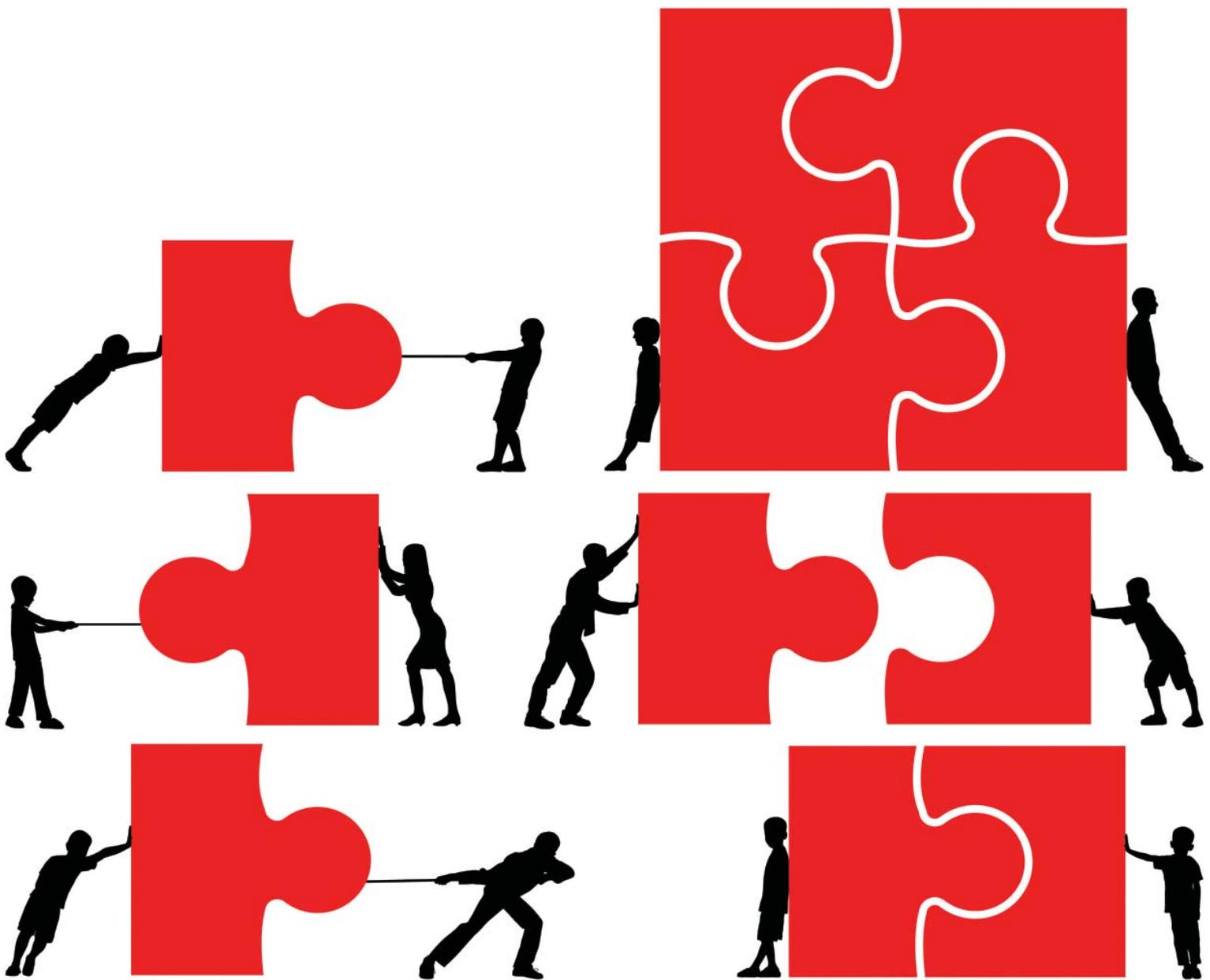


Unused Potential

The Role and Importance of Non-Governmental Organizations in Protection against Discrimination in Bosnia and Herzegovina



DISCRIMINATION
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Boris Topić



Sarajevo, 2013

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Author:

Boris Topić

Editor:

Edin Hodžić

Reviewer:

Snježana Vasiljević

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info@analitika.ba

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Translator:

Kanita Halilović

Proofreading and Copy editing:

Mirela Rožajac-Zulčić

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.

Introductory Observations

With the passing of the Law on the Prohibition of Discrimination (hereinafter referred to as: LPD) in July 2009, the existing anti-discrimination framework in Bosnia and Herzegovina was supplemented.¹ Thus Bosnia and Herzegovina joined a broad circle of countries trying to ensure the elimination of discrimination by adopting comprehensive anti-discrimination legislation that provides legal protection against discrimination committed both by the state and its bodies and by private persons.² This important law, among other things, recognizes the significant role that non-governmental organizations³ are able to play in the field

¹ It certainly includes the “Constitution of Bosnia and Herzegovina”, “Law on Gender Equality in Bosnia and Herzegovina” and provisions on the prohibition of discrimination in the labor field prescribed by the existing laws on labor in Bosnia and Herzegovina.

² 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. 336. On the need to pass comprehensive anti-discrimination legislation, compare Christa Tobler, *Remedies and Sanctions in EC Non-Discrimination Law* (Luxembourg: Office for Official Publications of the European Communities, 2005); also compare Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (New York: Committee on the Elimination of Discrimination against Women, December 16, 2010), paragraphs 31 and 32.

