other cases that they can settle more easily.[160] In any case, this practice has a negative effect on trust in the judicial system and the possibility of obtaining efficient judicial protection of rights, additionally discouraging victims from exercising protection through litigation.

In practice, in cases of established discrimination in Bosnia and Herzegovina so far which the public is familiar with, the opportunity provided by the law to speed up enforcement of the anti-discrimination judicial decision appears to be insufficiently used. It is noticeable that the opportunity to determine a shorter compliance time limit for enforcement of the court decision has been used in rare cases. In this regard, plaintiffs themselves have an important role too, as the claim they make should be defined accordingly. On the other hand, in terms of the court's discretion to order the non-suspensory effect of the appeal, its use is commendable in a judgment passed by Mostar Municipal Court related to segregation of children in schools along an ethnic principle. Although the court tried to objectively estimate the time needed to change the flagrant structural discrimination that has been present for many years, leaving a four-month time limit for its elimination (which may be questionable from the aspect of the scope and depth of the needed intervention, but is certainly longer than the usual legal time limits of 30 or 15 days)[161], the practical implications of the decision are reflected in eliminating the possibility for the respondent to protract redressing the issue through an appellate proceeding.

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[157] Taking account of the rule that the court is not bound by the legal ground for the claim (Civil Procedure Law of the Federation of Bosnia and Herzegovina, Article 53, para. 3).

[158] This may result in a situation in which for proceedings instigated under the LPD, the legal grounds designated in the CMS are classical litigation cases, damage compensation or labor dispute.

[159] See, for example, section 2. 6. of this report ("General problems") or Tena Šimonović Einwalter, "Antidiskriminacijsko pravo i Zakon o suzbijanju diskriminacije" [Anti-Discrimination Legislation and the Anti-Discrimination Act], in *A Guide to the Anti-Discrimination Act,* ed. Tena Šimonović Einwalter (Zagreb: Office for Human Rights of the Government of the Republic of Croatia, 2009), p. 18.

[160] See also in this regard the blatant negative example of court conduct from footnote 154.

[161] See "Civil Procedure Law of the Federation of Bosnia and Herzegovina," Article 179, para. 2, and Article 421.

2.5.7. Proving Discrimination

2.5.7.1. Rule on Shifting the Burden of Proof

When an individual claims they were discriminated against, the biggest obstacle that may appear on their road to protection from discrimination is proving that it had really taken place. Due to the specific nature of this social phenomenon, it is often difficult to prove, which may have a deterring effect on instigating an anti-discrimination proceeding. Namely, discriminators will not, except in very rare cases, openly admit, even to themselves, that they treat a particular person or group of persons unequally, and they will especially not openly state the reason, i.e. one of the protected discrimination grounds that motivate such conduct, which is often only present in the mind of the perpetrator or is part of a legal person's concealed internal policy.[162] Along with the fact that discrimination is concealed as a rule, it often occurs in the absence of witnesses, there is no written proof of the committed injury, and even if proof does exist, it is not available to the party and is not transparent, but is located in the discriminator's internal documentation.[163]

[162] If, for example, they fire a man upon learning about his homosexual orientation, they will not cite that as the reason for the dismissal, but will rather refer to reasons of an organizational, technical or similar nature.

[163] Often only the employer knows the amounts of salaries paid out to employees who hold similar or comparable positions. And only an employer who refuses to hire an individual knows what the other candidates were like, the reasons for the refusal and the internal structure of the staff in question.

In response to the described obstacles, the rule on shifting the burden of proof was developed[164] as a key precondition for effective protection from discrimination.[165] It is applied in anti-discrimination proceedings precisely due to the specific problems in proving discrimination, with the goal of "protecting the weaker side in the legal relation" and "ensuring access to information as an expression of the principle of procedural equality of the parties[166]". Thanks to the rule, excessively high standards of proof are not set for the discrimination victim, which would ultimately, in practice, deprive the victim of efficient instruments of protection from discrimination.[167]

[164] Thus, European Union member states are required to ensure that "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment." This concept in European Union law was only developed through European Court of Justice practice (see, for example, European Court of Justice, *Kowalska v. Freie und Hansestadt Hamburg*, C-33/89, June 27, 1990, point 16, and *Handels- og Kontorfunktionærernes Forbund I Danmark v Danfoss*, 109/88, October 17, 1989, point 16) and the rule was subsequently also codified in the Directive on the burden of proof in cases of discrimination based on sex – Council of the European Union, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *Official Journal of the European Communities*, L 014/1998; Racial Equality Directive – Council of the European Union, Council Directive 2000/43/EC, Article 8; Employment Equality Directive – Council of the European Union, Council Directive 2000/78/EC, Article 10; Directive on Equal Treatment between Men and Women in the Access to and Supply of Goods and Services – Council of the European Union, Council Directive 2004/113/EC, Article 22; and Gender Equality Directive – European Parliament and the Council of the European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)", *Official Journal of the European Union*, L 204/2006, Article 30. See also European Commission against Racism and Intolerance, General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (Strasbourg: European Commission against Racism and Intolerance, December 13, 2002), point 11.

[165] In addition to this rule, if the discriminator is unwilling to make available relevant evidence in their possession, the discrimination victim in a civil proceeding is favored by the general option to propose the introduction of certain evidence that hewas unable to obtain from the respondent, with a petition to the court to order the other party to submit it. Also useful for obtaining relevant evidence are the powers of the Ombudsman Institution, which it possesses in the scope of the investigation procedure, and in particular the obligation for persons to submit to the Ombudsman all requested data and documents.

[166] Siniša Rodin, "Dokazivanje diskriminacije i teret dokazivanja u pravu Europske unije" [Proving Discrimination and Burden of Proof in European Union Law], Working paper WP H 2/2009 (Opatija: Inter-University Centre of Excellence, 2009), pp. 3–4.

[167] The European Court of Human Rights (ECHR) in *Nachova and Others v. Bulgaria,* App. Nos. 43577/98 i 43579/98, February 26, 2004, established that effective implementation of prohibition of discrimination may require the use of specific measures that take into account difficulties in proving discrimination (European Court of Human Rights, *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 i 43579/98, point 168); in the practice of the ECHR and other regional and global human rights protection mechanisms, the rule on sharing the burden of proof is applied generally to proving human rights violation claims. European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law*, p. 124.