³ Although the terms non-governmental organization (NGO) and organization of civil society (OCS) are used very often, in particular in human rights discourse, one cannot say that there is a generally-accepted definition of non-governmental organizations. Therefore, this term refers to different types of organizations. Fundamental Principles on the Status of NGOs in Europe, adopted under the auspices of the Council of Europe, for example state that “NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities”. Laws in B&H, including the LPD, do not contain definitions of non-governmental organizations, nor do they use this term. NGOs in Bosnia and Herzegovina are organized and operate pursuant to relevant laws on associations and foundations. Thus, “Zakon o udruženjima i fondacijama BiH” [Law on Associations and Foundations of B&H], *Official Gazette of B&H*, 32/01, Article 2, paragraph 2, prescribes that “An association ... is founded by a joint agreement in which a group of three or more natural and/or legal persons, in all combinations, voluntarily associates in order to accomplish a common interest, without an intent to generate profit”. Taking into account the fact that there is no generally accepted definition of non-governmental organizations and that this term is also often used to identify organizations of civil society, non-profit organizations, civil sector and so on, this paper interchanges the terms non-governmental organizations and organizations of civil society, referring by them to organized and voluntary forms of association of human beings for the purpose of carrying out activities for the general good and, more specifically, promotion of the idea of human rights.

of combating discrimination by according them, among other things, certain procedural roles in the judicial proceeding for protection against discrimination.

In the international and comparative field, one of the most important activities of non-governmental organizations that stands out in the area of combating discrimination is their role in proceedings for protection against discrimination.⁴ The reason why organizations of civil society are allowed to participate in proceedings for protection against discrimination basically lies in the fact that suppression of discrimination is a public interest activity and that any well-regulated anti-discrimination system should contain different modalities of participation of non-governmental organizations in proceedings for protection against discrimination.⁵ Therefore, we may characterize NGO activities in proceedings for protection against discrimination as a specific form of public interest litigation.⁶ Special significance to NGOs in this field, at least in European Union countries,⁷ was accorded by directives in the discrimination field⁸, which require, for the purpose of ensuring efficient protection against discrimination, that the states in their judicial systems allow non-governmental organizations to act *on behalf* of victims of discrimination or *in support* of these individuals in proceedings for protection against discrimination.⁹

⁴ Ana Horvat, "Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva" [New Standards in Croatian and European Anti-discrimination Legislation], *Zbornik Pravnog fakulteta u Zagrebu* [Compendium of the Law School of Zagreb] 58, no. 6 (2008), p. 1487.

⁵ Compare Vladimir V. Vodinelić, "Tužbe za zaštitu od diskriminacije" [Lawsuits for Protection against Discrimination], in *Antidiskriminaciono pravo – vodič* [Anti-discrimination Legislation – A Guide], ed. Jovica Trkulja and Saša Gajin (Belgrade: Center for Development of Legal Studies, 2008), pp. 46–47.

⁶ Public interest litigation is a broad and amorphous term which is difficult to define precisely. In its rudimentary form, it is implemented through provision of legal aid services by non-governmental organizations or legal aid centers for the purpose of enabling vulnerable groups or individuals to exercise their legal interests. A characteristic of this phenomenon is that it strives to ensure that justice is met by using the law. For an overview of definitions of the phenomenon of public interest litigation, see: James A. Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects and Challenges", *Human Rights Quarterly* 28, no. 2 (2006), pp. 492–527; as well as Edwin Rekosh, Preface of *Symposium on Public Interest Law in Eastern Europe and Russia: June 29th - July 8th, 1997, University of Natal, Durban, South Africa: Symposium Report*, Public Interest Law Initiative in Transitional Societies (New York: Columbia Law School, Public Interest Law Initiative in Transitional Societies, 1997), pp. iii–viii.

⁷ A brief overview of legislative solutions defining the procedural roles of organizations of civil society in European Union countries is contained in Annex 3.

⁸ Racial Equality Directive – "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, Article 7; and Employment Equality Framework Directive – "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 9.

⁹ Horvat, "New Standards", p. 1487.

These procedural roles of non-governmental organizations are regulated differently in different legal systems. Yet, possible forms of activities of non-governmental organizations on behalf of the victim that we might single out are filing a lawsuit in the name and on behalf of the victim – i.e. legal representation, the option for a non-governmental organization to appear as co-plaintiff together with the victim or the option to appear as an independent plaintiff with the consent of the victim. In addition, a specific form of action on behalf of victims of discrimination that stands out are activities of non-governmental organizations on filing a collective or group lawsuit.¹⁰ A very important form of support to victims of discrimination in anti-discrimination proceedings is certainly the participation of organizations of civil society as interveners in proceedings on the side of the victim or as friends of the court (*amici curiae*).¹¹ Finally, a key contribution of non-governmental organizations in the field of combating discrimination is undoubtedly their role in so-called strategic lawsuits instigated to provide support to the implementation of anti-discrimination laws¹² or to clarify various concepts contained in anti-discrimination legislation.¹³

Bearing in mind the above, this report attempts to analyze the existing legislative solutions in light of comparative experience and to point out the obstacles standing in the way of more active engagement of non-governmental organizations in judicial proceedings for protection against discrimination. In addition, the report attempts to offer specific solutions that will additionally motivate non-governmental organizations to actively use the procedural roles accorded to them by the LPD, in the best interest of victims of discrimination.

The report is mainly based on secondary, comparative research focusing on the role, activities and best practice of organizations of civil society in judicial proceedings for protection against discrimination. In addition, relevant legislative solutions related to the procedural role of non-governmental organizations in

¹⁰ Also Lovorka Kušan, *Croatia – Country 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. 54, as well as Horvat, “New Standards”, p. 1487.

¹¹ Compare Horvat, “New Standards”, p. 1487. The term *amicus curiae* (friend of the court) denotes an individual whose participation in the proceeding is limited to providing the court with opinions related to factual and legal matters. On the other hand, by the term intervener we denote an individual who joins one of the parties in the proceeding because he or she has a legal interest in the success of the party that he or she is joining and as such is authorized to undertake a range of procedural actions, including lodging legal remedies.

¹² Margarita Ilieva, “Uloga NVO-a u primeni Zakona protiv diskriminacije: Iskustvo iz Bugarske” [The Role of NGOs in the Implementation of Anti-discrimination Law: Experience from Bulgaria], in *Sprovođenje Zakona protiv diskriminacije: izazov za Kosovo* [Implementation of Anti-discrimination Law: A Challenge for Kosovo] (Pristina: OSCE Mission in Kosovo, 2007), p. 10.

¹³ Isabelle Chopin, “Making non-discrimination rights effective”, in *The Role of NGOs and Trade Unions in Combating Discrimination*, ed. Richard Poláček (Luxembourg: Publications Office of the European Union, 2009), p. 10.

judicial proceedings for protection against discrimination were analyzed, as well as the first court judgments in discrimination cases in Bosnia and Herzegovina. Analysis of adopted legislative solutions in Bosnia and Herzegovina was performed in light of comparative experiences, primarily experiences of neighboring countries, considering that they share with Bosnia and Herzegovina a similar legal tradition and similar problems, as well as countries of the European Union which Bosnia and Herzegovina is trying to join. The analysis also encompassed other cases when needed to provide answers to specific questions. Finally, available sources on the current situation in the non-governmental sector in Bosnia and Herzegovina were also consulted, with particular focus on organizations working on protection of human rights.

In the first section, the report analyzes solutions prescribed by the Law on the Prohibition of Discrimination of Bosnia and Herzegovina pertaining to the procedural role of non-governmental organizations in anti-discrimination proceedings. The second section focuses on obstacles that prevent organizations of civil society from taking a more active part in judicial proceedings for protection against discrimination. Through an overview of comparative experiences, effort is made to point to the most important requirements and criteria for efficient use of the option of participation of non-governmental organizations in anti-discrimination proceedings in Bosnia and Herzegovina. Finally, the concluding observations sum up the observations from the analysis and formulate specific recommendations related to legislative and practical solutions in this field in Bosnia and Herzegovina.

2.

Non-Governmental Organizations in the Anti-Discrimination Proceeding: Legislative Solutions in Bosnia and Herzegovina in Light of Best Practice

Along with a limited opportunity to represent victims of discrimination accorded to employees of non-governmental organizations that provide legal aid, the LPD of B&H¹⁴ accords two important procedural roles to non-governmental organizations in Bosnia and Herzegovina. In line with comparative solutions¹⁵, and evidently bearing in mind the provisions of European Union directives pertaining to equality and prohibition of discrimination¹⁶, the LPD gives non-governmental organizations an opportunity to provide support to victims in proceedings for protection against discrimination by using the well-known institute of intervener or, for the purpose of abstract protection of victims of discrimination, to act independently through collective lawsuits.

2.1. Representation and Legal Standing in Individual Lawsuits

By introducing a specific proceeding for protection against discrimination, the LPD has given victims of discrimination an additional practical opportunity to

¹⁴ “Zakon o zabrani diskriminacije” [Law on the Prohibition of Discrimination], *Official Gazette of B&H*, 59/09.

¹⁵ Comparative analysis reveals that the LPD of B&H has largely accepted solutions that are present in “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. For a comparative overview of the prescription of procedural roles of organizations of civil society in anti-discrimination legislation in Bosnia and Herzegovina and neighboring countries, see Annex 1 and Annex 2.

¹⁶ “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”, Article 7; and “Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation”, Article 9.

exercise protection of their right to non-discrimination in a judicial proceeding.¹⁷ However, individuals, the most common victims of discrimination, very often are in a position from which it is difficult to successfully conduct a judicial proceeding – either due to lack of necessary know-how, financial resources or other similar difficulties, as a result of which they seldom decide to seek judicial protection of their rights. With the goal of eliminating or at least alleviating these obstacles, legislation often allows non-governmental organizations to represent victims of discrimination in judicial proceedings or to act in another way in the name of the victim.¹⁸ Nevertheless, the LPD does not introduce this option.

Namely, the above law in Article 12, which regulates the proceeding for individual judicial protection against discrimination, refers to the rules of civil proceedings. Relevant provisions on civil proceedings specify that the job of representative in a proceeding may exclusively be performed by a lawyer, law firm or employee of a free legal aid service. In addition to these persons, it is specified that the job of representative for legal persons may also be performed by the legal person's employee and that the job of representative for natural persons may also be performed by the party's spouse, non-marital partner or relative by blood or by marriage.¹⁹ Therefore, we may conclude from these provisions that the only legal person that may act as a legal representative in proceedings in Bosnia and Herzegovina is a law firm, and that legal aid, in addition to lawyers, may also be provided by employees of free legal aid services. As free legal aid services are considered to be all services that “provide legal aid to clients without compensation, regardless of their internal organization, manner of funding or affiliation with a broader association”²⁰, then under this term, along with

¹⁷ This refers to the civil proceeding. In addition to this proceeding, the LPD also recognizes an administrative proceeding and a proceeding before the Ombudsman. More in Reljanović, “Prohibition of Discrimination in Bosnia and Herzegovina”, and Adrijana Hanušić, *Ombudsman u sistemu zaštite od diskriminacije u BiH: analiza situacije i karakteristični problemi* [The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems] (Sarajevo: Analitika, 2012). Judicial protection against discrimination could (and still can) be exercised based on provisions on prohibition of discrimination in the field of labor prescribed by the current laws on labor or provisions of the laws on obligatory relations related to compensation of damage for violation of the right of personality.