The principle of shifting the burden of proof is a key innovation in the LPD. According to the principle, the victim does not have to prove discrimination as they would have to do in other civil proceedings. This means the victim is not obligated to prove the facts on which they base their claim in such way that the court can determine a fact with certainty based on evaluation of the presented evidence, and if unable to do so, make a decision by applying the rules on burden of proof.[168] It is enough for the plaintiff(s), in proceedings before the court, to "provide facts," "corroborating claims that prohibition of discrimination was violated"[169], after which the burden of proving that discrimination did not occur is shifted to the alleged offender. If the respondent does not succeed in proving, pursuant to the standards from the Civil Procedure Law, i.e. with certainty, that there was no discrimination, the acting court can do nothing but find that discrimination did occur.[170]

2.5.7.2. Application of the Rule on Shifting the Burden of Proof

In practice, incorrect understanding and interpretation of the rule on shifting the burden of proof is noticeable in the Bosnian and Herzegovinian judiciary. The OSCE B&H legal advisor points out that misunderstanding is still present with regard to the basic institutes, innovations and procedural specificities in the anti-discrimination field. She stresses that even in professional circles one can often hear the sentence "discrimination is hard to prove," which she points out neglects the fact that the plaintiff is supposed to make the discrimination plausible, in which case it actually then needs to be proven that discrimination did not occur.[171]

An analysis of anti-discrimination proceedings handled by the NGO "Vaša prava," clearly shows the problem of incorrect interpretation, even unfamiliarity with the

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[168] Under the classical procedural rule on burden of proof that is applied in the civil proceeding, the burden lies on the plaintiff. This means that if the plaintiff does not succeed in proving the facts on which they base their claim, the court maintains that a fact that was not proven does not exist and the claim will therefore be dismissed. "Civil Procedure Law of the Federation of Bosnia and Herzegovina," Article 123, in conjunction with Article 126.

[169] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 15.

[170] So-called principle "in dubio pro discriminatione." Nezirović, "Proceedings for Protection from Discrimination," p. 14. In addition, the provision of Article 15, para. 3, is particularly interesting and unusual, considering that for claims of discrimination due to failure of reasonable accommodation, it establishes that the burden of proof lies with the other party. Thus Bosnia and Herzegovina in this situation goes one step further from the rule on sharing the burden of proof. See in this regard Mario Reljanović, "Zabrana diskriminacije u Bosni i Hercegovini – pravni okvir i praksa" [Prohibition of Discrimination in Bosnia and Herzegovina – The Legal Framework and Practice], in *Pravo zemalja u regionu* [Legislation in Countries in the Region], ed. Vladimir Čolović (Belgrade: Institute of Comparative Law, 2010), p. 341. The legislative wording that the burden of proof lies with the other party if a person "considers that s/he suffered consequences of discrimination due to failure of reasonable accommodation" may, namely, give the impression that in order for burden of proof to be shifted, it is enough to "consider," or claim, that this type of discrimination occurred.

[171] Lori Mann, interview, March 12, 2012.

specific rule on burden of proof and incorrect legal understanding of the procedural obligations of the parties to the proceeding by some courts.[172] Thus, for example, Zavidovići Municipal Court in a verdict to dismiss the charges states in several places that the "plaintiff did not prove...," implying that the court understood the procedural obligations of the parties to the proceeding, by inertia, in line with the general rule of the CPL rather than the special provisions of the LPD.[173] Also revealing is a Mostar Municipal Court verdict to dismiss the charges, elaborating that the "plaintiff in this regard did not offer a single piece of evidence that makes plausible that the lack of payment is a direct or indirect consequence of the respondents' failure"[174]. The court overlooked the fact that this specific case was about the structural problem of failure to pay salaries to a specific category of the population pursuant to their legally prescribed right, which may undoubtedly be blamed on the respondents – Government of the Federation and Government of the relevant canton.

In comparative judicial practice in European Union countries, although they all prescribe the rule on shifting the burden of proof, a variety of problems are familiar in its application. Undeveloped awareness, namely, is observed among different actors in the judicial community regarding the existence of this rule which is specific to the discrimination proceeding[175]. Although European Union law, including this rule, has a binding effect in domestic legal systems, in some European Union countries there have been no visible changes in domestic procedural legislation in this regard. Thus the rule either remains unfamiliar[176] or legal insecurity is present with regard to its application.[177] Furthermore, its application is still not harmonized, because, for example, it is not always clear and there are different interpretations regarding the question of which facts may be considered as an indicator based on which it may be presumed that discrimination occurred.[178] These dilemmas are still present

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[172] Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* May 2012, available in the archives of Analitika.

[173] *Ibid.*

[174] *Ibid.*

[175] For example, Italy and France. See Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law*, p. 26; European network of legal experts in the non-discrimination field, *Burden of Proof* (Discussion Paper for Workshop 4 of the Legal Seminar on Approaches to Equality and Non-discrimination Legislation inside and outside the EU, Brussels, October 4, 2011), p. 3.

[176] For instance in Greece. See European network of legal experts in the non-discrimination field, "Burden of Proof," p. 3.

[177] Latvia and Lithuania. See European network of legal experts in the non-discrimination field, "Burden of Proof," p. 3.

[178] See European network of legal experts in the non-discrimination field, "Burden of Proof," p. 3.

despite the fact that the European Court of Human Rights, for example, has in past cases offered its elaboration and interpretation of this matter, among others.[179]

The potential problem of limited application of this rule only to special anti-discrimination proceedings arises here again. Literal interpretation of the legal wording of Article 15, paragraph 1, related to burden of proof, namely, only points to proceedings instigated upon special anti-discrimination lawsuits, and not to discrimination claims made in existing court proceedings, administrative proceedings and administrative disputes. Nezirović warns that such interpretation would considerably narrow down the application of relevant European Union directives[180] and that it would be "contrary to the spirit and purpose of the law".[181] In Croatia, the rule on burden of proof, for example, is applied in both civil and administrative proceedings[182]. In addition, European Union equality directives require the application of this rule before "a court or other competent authority"[183].

2.5.7.3. Instruments of Evidence in Anti-Discrimination Proceedings

There is a wide array of types of evidence that may be used and that are used in anti-discrimination proceedings. They are, primarily, statements by witnesses and parties to the proceeding, documents and common knowledge[184], acts issued by Ombudsmen and reports by non-governmental or international organizations. Other types of evidence that may be used in these proceedings are: statistics, situation

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[179] For example, in the Feryn case (European Court of Justice, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, C-54/07*, July 1, 2008) the fact that an employer publicly announced that he would not hire persons of a particular ethnic or racial origin may constitute a fact leading to presumption of a discriminatory employment policy. Therefore, in this kind of situation the employer would have to prove that he did not thereby breach the principle of equal treatment, for example by pointing out that the employment policy up until then does not match such statements. In another case, the European Court of Justice found that it was a *prima facie* case of discrimination when it was established that a speech pathologist's salary was much lower than a pharmacist's salary, with virtually all speech pathologists being female, while the pharmacists were male, which was enough to shift the burden of proof (European Court of Justice, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, C-127/92, October 27, 1993).

[180] Directive on the Burden of Proof in Cases of Discrimination Based on Sex, Racial Equality Directive, Employment Equality Directive, Directive on Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, Gender Equality Directive. See footnote 162.

[181] Nezirović, "Proceedings for Protection from Discrimination," p. 4.

[182] Kušan, *Croatia – Country Report 2010: Report on measures to combat discrimination,* p. 56.

[183] Racial Equality Directive – Council of the European Union, Council Directive 2000/43/EC, p. 8.