¹⁸ Also Horvat, “New Standards”, p. 1487.

¹⁹ “Zakon o parničnom postupku Federacije BiH” [Civil Procedure Law of the Federation of B&H], *Official Gazette of the Federation of B&H*, 53/03, 73/05 and 119/06; “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, 49/09 – CPL RS/FB&H, Article 301.

²⁰ Comments accompanying Article 301 of the Civil Procedure Law of the RS/FB&H in Zlatko Kulenović et al., *Komentar Zakona o parničnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj* [Comments on the Civil Procedure Law in the Federation of Bosnia and Herzegovina and Republika Srpska] (Mostar: Agencija Apriori organizacije, 2011); hereinafter referred to as: *Comments on the CPL RS/FB&H*.

institutions for provision of legal aid established by the laws on free legal aid,²¹ we may also infer non-governmental organizations.

It should be stressed that, pursuant to the current legislative solution in Bosnia and Herzegovina, non-governmental organizations themselves cannot appear as representatives of clients, which may only be done by named individuals employed with the non-governmental organization.²² This practically means that a victim of discrimination may not authorize a non-governmental organization to represent her or him, but must specifically authorize individual NGO employees to undertake specific actions.²³ This may lead to various practical problems, because one employee may be prevented from attending a hearing or simply stop working for the organization, potentially leading to a standstill in the proceeding or failure to take necessary actions in the proceeding. Non-governmental organizations typically resolve this problem by having the beneficiary of the service authorize several employees of the organization to represent her or him, as this is currently the only rational, albeit clumsy practical solution.²⁴

On the other hand, reports from other countries state that non-governmental organizations, as well as their members, are often authorized to act in the name of victims of discrimination in a judicial proceeding. Such solutions have been

²¹ Laws that regulate provision of free legal aid have been enacted in the Republika Srpska, Brčko District of Bosnia and Herzegovina and several cantons in the Federation of Bosnia and Herzegovina (Sarajevo Canton, Zenica-Doboj Canton and Tuzla Canton). Compare Jozo Čizmić, “Pružanje besplatne pravne pomoći u Bosni i Hercegovini sa osvrtom na iskustva Republike Hrvatske” [Provision of Free Legal Aid in Bosnia and Herzegovina with a Look at Experience in the Republic of Croatia], in *Pristup pravdi u Bosni i Hercegovini: besplatna pravna pomoć: poseban osvrt na Hercegovačko-neretvanski kanton* [Access to Justice in Bosnia and Herzegovina: Free Legal Aid: A Special Look at Herzegovina-Neretva Canton], ed. Nurko Pobrić and Rebeka Kotlo (Mostar: Center for Human Rights in Mostar, 2011), p. 22.

²² “Zakon o besplatnoj pravnoj pomoći Republike Srpske” [Law on Free Legal Aid of the Republika Srpska], *Official Gazette of the Republika Srpska*, 120/08, further defines that the right to act as a representative in a civil proceeding may be exercised by employees of non-governmental organizations that provide legal aid under conditions prescribed for employees of Centers for Provision of Legal Aid, and regulates more specifically in Article 10 that employees of the Center may provide legal aid in judicial and administrative proceedings, provided that they have a law degree and have passed the bar examination and that they have at least two years of working experience in legal matters after passing the bar examination.

²³ Under the provisions of procedural laws, an authorized representative who is not a lawyer shall always be requested to have special authorization to withdraw the claim, acknowledge or waive the statement of claim, reach a settlement, waive or abandon a legal remedy, as well as to transfer the power of attorney to another person and submit a request for an extraordinary legal remedy (Civil Procedure Law of RS/FB&H, Article 307).

²⁴ In the *E. B.* case which is litigated before Mostar Municipal Court, for example, in the preamble of the first-instance Judgment number P 58 0 P 056658 09 P dated July 6, 2010, as many as six employees of the organization “Vaša prava” are listed in the role of representatives of the plaintiff.

adopted in, for example, Sweden, Poland²⁵ and Latvia and are welcome²⁶ precisely because they expand opportunities for providing direct legal aid to victims. Some jurisdictions, such as the Greek or Estonian, also allow trade unions and other organizations that have a legitimate interest to represent victims of discrimination as long as they have a written authorization from the victim (Greece) or meet certain criteria (Estonia).²⁷ In contrast, the French and Belgian jurisdictions, for example, allow legal representation only by organizations that have existed for at least five years. But this requirement has been the subject of a lot of criticism and the European Commission has assessed it as too restrictive.²⁸

Among countries in the region, in Croatia we find a solution corresponding to the solution that is contained in Bosnian and Herzegovinian legislation. But anti-discrimination laws in Montenegro and Serbia contain different solutions. According to the solution adopted in Montenegro, non-governmental organizations, as well as individuals dealing with protection of human rights, may file a lawsuit for protection against discrimination in the name of a discriminated person with the person's prior consent.²⁹ In Serbia, according to relevant provisions of the Law on the Prohibition of Discrimination, non-governmental organizations dealing with human rights protection, with prior written consent by a discriminated person, may file a lawsuit in their own name.³⁰ The main difference between these two approaches is that in the former case a non-governmental organization or an individual appears as a representative, whereas in the latter case a

²⁵ In Poland this is the case in certain proceedings defined by the Civil Procedure Law. For more on this, see Lukasz Bojarski, *Poland – Country 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), pp. 105–110.