[184] For example, the high proportion of Roma children in a particular school was taken by Hungarian courts to be common knowledge. Farkas, *How to Present a Discrimination Claim,* p. 46.

testing, audio or video recordings[185], if so permitted by the law or through court practice, forensic expert opinions[186], public statements made to media, etc.[187]

Situation Testing as a Method of Proving Discrimination

In conditions of difficulties in proving patterns of discriminatory behavior, situation testing has often shown to be a key method for proving discrimination.[188] The method consists of deliberate exposure, on one hand, of individuals who possess personal characteristics that may lead to discriminatory situations in which they know or expect that they would be treated adversely in using a specific service[189] and, on the other hand, individuals similar to them who only differ in that they do not have the characteristic that may represent a discriminatory ground, and comparing how they are treated by the potential discriminator. These are, therefore, not discrimination victims in a traditional sense, but individuals who are, for example, concerned with the implementation of the LPDB&H and eradicating occurrences of discrimination or those who want to help someone prove discrimination and thus deliberately expose themselves to a particular situation with the goal of obtaining evidence of discrimination by "testing" the behavior of the potential discriminator.[190] This method is often used to reveal examples of discriminatory practices, such as

[185] An interesting example is Livno Municipal Court, First-instance judgment No. 68 0 P 017561 11 P, which established discrimination against a nun committed by Glamoč Municipality, where the court heard and examined as evidence a video recording of the municipality mayor's statement made in the program "Crta" on BHT and read an article in the electronic version of "Oslobodjenje."

[186] This proves, for example, the degree of suffering inflicted on the discrimination victim as a result of violation of the victim's reputation, honor and dignity (e.g. in Livno Municipal Court, Judgment No. 68 0 P 017561 11 P). In addition, an expert may determine if certain conditions at the school are adjusted to children with slight learning disabilities, as required by the Law.

[187] Farkas, *How to Present a Discrimination Claim,* p. 50.

[188] See Isabelle Rorive, *Proving Discrimination: The Role of Situation Testing* (Stockholm: Centre for Equal Rights; Brussels: Migration Policy Group, 2009). The method was first developed in Great Britain. Commission for Racial Equality. European Roma Rights Center, Interights, and Migration Policy Group, *Strategic litigation of race discrimination in Europe: from principles to practice* (Budapest: European Roma Rights Center; London: Interights; Brussels: Migration Policy Group, 2004), p. 80.

[189] Employment, housing, etc.

[190] On the potential of non-governmental organizations' role in using this method, see Topić, *Unused Potential,* pp. 51–53.

denying access to cafés, restaurants or employment due to a specific personal characteristic possessed by potential users.[191]

Progressive affirmation of the situation testing method in anti-discrimination proceedings has been observed in comparative practice. In some European Union countries, the situation testing technique is familiar and has been used for a long time[192], while in other countries a rising trend is evident in the number of cases in which the method is used.[193] In Serbia, this option is explicitly prescribed, for example in the form of filing a lawsuit; however, a person who consciously exposes themselves to discriminatory conduct with the intention of testing the application of rules on the prohibition of discrimination cannot seek damages[194].

In Bosnia and Herzegovina, situation testing is not explicitly envisioned by the Law. Legislative codification of this option would leave no room for ambiguities regarding the admissibility of this instrument of evidence,[195] considering the potential resistance of the domestic judicial community to the innovation. One should, however, bear in mind that this does not necessarily pose an obstacle to its use as a method of presenting evidence before our courts.[196] In comparative practice, explicit codification of this method of evidence, namely, is more of an exception – it is prescribed only in Hungary,[197] France and Belgium – whereas in all other European Union member states the method is admissible under the general rules of evidence, despite not being explicitly prescribed by the law.[198]

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191 A known example in Sweden regards an immigrant whose request to rent a property was denied, which was interpreted as discriminatory conduct. In order to prove that, two of his Swedish friends also came to the real estate agency showing interest in renting the apartment and both were given an opportunity to look at the apartment, while their immigrant friend was not. This test was not decisive in passing the decision, but it certainly helped in proving discrimination, as a result of which the court found that it had taken place and awarded the plaintiff damages. Gothenburg District Court, T13077-5, November 6, 2007.

192 These countries are certainly the United Kingdom and Holland.

193 Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Hungary, Latvia, Slovakia and Sweden. In Hungary, systematic use of the method has helped in winning important legal victories in cases of widespread discrimination against Roma. In Austria, Italy and Cyprus, non-governmental organizations and equality bodies have started using situation testing. Farkas, *How to Present a Discrimination Claim,* p. 47.

194 “Law on the Prohibition of Discrimination of the Republic of Serbia,” Article 46, para. 3.

195 Nezirović, “Proceedings for Protection from Discrimination,” p. 22.

196 For the same interpretation in the context of Croatia, where this option is not legally prescribed either, but there are no procedural obstacles in civil or anti-discrimination legislation to the admissibility of this method, see Kušan, *Croatia – Country Report 2010: Report on measures to combat discrimination,* p. 18.

197 In Hungary, the right of the equality body to employ situation testing in its investigations and to use these findings and facts as needed in court was explicitly prescribed by a government decision in 2004. Rorive, *Proving Discrimination Cases,* p. 67.

198 Farkas, *How to Present a Discrimination Claim,* p. 48.

Statistics

An important instrument of evidence used in anti-discrimination proceedings is statistics. Relevant European Union directives[199] prescribe the option of using statistical evidence as a possible instrument for determining indirect discrimination. It allows the victim or representative of the victim's interests to point to the discriminatory effects that specific provisions or a specific practice *de facto* have, although having a neutral character at first glance, because they have a disproportionately negative effect on specific protected groups compared to other persons in a similar situation.[200] Statistics, furthermore, may be used to prove direct discrimination as well. These data may be a very reliable indicator of an existing discriminatory practice, which points to a broader problem of structural inequality and which at the same time proves an individual case, i.e. discrimination against an individual who falls in the category of persons on which such practice or regulation has a negative effect.[201] This procedure is often used in the United States and European Union member states.[202]

Which statistical indicators will be enough to create a presumption of discrimination and shift the burden of proof to the respondent cannot be determined in advance and this question depends on each specific case. In this regard, the court has a big responsibility for proper interpretation of the presented data. Although the ECHR and European Court of Justice have not laid down any strict threshold requirement that needs to be evidenced in establishing that indirect discrimination has taken place, the latter points out that a "substantial figure" needs to be achieved[203]. Thus, for example, to presume discrimination based on sex, a disputed

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[199] Racial Equality Directive – Council of the European Union, Council Directive 2000/43/EC and Employment Equality Directive – Council Directive 2000/78/EC, point 15.

[200] European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law,* p. 129. For interesting examples of judicial practice, see *Ibid,* p. 129. and ff.

[201] Thus, for example, a statistical indicator on the ethnic structure of employees in a particular legal person may be used to make plausible that discrimination on ethnic ground occurred during the hiring process when a person was rejected despite meeting the requirements or discrimination on ground of sex may be argued in case it is proven in a proceeding that most male employees have higher salaries than female employees, although they have more or less similar qualifications and responsibilities. In this case the burden is placed on the respondent to prove the contrary: that it is the result of an objective factor unrelated to a protected ground such as ethnic background or sex. The ECHR took this stand in the *Hoogendijk v. the Netherlands,* App. No. 58461/00, January 6, 2005.

[202] On examples of use of statistical indicators in Hungary, Ireland, Germany and the Czech Republic, see Farkas, *How to Present a Discrimination Claim*, pp. 49–50. On the current situation in the field of statistics on discrimination in Bosnia and Herzegovina in a comparative perspective, see Emina Ćerimović and Dženana Hrlović, *From Collection to Prevention: Preconditions for Comprehensive Gathering of Information on Discrimination in Bosnia and Herzegovina* (Sarajevo: Analitika – Center for Social Research, 2013).

[203] European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law,* p. 129.

measure must affect a "far greater number of women than men"[204] or a "considerably lower percentage of men than women"[205]. This court, however, also points out that a lower level of disproportion between men and women may still indicate indirect discrimination if it "points to a persistent and rather constant difference over a long period of time" between these two groups[206]. In the same context, the ECHR in *D.H. and Others v. Czech Republic*[207] established that data presented by the applicants, according to which 50% to 60% of students in special schools were Roma children, as well as data from inter-governmental sources showing that 50% to 90% of Roma children in the whole country attended these schools, even if not precise, indicate that the number of Roma children is "disproportionately high" compared to their share in the structure of overall society, thereby finding that it constitutes segregation of Roma children in Czech schools.

2.5.7.4. Statistics on Discrimination in Bosnia and Herzegovina

The Law on the Prohibition of Discrimination of B&H explicitly prescribes the possibility of using statistical data or databases as an instrument of evidence.[208] As this is a relatively new phenomenon, it remains, however, despite the legal openness, to yet test the application of this progressive solution in judicial practice, i.e. to test the readiness of judges to accept these data as relevant indicators of discriminatory practices. In addition, a question that remains open is to what extent domestic judges will follow the specific standards developed in relation to the application of this method of evidence, which essentially requires their adequate education on this aspect of anti-discrimination protection.

A specific challenge arising in Bosnia and Herzegovina is the unavailability of statistical indicators that might indicate a discrimination practice. This is, among other things, a result of inactivity of the Ministry of Human Rights and Refugees of B&H in performing its basic legal duties – monitoring the implementation of the law, keeping a single database of discrimination cases and preparing annual and special reports on discrimination, along with proposing legal and other measures for

[204] European Court of Justice, *Rinner-Kühn v. FWW Spezial-Gebäudereinigung,* C-171/88, July 13, 1989. In this case, the court established that the percentage of 89% of women met the requirement.

[205] European Court of Justice, *Nimz v. Freie und Hansestadt Hamburg,* C-184/89, February 7, 1991; European Court of Justice, *Kowalska v. Freie und Hansestadt Hamburg,* June 27, 1990.

[206] European Court of Justice, *R v. Secretary of State for Employment, ex parte Seymour-Smith and Perez*, C-167/97, February 9, 1999. For more on this case, see also European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law*, p. 130.

[207] European Court of Human Rights, *D.H. and Others v. the Czech Republic,* App. Nno. 57325/00, November 13, 2007, para. 18, pp. 196–201.

[208] "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 15, para. 2.

preventing and suppressing discrimination occurrences.[209] The Helsinki Committee and Ombudsman of B&H warn in their reports of the fact that the Ministry has not passed a rulebook on the manner of collection of data on discrimination cases in Bosnia and Herzegovina.[210] The rulebook has not been adopted to date, February 2013.[211] In this situation, particular responsibility will lie with non-governmental organizations and other representatives of victims in Bosnia and Herzegovina or their associated activities in collecting statistics needed to prove cases. However, it is realistically difficult to expect them to fulfill such a complex task.

On the other hand, a particularly important potential for collecting and using these data to facilitate judicial protection from discrimination are the existing powers of the Ombudsman (potentially also of relevant inspection services).[212] This is important, for example, when in order to prove indirect discrimination statistics need to be collected from bodies which would be unwilling to provide, to individuals or their authorized agents, information that may be detrimental to them, but which, in light of their obligation of cooperation with the Ombudsman, must provide such data on the Ombudsman's request.[213] The Law on the Prohibition of Discrimination accords an explicit mandate in this regard to the Ombudsman.[214] On the other hand, it is important to make sure that lack of statistics must not be interpreted as an obstacle to proving discrimination. Thus, for example, the ECHR in *Opuz v. Turkey*[215] points out the fact that even in the absence of statistics it is possible to

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209 "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 8.

210 Helsinki Committee for Human Rights in Bosnia and Herzegovina, *Izvještaj o stanju ljudskih prava u Bosni i Hercegovini za period januar – decembar 2010* [Report on the State of Human Rights in Bosnia and Herzegovina for January – December 2010], (Sarajevo: Helsinki Committee for Human Rights in Bosnia and Herzegovina, 2011); Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011, pp. 25–26.

211 See Emina Ćerimović and Dženana Hrlović, *From Collection to Prevention: Preconditions for Comprehensive Gathering of Information on Discrimination in Bosnia and Herzegovina* (Sarajevo: Analitika – Center for Social Research, 2013).

212 Efforts to overcome the information asymmetry in anti-discrimination civil proceedings with the help of these bodies are present in comparative practice too. See Julie C. Suk, "Criminal and civil enforcement of antidiscrimination law in Europe," in *European Anti-Discrimination Law Review,* No. 14(2012), pp. 18 and 20.

213 Thus, for example, in a case related to discrimination against Roma in the education field in Croatia, the Assistant Ombudsman provided assistance in ensuring statistics. European Roma Rights Center, Interights and Migration Policy Group, *Strategic litigation of race discrimination in Europe,* p. 84.

214 "Law on the Prohibition of Discrimination of Bosnia and Herzegovina," Article 7(2)e).

215 European Court of Human Rights, *Opuz v. Turkey,* No. 33401/02, June 9, 2009.

prove disproportionate effect, i.e. discrimination, provided the available sources are reliable and support such claims.[216]

2.6. General Problems

2.6.1. Scant Judicial Practice - Insufficient Implementation of the LPD

A big problem in this field is posed by the fact that significant case-law related to the implementation of the Law on the Prohibition of Discrimination has not yet been developed. Since the adoption of the LPD, the NGO "Vaša prava," the only non-governmental organization in Bosnia and Herzegovina systematically committed to strategic litigation in the discrimination field through provision of free legal aid, has conducted a total of 22 cases before courts and administrative bodies in Bosnia and Herzegovina, three of which have so far resulted in positive first-instance judgments.[217] When this information is compared to the fact of omnipresent discrimination in Bosnia and Herzegovina[218], a stunning discrepancy is observed between the number of registered occurrences of discrimination and those that go on to have a court epilogue. This situation is primarily conditioned by the problem that individuals themselves, and potentially their legal agents as well,

[216] In this case the ECHR found, among other things, that the state had discriminated against the female applicants because the failure to offer adequate protection from domestic violence was based on the fact that they were women. In the absence of reliable statistics, in concluding that victims of this kind of violence are predominantly women the court relied on the assessments of Amnesty International, a reputable non-governmental organization, and the UN Committee on the Elimination of Discrimination against Women that this was a significant problem in Turkey. European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law,* pp. 131–132.

[217] Vaša prava, *Overview of Cases Handled by the NGO Vaša Prava Anti-Discrimination Legal Team,* November 5, 2012, available in the archives of Analitika.