²⁶ Horvat, "New Standards", p. 1487.

²⁷ 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), p. 70. The mentioned criteria regard the existence of a legal interest in protection against discrimination. For more on this, see Vadim Poleshchuk, *Estonia – Country 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, 2010), p. 79.

²⁸ Horvat, "New Standards", p. 1487. For more on this, see Emmanuelle Bribosia and Isabelle Rorive, *Belgium – Country 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. 152. In response to the criticism, the Belgian lawmaker reduced the period to three years.

²⁹ "Zakon o zabrani diskriminacije" [Law on the Prohibition of Discrimination], *Official Gazette of Montenegro*, 46/10, Article 30.

³⁰ In this lawsuit they may make the same types of claims as the discriminated person, with the exception of a claim for damages. "Zakon o zabrani diskriminacije" [Law on the Prohibition of Discrimination], *Official Gazette of the Republic of Serbia*, 22/09, Article 46.

non-governmental organization appears as the plaintiff, in other words the organization is recognized standing even in cases of individual discrimination. This advances the implementation of the law and protection in cases when the victim is reluctant to appear in the proceeding as a party.³¹

A well-regulated system of anti-discrimination protection should contain solutions that allow non-governmental organizations whose main activity and mission are protection and promotion of human rights primarily to appear as representatives of victims. Meanwhile, they should also be given the opportunity to act in their own name in cases of individual discrimination, of course with the prior consent of the party. Introducing the option for a non-governmental organization as a legal person to appear as the authorized agent of a victim of discrimination would not be a particular novelty in Bosnia and Herzegovina's legal system as the current procedural laws accord this opportunity to a law firm and as material law, i.e. the Civil Obligations Act, also prescribes the option for a legal person to appear as an authorized agent.³²

Introducing the option for non-governmental organizations to appear as legal representatives would improve the procedural position of the discriminated individual, on one hand, and expand the options for non-governmental organizations to participate in the proceeding for protection against discrimination, on the other. Namely, a victim of discrimination would be given the option to be represented by a non-governmental organization as such, rather than by an individual from an NGO who, moreover, must fulfill certain formal requirements prescribed by the existing legal solutions. That would also avoid the already mentioned practical difficulties regarding access to hearings and undertaking procedural actions. On the other hand, options for non-governmental organizations to take part in the proceeding for protection against discrimination would be additionally expanded, because organizations working on protection of human rights in a broader sense would also be able to appear in the role of legal representative, regardless of whether their operations are exclusively focused on providing legal aid and regardless of the composition of their staff. Admittedly, some commentators are reserved

³¹ Vladimir V. Vodinelić, "Građanskopravna zaštita od diskriminacije" [Civil Law Protection against Discrimination], *Hereticus: časopis za preispitivanje prošlosti* [Hereticus: Magazine for Reexamination of the Past] 6, no. 3–4 (2008), p. 40.

³² "Zakon o obligacionim odnosima" [Law on Civil Obligations], *Official Gazette of the SFRY*, 29/78, 39/85, Constitutional Court of Yugoslavia – U 363/86, 45/89, 57/89; *Official Gazette of RB&H*, 2/92, 13/93 and 13/94; *Official Gazette of the Federation of B&H*, 20/03; *Official Gazette of the Republika Srpska*, 17/93, 3/96 and 74/04, Article 89, paragraph 3. Of course, a non-governmental organization itself, like any other legal person including a law firm, does not have postulation capacity (capacity to act personally and independently in the proceeding) and in this case certain procedural actions before the court are undertaken by a physical person authorized by the NGO the same way that an NGO appears in the capacity of an intervener in a proceeding or in the capacity of the plaintiff in a collective lawsuit (see Section 2.3 of this report). Compare *Comments on the CPL of RS/FB&H* accompanying Article 301 of CPL.

regarding such a solution, pointing out that representation in court should be allowed exclusively to lawyers and law firms because, due to their expertise, only they would be able to provide adequate representation and thus contribute to the promptness and efficiency of courts.³³ However, these fears may be alleviated by the argument that the above solution would be limited to proceedings for protection against discrimination and that it would be introduced to serve the public interest, and combating discrimination in Bosnia and Herzegovina certainly is that.

Public interest values have been the guiding principle for solutions that recognize the legal standing of non-governmental organizations dealing with protection of human rights to seek protection against discrimination in their own name even in cases when discrimination occurred against an individual. Recognizing non-governmental organizations the right to instigate a proceeding for individual protection against discrimination in the capacity of the plaintiff, on behalf of a consenting party, would certainly result in additionally strengthening the position of the victim of discrimination and eliminating the fear of further victimization.³⁴ Namely, although the LPD of B&H prohibits victimization, prescribing in Article 18 that a person who reported discrimination or participated in legal proceedings for protection against discrimination shall not suffer the consequences of such report or participation, it should be pointed out that victims often abandon fighting discrimination fearing that the alleged discriminator would further victimize them.³⁵ For precisely this reason, allowing human rights organizations to instigate a proceeding on behalf of an individually named client is considered justified.³⁶ This solution allows the processing of discrimination even in cases when the victim does not want to participate in the proceeding as a party, thus advancing the implementation of the Law on the Prohibition of Discrimination. In addition, according to this solution, human rights organizations do not need to prove the existence of a specific legal interest on their side, because they are accorded legal standing since they exercise their main activity this way and fulfill the goals for which they were founded.³⁷

The Law on the Prohibition of Discrimination of the Republic of Serbia, for example, accords legal standing to other persons as well, in addition to the discriminated individual. Pursuant to the law, along with the victim of discrimination, a lawsuit for protection against discrimination may also be filed by the Commissioner for the Protection of Equality, by an organization engaged in the protection of human

³³ *Comments on the CPL of RS/FB&H* accompanying Article 301 of CPL, p. 527.