[218] Numerous reports by non-governmental and international organizations and the Institution of Ombudsman of B&H on occurrences of discrimination corroborate this assertion. See, for example, European Commission, Bosnia and Herzegovina 2012 Progress Report (Brussels: European Commission, October 10, 2012), SWD(2012) 335 final; Human Rights Watch, *Second Class Citizens*: *Discrimination Against Roma, Jews, and Other National Minorities in Bosnia and Herzegovina* (New York: Human Rights Watch, 2012); Helsinki Committee for Human Rights in Bosnia and Herzegovina, *Izvještaj o stanju ljudskih prava za period januar – decembar 2011* [Report on the State of Human Rights in Bosnia and Herzegovina for January – December 2011] (Sarajevo: Helsinki Committee for Human Rights in Bosnia and Herzegovina, 2012); Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011. See in this regard also items from the portal http://www.diskriminacija.ba, which point to numerous cases of discrimination in all walks of Bosnian and Herzegovinian society.

have in recognizing that they are victims of discrimination. In addition, an important limiting factor, bearing in mind experience in other countries, is unwillingness to instigate anti-discrimination judicial proceedings due to unfamiliarity with the protection mechanism available to them, fear of victimization, lack of an efficient system of free legal aid, the deterring effect of the potential obligation to pay fees and costs of the proceeding, as well as lengthiness of the proceeding. Further, problems have been observed in relation to discrimination victims' distrust in the judicial system, expectance of a lengthy potential proceeding and skepticism regarding the likelihood of changing a discriminatory practice by bringing a case.[219] Nevertheless, the lack of judicial practice in anti-discrimination protection cannot be associated only with lack of information, unwillingness or inability of discrimination victims to stand up to this negative social phenomenon in this manner. Part of the responsibility lies with the judiciary, which does not process anti-discrimination proceedings in a timely fashion.[220]

It is important in this regard to bear in mind the fact that implementation of anti-discrimination acts is a big challenge in many European Union member states as well. Although there has been a mild rise in judicial practice on this matter, in some countries the number of reported discrimination cases remains very low, which is associated with obstacles on the road to justice, both real and perceived ones.[221] An important barrier in the context of European Union member states is the complexity of discrimination legislation, which deters victims from bringing cases[222] due to lack of skill to conduct the proceeding themselves, as well as due to lack of funding to ensure adequate representation and poor solutions for provision of free legal aid (a problem that stands out in this regard is related to complicated procedures for accessing this type of aid and its restriction to a narrow circle of potential beneficiaries).[223]

2.6.2. Insufficient Education of the Judicial Community

In Bosnia and Herzegovina, not enough attention is devoted to educating the judicial community regarding the implementation of the LPD. The problem of insufficient education and lack of education programs for judges on the implementation of the

[219] *Zbirni izvještaj o pojavnim oblicima diskriminacije* [Summary Report on Manifestations of Discrimination] (December 2011 – September 2012), produced by partner organizations in the B&H anti-discrimination program in the framework of the "Mapping Discrimination in B&H" component (ICVA, Prava za sve, Forum građana Tuzla, Helsinški parlament građana Banja Luka, Centar za ljudska prava Mostar, Budi moj prijatelj), available in the archives of Analitika.

[220] See also section 2. 4. 5. 2. 2.

[221] Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* pp. 67, 100.

[222] Examples that are mentioned are Austria and United Kingdom. *Ibid.*

[223] For additional identified obstacles in this regard, see Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* pp. 68–69.

LPD is often pointed out among the expert public.[224] This problem is also pointed out in relation to lawyers, as well as relevant authorities.[225] Particular emphasis, however, is placed on the judicial bodies[226] as they are the ones that have an obligation to provide protection to victims in the most efficient way.

Thus, among others, a big problem that is present in this field is judicial inertia – provisions of other laws (e.g. Law on Labor) are often applied in practice in discrimination cases, without taking into account innovations in proceedings pursuant to the new law in this field, thereby de-essentializing the specific legislative solutions that were introduced in Bosnia and Herzegovina's judicial system precisely with the aim of easing the position of the discrimination victim.[227] The NGO "Vaša prava" points out that it is evident in incidental anti-discrimination proceedings that courts focus on violation of the subjective right itself, rather than on the issue of discrimination, which they do not consider, likely because "these arguments/ claims appear easier to decide (adjudicate)"[228]. The Ombudsman of B&H has also concluded by monitoring anti-discrimination judicial proceedings that "unequal treatment by the courts is present to a significant degree, which is a consequence of a different level of awareness among judges on discrimination as a prohibited

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[224] Nedim Jahić, "Pravosuđe i borba protiv diskriminacije" [The Judiciary and Battling Discrimination], in *Ljudska prava i pravosuđe u Bosni i Hercegovini. Izvještaj o provedbi preporuka u oblasti pravosuđa iz Univerzalnog periodičnog pregleda Vijeća za ljudska prava Ujedinjenih nacija* [Human Rights and the Judiciary in Bosnia and Herzegovina. Report on the Implementation of Recommendations in the Judicial Field from the United Nations Human Rights Council Universal Periodic Review] (Sarajevo: Association for Democratic Initiatives for the Justice Network in Bosnia and Herzegovina, 2011), p. 69.

[225] European Commission against Racism and Intolerance, Fourth Report on Bosnia and Herzegovina (Strasbourg: European Commission against Racism and Intolerance, December 7, 2010), CRI(2011)2, subsection 32.

[226] For more indication of judicial bodies' problems related to the implementation of the LPD, see statement by Predrag Raosavljević, Assistant Ombudsman and Head of Department for Elimination of Discrimination, in Mirna Duhaček, "Depo istraživanje/Nacionalna diskriminacija u BiH: U Sarajevu se Srbi i Hrvati teže zapošljavaju od Bošnjaka" [Depo Survey/Ethnic Discrimination in B&H: In Sarajevo, Serbs and Croats have Harder Time Finding Work than Bosniaks], Depo portal, March 10, 2011; public discussion "Borba protiv diskriminacije – sadašnje stanje i izazovi u BiH" [Combating Discrimination – The Current Situation and Challenges in B&H] (Mostar, hotel "Bristol," October 31, 2011).

[227] Emir Prcanović and Nermin Hanjalić, interview with the author, February 21, 2012. A typical example is a Travnik Municipal Court, First-instance judgment on segregation of children in two schools under one roof in Central Bosnia Canton, No. 51 0 P 054522 11 P of 3 October 2011, dismissing the charges filed by the NGO "Vaša prava" for alleged lack of active standing.

[228] Vaša prava, *Sprečavanje diskriminacije strateškim parničenjem, bh. antidiskriminacioni tim: narativni izvještaj* [Preventing Discrimination through Strategic Litigation, The B&H Anti-Discrimination Team: A Narrative Report], July 30, 2012, available in the archives of Analitika. In a cited example, the court told their lawyer that regarding this prejudicial matter "he may speak in the closing argument, refusing to discuss it in the main hearing."

social phenomenon".[229] It is further pointed out that this phenomenon is particularly pronounced with regard to several special forms of discrimination, such as mobbing, harassment, sexual harassment or victimization, in other words forms that are not tied to the obligation of identifying a special discrimination ground. The Ombudsman of B&H explains this fact by the ECHR's practice over many years before Protocol no. 12 came into effect, when discrimination was not recognized as a separate right violation.[230] The Ombudsman also points out that efficient measures have not yet been taken to ensure "ongoing training and education of responsible persons" in the administration, judges, lawyers and agencies for free legal aid in recognizing discrimination.[231]

Unfamiliarity with the key standards of proving discrimination among some judges in Bosnia and Herzegovina has had a negative effect on protection of individuals. The Institution of Ombudsman of B&H pointed out this problem in its report on occurrences of discrimination through the concrete example of a case related to "discriminatory motive" on the part of the alleged discriminator. Namely, according to the claimant's allegations, in May 2011 Roma persons were not served in a catering establishment in Zavidovići. As the Ombudsman's adopted recommendation to comply with the provisions of the LPD was not respected, the injured party instigated a court proceeding which ended in a judgment to dismiss the charges, because Zavidovići Municipal Court "was unable to establish discriminatory motive on the part of the respondent".[232] Under European anti-discrimination law, certain facts do not need to be proven in the anti-discrimination proceeding. Thus, it is not necessary to prove that an action resulting in different treatment is motivated by prejudice. In order to prove racial discrimination, therefore, it is totally irrelevant whether the offender's racist views are behind it.[233] Furthermore, it is not important whether a particular rule or practice had been intended to lead to adverse treatment – even well-meaning conduct can constitute discrimination if its ultimate

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229 Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011, p. 26.

230 *Ibid,* p. 27.

231 *Ibid.*

232 *Ibid,* p. 20; case Ž-BL-06-85/11.

233 The European Court of Justice took this stand in the *Feryn* case, deeming irrelevant the employer's claims that it was not him, but rather his clients, who wanted only white Belgians to do the job.

effect is inequality of a particular group of persons.[234] Intent is important only in criminal proceedings related to discrimination and incidents based on prejudice,[235] where due to the specific nature of the proceeding, primarily the serious sanctions threatening the defendants and the rule of fair trial, there is no room for application of the rule on sharing the burden of proof,[236] but facts have to be proven beyond any reasonable doubt. Although the case is now before the second-instance court, where, if all other requirements are met, the injured individual will have an opportunity to exercise protection at higher judicial instances, this is certainly an example that shows to what extent insufficient education of first-degree judges, which leads to evidently incorrect application of international anti-discrimination standards, may have a negative impact on faster and more efficient protection of individuals from discrimination.

The role of the judge is crucial on many issues that may arise during these proceedings, in particular with regard to the implementation and interpretation of vague or unclear legal provisions and specific legal institutes which were previously unfamiliar to judges and which differ from those in regular civil proceedings. This is equally true of comparative practice and practice of European jurisdiction protection mechanisms, which only through their stands and interpretations developed over many years of practice have given real meaning to the anti-discrimination provisions that they are supposed to apply.[237] Finally, the assessment itself on whether discrimination has occurred often implies the individual judge's subjective value judgment. An important role in this segment is also played by potential representatives of discrimination victims – lawyers and providers of legal aid.

Nevertheless, initial, albeit insufficiently systematized efforts toward educating the judicial community in Bosnia and Herzegovina are noticeable. In this regard, it is worth mentioning an initiative launched by the Center for Judicial and Prosecutorial Training in the Republika Srpska, in cooperation and with the support of the OSCE Mission, which is reflected in organizing seminars for judges on the subject of the

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[234] Thus, for example, in *D.H. and Others v. Czech Republic*, the ECHR, in response to the government's claims that the system of "special" schools was introduced with the goal of helping Roma children in overcoming lingual barriers and lack of pre-school education, found that it was irrelevant whether there had been intent to discriminate. To prove discrimination it was only important to point out that such conduct had a negative and disproportionate effect on Roma children compared to children of the majority population. See European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law*, p. 127.

[235] For example, in proving "hate crimes."

[236] See in this regard Article 8(2) of the Racial Equality Directive – Council of the European Union, Council Directive 2000/43/EC.

[237] Many European Union countries have, for example, transposed into their anti-discrimination laws the European Union directives, whose text is vague in itself. Thus, in these domestic judicial systems an important role will be played by the judge who can explain obstacles that may arise in the implementation of the law. Chopin and Uyen Do, *Developing Anti-Discrimination Law in Europe,* p. 100.

LPDB&H in Bijeljina and Banja Luka.[238] Two seminars of this type have also been added to the training program for judges in Tuzla and Sarajevo, organized by the Center for Judicial and Prosecutorial Training of FB&H.[239] Still, these seminars are merely the first step in a field in which a systematic approach is still absent. In addition, one should particularly bear in mind that the target group for this kind of training is limited to judges and legal officers in courts. Provision of adequate education activities on anti-discrimination standards is especially relevant for lawyers and legal experts working with associations and official institutions for providing legal aid, on whose knowledgeability and proper interpretation of the Law and the specific protection instruments that it provides to victims in the majority of cases depends the decision on whether an anti-discrimination court proceeding will even be instigated.

[238] For more information, see website http://www.rs.cest.gov.ba.

[239] See Center for Judicial and Prosecutorial Training in the Federation of Bosnia and Herzegovina, Initial Training Program and Professional Advancement Program for 2012 (Sarajevo: Center for Judicial and Prosecutorial Training in the Federation of Bosnia and Herzegovina, December 2011).

3.

Concluding Observations

The adoption of the Law on the Prohibition of Discrimination of B&H is an important step toward advancing the protection of individuals from discrimination in Bosnia and Herzegovina. A single, comprehensive anti-discrimination law is an important tool for eliminating discrimination and thus advancing protection of human rights in Bosnia and Herzegovina. A lot of hope and faith is placed in the results that its implementation may produce. The Law introduces numerous innovative solutions in the field of protection from discrimination and generally in the legal system of Bosnia and Herzegovina. It is evident from its provisions that it is largely inspired by good comparative practice and that it is mostly harmonized with relevant standards – European Union directives and European convention law. Its most important segment is the creation of a special judicial mechanism of protection through the civil proceeding, which differs from the regular proceeding by numerous procedural specificities, such as the rule on shifting the burden of proof, the possibility of intervention by a third party in the proceeding, use of statistics as evidence, protection against victimization and urgency of procedure, whose ultimate goal is to strengthen the procedural position of victims of discrimination and create conditions for their better protection and thus efficient battling of this negative, but omnipresent social phenomenon in Bosnia and Herzegovina.

All of the previously described legal provisions, however, only become meaningful with their implementation in practice, but it is precisely implementation that is still on an unsatisfactory level in the Bosnian and Herzegovinian judiciary. Even there where it has taken place, despite individual positive examples, numerous challenges are evident which prevent the full use of the potentials offered by the Law. In this regard, in the research we attempted to identify the fundamental problems that deserve attention in the coming period, in which a rising number of proceedings instigated under this Law may be expected.