³⁴ Also compare Reljanović, "Prohibition of Discrimination in Bosnia and Herzegovina", p. 342.

³⁵ Vodinelić, "Civil Law Protection against Discrimination", p. 39.

³⁶ *Ibid.*

³⁷ Vodinelić also points this out, "Lawsuits for Protection against Discrimination", p. 47.

rights or the rights of the group to which the injured party belongs³⁸, as well as by a so-called voluntary discrimination tester.³⁹ The Equality Commissioner and non-governmental organizations working on protection of human rights may file all types of lawsuits for protection against discrimination, except a lawsuit claiming damages. They file a lawsuit for protection against discrimination in their own name and appear in the proceeding in the capacity of the plaintiff, even if the discriminatory treatment solely affects a specific person, provided they receive that person's explicit consent. This solution aims to strengthen the position of victims of discrimination and at the same time to prevent non-governmental organizations from conducting proceedings for the purpose of their own promotion and against the will of the victim of discrimination.⁴⁰ Introduction of a similar solution in anti-discrimination legislation in Bosnia and Herzegovina would additionally strengthen the position of the victim for the above mentioned reasons, while non-governmental organizations would be given another mechanism to strengthen the implementation of the LPD.

In addition to strengthening the position of the discriminated person in the proceeding, this solution contributes to improving the procedural position of the non-governmental organization itself. Namely, the victim, if he or she wants to, may join the proceeding, in other words may appear as a co-plaintiff along with the non-governmental organization. Finally, it is very important to emphasize that in this model the NGO brings all its expertise into the proceeding and is additionally motivated to take part in the judicial proceeding because, as a party in the proceeding, it has the right to claim, in case of a successful lawsuit, reimbursement of all costs of the proceeding.⁴¹ In a time of scarce resources available to non-governmental organizations in Bosnia and Herzegovina, this would certainly not be a negligent element in an NGO's decision to instigate a proceeding for protection against discrimination.

³⁸ "Law on the Prohibition of Discrimination of the Republic of Serbia", Article 46, paragraph 1.

³⁹ Pursuant to Article 46, paragraph 3, of the "Law on the Prohibition of Discrimination of the Republic of Serbia", this refers to "a person who had deliberately exposed himself or herself to discriminatory treatment intending to directly test the application of regulations pertaining to the prohibition of discrimination in the particular case". This person is called in literature a "*voluntary discrimination tester*". Vodinelić, for example, provides the following explanation: "A voluntary discrimination tester is any person who personally and directly becomes involved in a situation to test on the spot whether the prohibition of discrimination is violated in the particular situation (for example a Roma or someone who goes with him or her to a discotheque which is rumored not to admit Roma, a disabled person or someone who goes with him or her to a dentist who is reputed to not want to... provide services to persons with a certain disability)". Vodinelić, "Lawsuits for Protection against Discrimination", p. 74.

⁴⁰ Vodinelić, "Civil Law Protection against Discrimination", p. 40.

⁴¹ Litigation costs include costs incurred during the proceeding or in connection therewith (CPL of RS/FB&H, Article 383). The term litigation costs is quite broadly defined and, in addition to direct costs in the proceeding, such as paying court fees, expert fees and witness costs and so on, it also includes all costs related to preparation for participation in the lawsuit.

2.2. Non-Governmental Organizations as a Third Party in the Proceeding

Examining the role of non-governmental organizations in proceedings before the European Court of Human Rights, Di Ratallma points out that by intervening in the capacity of a third party in the proceeding, non-governmental organizations aim to accomplish multiple goals, which are primarily related to strengthening the position of the individual claimant by giving his or her arguments “outside and objective” support. Further, through this type of engagement in judicial proceedings, non-governmental organizations aim to promote the general interest that the individual applicant does not represent. This way, non-governmental organizations also try to attract more resources for their work. Finally, through their engagement in this field NGOs draw public attention to a specific problem.⁴²

An example of an organization that fulfills all of the above goals is London-based AIRE center. Providing support to applicants before the European Court of Human Rights, either by advising applicants’ lawyers or by directly representing applicants or through third party interventions, this non-governmental organization has achieved a lot of success before the European Court of Human Rights. Its interventions have been focused on expanding the concept of rights prescribed by the Convention and thus on improving the position of victims.⁴³ As for providing resources for its activities, by achieving success in its work before the European Court, the AIRE center has built an enviable reputation and attracted an impressive number of foundations, funds and institutions supporting its work.⁴⁴

The advantages of third party intervention as a method of providing support for the implementation of anti-discrimination norms are not negligent. They are primarily reflected in the fact that, unlike classical representation, participation in this capacity relieves a civil society organization of problems that might arise in conflict between the interest of the victim as the organization’s client and the interest of the organization in achieving not only a favorable outcome in the particular case, but also in achieving broader impact of the litigation. This mechanism thus allows focus to be placed on the individual aspects of the case.