On one hand, what is evident is incorrect interpretation or even unfamiliarity and ignoring some of the previously described specificities of the LPD, which are an innovation in Bosnia and Herzegovina's legal system and which are crucial for the efficiency of protection of individuals from discrimination. Thus, unacceptable examples have been observed with regard to judicial conduct in anti-discrimination proceedings by inertia, in line with the usual rules applicable to other civil proceedings, which deprives the high-quality specific solutions, introduced with the aim of strengthening the position of the discrimination victim, of their essence and effect. On the other hand, one should bear in mind that there are certain legal ambiguities, for which, although they may be resolved by adequate interpretation

in the individual courtrooms, taking into consideration the relevant recency of the Law and the matter of anti-discrimination protection in general, in certain cases the most optimum solution seem to be amendments, i.e. specifically defining the legal provisions in a way that would minimize room for interpretations that are contrary to the internationally accepted highest standards of protection of individuals from discrimination. Furthermore, there are significant legal shortcomings, such as, for example, excessively short time limits, which considerably impede protection from discrimination and which can only be eliminated through adequate legislative intervention. What is also evident is a reflection of structural problems of the judiciary on the specific field of judicial protection from discrimination, such as the impact of the over-encumbered judiciary on implementing the principle of urgency which, under the LPD, is associated with anti-discrimination proceedings. This kind of problem surpasses the issue of acting judges' commitment to these proceedings and requires the creation of systemic preconditions for overcoming them. From all available information in this initial phase of implementation of the LPD, it follows that it is also especially important to take a systematic approach with regard to ensuring high quality and regular education of the judicial community, which should encompass, along with court staff, also potential representatives of discrimination victims.

Finally, in order to advance the efficiency of implementation of anti-discrimination legislation, one should bear in mind that a particularly important issue for discrimination victims is the issue of providing the basic requirements for the option of using the judicial protection mechanism through adequate reliefs related to costs of proceedings and through high-quality free legal aid.

Only with joint action of multiple actors and a combination of a variety of measures of a legislative, educational and judicial nature will it be possible to achieve the full potential of protection that Bosnian and Herzegovinian legislation offers victims of discrimination.

4. Recommendations

Based on the above analysis of legislative solutions and judicial practice in Bosnia and Herzegovina in the field of protection from discrimination, and in light of relevant comparative experience and best practice in other countries, the following recommendations were produced for advancing the legislative framework and practice of judicial conduct in cases from the field of discrimination.

Recommendations for the Legislator

Costs of Anti-Discrimination Proceedings

1. It would be meaningful, at least in the initial phase of implementation of the Law on the Prohibition of Discrimination, until its full implementation takes hold, with the aim of protecting the fundamental constitutional and international legislative values of protection from discrimination, using comparative experience in European Union member states as a model, to introduce a provision pertaining to anti-discrimination proceedings which would provide relief from or at least a reduction of court fees in these cases.[240] In the meantime, the acting courts should not *a priori* jeopardize the individual's right to a fair trial within a reasonable time due to failure to pay the court fee.

2. As a potential way of ensuring needed funding for provision of free legal aid specifically to victims of discrimination, consideration should be given to setting up a free legal aid fund, similar to the solution adopted in Kosovo. Money collected from pronounced misdemeanor sanctions could be directed into the fund; under the current legislative solution, this money is not ordered to be paid to the discrimination victim against whom the misdemeanor was committed anyway[241], but rather pours into public budgets. This could ultimately, in addition to having the purpose of sanctioning the offender, serve to provide legal aid to victims of discrimination and as a factor of strengthening the application of the legislative protection

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[240] See in this regard also Topić, *Unused Potential,* p. 56.

[241] A fine as a misdemeanor sanction for certain discrimination-related misdemeanor acts prohibited by law is a separate and entirely different category from indemnification to the discrimination victim for non-pecuniary and pecuniary damages suffered.

mechanisms, thus closing the protection circle.[242] In the meantime, until the number of cases and thus the influx of resources into the potential fund increase, alternative sources of its funding may be introduced, such as allocations from the budget or donations.

Elective Territorial Jurisdiction

With the aim of providing efficient protection to victims of discrimination and facilitating their access to justice, elective territorial jurisdiction of the court most favorable to them[243] should be introduced in the LPD, as has already been done in other countries in the region. That would reduce the financial and technical obstacles to accessing the court with the aim of protection from discrimination, which is particularly important for members of marginalized groups.

Implementation of Specific Rules of Anti-Discrimination Judicial Proceedings to Existing Protection Proceedings

4. Taking into account that one of the main postulates of the LPD is to ease the position of the victim of discrimination, its systemic interpretation suggests that it is more conducive for the victim to apply the procedural institutes stipulated by the LPD to both types of proceedings for protection of discrimination victims, which should not be differentiated in a way that could lead to different levels of efficiency of protection. With the goal of strengthening legal security and providing guarantees of the same level of protection, an even better solution is to prescribe by law that the specific procedural rules established with the goal of strengthening the procedural position of the discrimination victim are also to be applied in proceedings in which discrimination is decided upon as an incidental issue. This particularly regards the rule on urgency of procedure and rule on shifting the burden of proof.

Time Limits

5. The LPDB&H should be harmonized with the European Union legislation standard, which requires that time limits in these proceedings must not be less favourable than time limits from similar lawsuits, i.e. such that in practice they prevent the enjoyment of rights from relevant European Union directives. In the current legislative framework in Bosnia and Herzegovina, this can be done either by completely eliminating time limits and leaving the application of the general statutes of limitations to cover this form of protection, as is the case in other countries in the region, or by considerably extending the current limits for filing an anti-discrimination lawsuit. A third option, which may be introduced in combination

[242] For a similar recommendation related to non-governmental organizations as representatives of victims of discrimination, see Topić, *Unused Potential,* p. 57.

[243] Nezirović, “Proceedings for Protection from Discrimination,” pp. 11 and 22.

with the second option, is to give the court discretion to allow in certain justified cases the filing of a lawsuit beyond the legally prescribed timeframe.

Calculating Time Limits for Continued Discrimination

6. In case of continued right violations, time limits should be calculated from the day of the last action. In case of systemic discrimination, on the other hand, time limits should not be calculated at all. With the goal of eliminating room for dilemmas related to this issue and using good comparative practice as a model, the best solution is to explicitly codify the way time limits are calculated in situations of continued violation of the right to freedom from discrimination.

Temporary Security Measures

7. Specific prerequisites should be prescribed in the LPD for the issuance of a temporary security measure, adapted to anti-discrimination proceedings.[244] In doing that, legislators may be guided by solutions from neighboring countries, which obligate the applicant of this type of measure to make plausible that the ordering of the measure is necessary for eliminating the danger of irreparable harm, especially grave violation of the right to equal treatment, prevention of danger of violence as a result of discriminatory conduct or prevention of use of force. Account should be taken that the standard of proof in this proceeding does not differ from the standard applicable to the proceeding for determining discrimination.

8. Using neighboring countries as a model, it should be specifically prescribed in the LPD that the court must make a decision on the application "without delay, no later than 3 days from the day of receipt of the application".

Recommendations for Courts and HJPC

Urgency of Procedure

9. It is essential to ensure strict compliance with the rule on urgency of procedure on claims for judicial protection from discrimination. This primarily means giving a higher degree of attention to the way acting judges conduct these types of proceedings, as well as heightened supervision by court presidents and the HJPC over the conduct of proceedings of this kind. As slow action in these proceedings is a reflection of the generally inefficient and over-encumbered judiciary, efforts should continue toward overcoming this structural problem.

10. Adequate use should be made of the legislative option of seeking and determining a shorter time limit for the respondent to carry out an ordered action related to enforcement of the court judgment (time limit for compliance), as well as determining the non-suspensory effect of an appeal in anti-discrimination proceedings.

[244] Compare Nezirović, "Proceedings for Protection from Discrimination," p. 22.

Victimization

11. The terms “discrimination report” and “legal proceeding for protection from discrimination” should be interpreted properly so that they encompass all forms of discrimination reports and proceedings instigated with the aim of protection from discrimination – including, for example, proceedings instituted within individual organizations or institutions. “Participation in the proceeding” should be interpreted as a standard that also includes third persons who are not directly discriminated against, but who testify or in another way take part in anti-discrimination proceedings.

12. In case a person considers themselves victimized, the Law should be interpreted so as to offer that person the option of instigating and conducting a special civil proceeding for protection from discrimination, pursuant to the provisions of the LPD[245], but one from which the need to prove elements of discrimination would be exempted. That would offer the victimized person all options stipulated for protection from discrimination, including the option of claiming damages and application of specific rules on proving discrimination. An even better option would be explicit codification of this solution for victimization cases.

Proving Discrimination

13. Specific standards developed as part of European convention law and European Union law should be applied in adducing evidence in anti-discrimination proceedings. It is particularly important, in light of these standards, to ensure proper application of the rule on shifting the burden of proof and absence of obligation to prove discriminatory intent and prejudice.

14. As stated previously, the rule on shifting the burden of proof should be applied equally to special anti-discrimination proceedings and existing judicial and administrative proceedings in which discrimination claims are made. This rule, namely, has been accepted as a standard, both in European Union law and in European Court of Human Rights practice, obligating domestic bodies to apply it adequately in interpreting domestic legislation. In order to avoid dilemmas in this regard, however, it should be expressly prescribed by law that the rule on burden of proof also refers to the existing judicial and administrative proceeding.[246]

15. The procedural system for proving discrimination must remain open to situation testing.[247] The option of using situation testing as a method of evidence

[245] Proceeding especially from the fact that victimization, according to some interpretations, may in a way be considered a specific form of discrimination, as envisioned by European Union non-discrimination directives. See Farkas, *How to Present a Discrimination Claim,* p. 40. Victimization is categorized as discrimination in Australia too. See footnote 75.

[246] See also Nezirović, “Proceedings for Protection from Discrimination,” p. 22.

[247] Suk, “Criminal and civil enforcement of antidiscrimination law in Europe,” p. 17.

for this kind of proceeding should be prescribed in the LPD.[248] In the meantime, however, the absence of its explicit codification should not be understood as an obstacle to its use in anti-discrimination proceedings.

16. Courts should allow victims to use statistics to support claims of direct or indirect discrimination. When judging which statistical indicators are sufficient for shifting the burden of proof to the other person, the court should be guided by standards developed through practice of comparative judicial instances, primarily practice of the ECHR and European Court of Justice[249].

17. When collecting statistics that discrimination victims and their representatives, lawyers and non-governmental organizations need, the potential offered by the Ombudsman's competences should be used and appropriate cooperation should be established with the Ombudsman Institution in this field.

Recommendations for Other State Bodies and the Judicial Community

Keeping Statistics on Discrimination Cases

18. The Ministry of Human Rights and Refugees of B&H should fulfill its basic legal obligations – adopt a rulebook on the manner of collection of data on discrimination cases in Bosnia and Herzegovina, monitor the implementation of the law, keep a single database of discrimination cases and prepare annual and special reports on discrimination, along with proposing legislative and other measures for prevention and suppression of occurrences of discrimination. That way, in addition to enabling the use of statistics as a method of evidence in judicial proceedings, the structural problems of processing discrimination cases can be addressed and systematic activity of the state on suppressing this social phenomenon can be ensured.

Education of the Judicial Community

19. With the aim of providing faster and more efficient protection of individuals from discrimination, adequate education is important in order to ensure proper implementation of the LPD and relevant international anti-discrimination standards. Analysis of relevant standards, a precondition for proper interpretation of some of the specific institutes that this law stipulates, should be a mandatory part of education programs.

20. Specifically, initial seminars that have been organized by the centers for judicial and prosecutorial training, with the support of the OSCE Mission, should certainly become customary practice, in the form of initial education, but forums

[248] See also Nezirović, "Proceedings for Protection from Discrimination," pp. 11 and 22.

[249] For a brief elaboration of these standards, see section 2. 4. 6. 3. 2.

should also be organized later for exchange of experience and addressing dilemmas, which should become part of the official training program. In order to maximize the effects, at least in the initial period of implementation of the Law, this form of education needs to be conducted systematically and regularly.

21. Finally, it is equally important to provide education activities for legal experts and lawyers dealing with human rights issues and protection from discrimination, as well as for services and associations that provide legal aid, so that these actors, whose education is currently neglected, are also trained to use the full potential of instruments for protection of discrimination victims offered by the Law.

Promotion of Suing for Discrimination in Bosnia and Herzegovina

22. All previously mentioned recommendations, such as strengthening funds and mechanisms for provision of free legal aid for discrimination lawsuits, introducing elective territorial jurisdiction and extending time limits for pressing discrimination charges, ultimately are aimed at removing the barriers for victims of discrimination to claim and exercise judicial protection. They only gain their true meaning, however, with adequate and badly needed promotion of anti-discrimination legislation and education of the public, focusing on vulnerable groups, which will allow individuals to recognize that they are victims of discrimination and to be aware of the protection mechanisms available to them.

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About the Author

Adrijana Hanušić obtained a Master's Degree in International Law from the University of Strasbourg Law School in 2009 (French Government scholarship, graduated with honors – 'Mention Bien'). In 2008 she attended the summer semester at the Humboldt University of Berlin Law School. In 2007 she graduated with top grades from the University of Sarajevo Law School, with recognition for excellence. She participated in numerous domestic and international conferences and education programs, including the Council of Europe School of Political Studies, Support Program for Public Policy Research in B&H of Open Society Fund of B&H, and the Council of Europe and USAID project "Strengthening the role of women and youth in public and political life in B&H. She publishes papers on international law, human rights protection and constitutional law of B&H. She acquired considerable experience by working with the Human Rights Bureau in Tuzla, Germany's Bundestag (IPC), Venice Commission, law firm, B&H Parliamentary Assembly House of Representatives Constitutional and Legal Committee and, in the role of UNDP B&H legal expert, and with the Institution of the Human Rights Ombudsman of B&H. She currently works as a legal advisor for the Swiss non-governmental organization TRIAL and occasionally as a consultant for other non-governmental organizations. She is a member of the Justice Network in B&H Working Group for Production of a Report on the Implementation of Recommendations from the Fields of Human Rights and Judiciary in B&H in the framework of the United Nations Human Rights Council Universal Periodic Review.

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