⁴² Marco Frigessi di Ratallma, “NGO before the European Court of Human Rights: Beyond Amicus Curiae Participations”, in *Civil Society, International Tribunals and Compliance Bodies*, ed. Tullio Treves et al. (The Hague: T. M. C. Asser Press, 2005), p. 57.

⁴³ For example, in *Osman vs. United Kingdom*, the European Court of Human Rights clearly established that the right to life from Article 2 of the Convention imposes an obligation on the states under certain conditions to protect one person’s life from another physical person’s threats and attacks. Establishing the states’ such obligation transcended the borders of the case and now the positive obligation of states in this regard is interpreted to also refer to cases of domestic violence or the obligation to prevent racially-motivated violence.

⁴⁴ A list of the organization’s donors is featured on its website <http://www.airecentre.org/pages/sub-link-two-goes-on-two-lines.html> (accessed October 22, 2012).

On the other hand, there are also some shortcomings related to participation of non-governmental organizations as a third party in anti-discrimination proceedings. These shortcomings primarily concern the issues of limited potential to influence the course of the litigation and possible conflict of arguments presented by the party and arguments presented by the organization appearing as a third party.⁴⁵

The Law on the Prohibition of Discrimination of B&H prescribes in Article 16 that “a body, organization, institution, association or other person whose scope of activities includes protection from discrimination of a person or a group of persons whose rights are being decided upon in the proceeding” may join an anti-discrimination proceeding on the side of “a person or a group of persons claiming to be victims of discrimination.” Bosnia and Herzegovina thus joined the circle of countries whose anti-discrimination legislation recognizes the right of non-governmental organizations to provide specific support in the capacity of a third party to victims in a judicial proceeding instigated for protection against discrimination. Unlike the United Kingdom, Finland or Denmark, which do not have specific regulations regulating the option for non-governmental organizations to join an anti-discrimination proceeding, Bosnia and Herzegovina followed the example of Croatia⁴⁶ and Austria⁴⁷, which explicitly prescribe this option in special anti-discrimination laws. Introduction of a provision that gives NGOs the right to join an anti-discrimination proceeding is a good solution. Such special provisions in anti-discrimination legislation emphasize the special role that NGOs are able to play in the field of combating discrimination and allow them to offer assistance to the victim, as well as to develop their own potentials for providing support to those cases that have the potential to produce broader social change.⁴⁸

In terms of regulating the participation of third parties in proceedings, Bosnian and Herzegovinian law, using the legislative solution in Croatia as a model, uses the well-established institute of intervener, whose general rules are contained in

⁴⁵ Roger Smith, “Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs”.

⁴⁶ The provisions of Article 16, paragraphs 1 and 2, of the LPD of B&H largely match the provisions of Article 21, paragraphs 1 and 2, of the Law on the Suppression of Discrimination of the Republic of Croatia.

⁴⁷ Austrian anti-discrimination legislation explicitly empowers an association of non-governmental organizations to intervene as a third party in anti-discrimination proceedings. For more on this, see: Dieter Schindlauer, *Austria – Country 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. 73.

⁴⁸ See Horvat, “New Standards”, p. 1490.

relevant laws on civil proceedings.⁴⁹ Broadly determining the option to intervene in the judicial proceeding by various forms of organization, the Law recognizes the importance of public interest litigation⁵⁰ and, in contrast to general rules on intervention, does not grant the option to intervene only to persons who would have a legal interest in the success of one of the parties to the dispute, but rather defines that legal interest by the requirement to perform the activity of protection against discrimination of the person or group of persons whose rights are being decided in the proceeding. This requirement would be met by most non-governmental organizations working on protection and promotion of human rights, including organizations that are not registered in Bosnia and Herzegovina,⁵¹ as well as other bodies such as the Ombudsman or equality agency.⁵² By adopting this rather broad definition of the range of subjects that may offer assistance to the victim of discrimination by joining the lawsuit, the anti-discrimination law of Bosnia and Herzegovina goes one step further than some more restrictive solutions adopted in other legislations, which allow non-governmental organizations to provide support to victims in anti-discrimination court proceedings provided the organization has at least 75 members (Germany) or give this option only to organizations that have existed for at least five years (Luxembourg).⁵³

In line with general rules of intervention, an intervener may join the lawsuit any time during the proceeding until the judgment on a claim becomes final and binding, as well as during the extraordinary legal remedy proceedings,⁵⁴ and may

⁴⁹ “Zakon o parničnom postupku Federacije BiH” [Civil Procedure Law of the Federation of B&H], *Official Gazette of the Federation of B&H*, 53/03, 73/05 and 119/06; “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, 49/09; “Zakon o parničnom postupku Bosne i Hercegovine” [Civil Procedure Law of B&H], *Official Gazette of B&H*, 36/04, 84/07; “Zakon o parničnom postupku Brčko distrikta Bosne i Hercegovine” [Civil Procedure Law of Brčko District of B&H], *Official Gazette of Brčko District of B&H*, 5/00, 1/01, 6/02, 8/09 and 52/10.

⁵⁰ Uzelac describes an intervener in the anti-discrimination proceeding as a *sui generis* intervener, i.e. a public interest intervener who appears as a kind of friend of the court, Alan Uzelac, “Postupak pred sudom” [The Proceeding before Court], in *Vodič uz Zakon o suzbijanju diskriminacije* [Guide Accompanying the Law on the Prohibition of Discrimination], ed. Tena Šimonović Einwalter (Zagreb: Office for Human Rights of the Government of the Republic of Croatia, 2009), p. 100. Public interest intervention is not an absolute novelty as it was already familiar in the field of domestic law, where a guardianship organ participates as a special intervener.

⁵¹ This solution was adopted in the 2003 Law on Information of the Republic of Serbia, which authorizes non-governmental organizations to file a lawsuit for hate speech. For participation of ERRC and partner organizations in the proceeding, see European Roma Rights Center, Humanitarian Law Center and Minority Rights Center, *Priručnik za advokate o zastupanju Roma – žrtava diskriminacije* [Handbook for Attorneys on Representation of Roma Victims of Discrimination] (Budapest: European Roma Rights Center; Belgrade: Humanitarian Law Center and Minority Rights Center, 2005), pp. 33–34.

⁵² Compare Uzelac, “The Proceeding before Court”, p. 100.

⁵³ Chopin and Uyen Do, *Developing Anti-discrimination Law in Europe*, p. 71.

⁵⁴ CPL, Article 369, paragraph 2.

give a statement on joining the litigation at the hearing or in a written pleading.⁵⁵ An intervener joins the litigation in the existing form at the moment of intervention.⁵⁶ In the further course of litigation, the intervener is authorized to file motions and take all other litigation actions.⁵⁷ In order to be authorized to file an extraordinary legal remedy, the intervener must join the litigation before the judgment on the claim has become final.⁵⁸ As the LPD in Article 16, paragraph 1, only allows intervention on the side of the plaintiff, interveners in proceedings instigated under the LPD may take procedural actions only in favor of the plaintiff⁵⁹ and with the plaintiff's consent.⁶⁰ Yet, the reasons that guided the lawmaker in adopting this kind of provision are not entirely clear, because, as Horvat observes commenting on an identical requirement from Croatian legislation, it is difficult to imagine a situation in which an intervener would join the proceeding without the "blessing" of the party and by his or her actions aggravate the procedural position of the party.⁶¹ The main reason to intervene in the proceeding by definition is precisely to strengthen the position of the person claiming to be a victim of discrimination.

A specific characteristic of intervention in the anti-discrimination proceeding compared to the general rules on intervention is a provision that obliges the third party, regardless of the outcome of the lawsuit, to cover its own costs of participation in the proceeding.⁶² This solution has both advantages and disadvantages. Namely, it is possible for several persons and non-governmental organizations to join the proceeding, which would, if the plaintiff loses the case,

⁵⁵ CPL, Article 360, paragraph 3.

⁵⁶ CPL, Article 371, paragraph 1.

⁵⁷ *Ibid.*

⁵⁸ CPL, Article 371, paragraph 2.

⁵⁹ Uzelac also states this, commenting on the institute of intervener prescribed by Article 21 of the Law on the Suppression of Discrimination of the Republic of Croatia. Uzelac, "The Proceeding before Court", p. 100. Dika, however, takes a different position and maintains that intervention in the Croatian system of protection against discrimination would also be possible on the side of the defendant, i.e. the alleged discriminator. Compare Mihajlo Dika, "Sudska zaštita u diskriminacijskim stvarima" [Judicial Protection in Discrimination Matters], in *Primjena antidiskriminacijskog zakonodavstva u praksi* [Implementation of Anti-discrimination Legislation in Practice] (Zagreb: Center for Peace Studies, 2011), p. 87.

⁶⁰ LPD of B&H, Article 16, paragraph 2.

⁶¹ Compare Horvat, "New Standards", p. 1491.

⁶² LPD of B&H, Article 16, paragraph 3. Procedural laws on the general rules of intervention do not contain specific provisions on reimbursement of costs. Therefore, rules on reimbursement of costs of the intervener should be sought in the general rules on reimbursement of costs that are also contained in laws on civil proceedings. In contrast to solutions adopted in neighboring countries, the mentioned rules do not contain explicit provisions on reimbursement of costs of the intervener. However, according to jurisprudence, the losing party is obligated to reimburse the expenses of the intervener of the successful party in the proceeding. Court of Appeals of Brčko District of Bosnia and Herzegovina, Judgment 097-0-GŽP-08-000030 of April 7, 2009.

according to the general rules of proceedings, place the costs of the lawsuit at his or her expense.⁶³ Looking from that perspective, the current solution regarding costs of participation of the third party in the proceeding appears justified. On the other hand, the very existence of this provision may point to the fact that there is some distrust toward the institute of intervener in the anti-discrimination proceeding.⁶⁴

Yet, emphasis on the option for non-governmental organizations and other bodies which in the scope of their activities provide “protection from discrimination of a person or group of persons whose rights are being decided upon in the proceeding” to intervene in the proceeding for individual anti-discrimination protection creates a more favorable legal foundation for non-governmental organizations to provide support to victims of discrimination. As a result of this specification, even non-governmental organizations which do not employ staff who meet requirements for representing individuals in the proceeding or do not have sufficient funding to hire lawyers to represent victims of discrimination still have a surer chance to intervene in the proceeding envisioned by the LPD, either on their own initiative or upon the party’s invitation. In other words, precisely this provision has considerably broadened the range of organizations that may offer assistance to the plaintiff in the anti-discrimination proceeding. As has already been emphasized,⁶⁵ requirements for intervention in the anti-discrimination proceeding on the side of the plaintiff would be met by organizations dealing with protection of a specific group of people, such as associations for protection of women’s rights, associations for protection of disabled persons, organizations for protection of children’s rights, etc.⁶⁶ For example, trade unions may appear as interveners in a labor anti-discrimination lawsuit instigated by their member. In addition to these organizations, non-governmental organizations dealing with protection and promotion of human rights in general may also appear as interveners in the proceeding.

Bearing in mind that allowing participation on the side of the plaintiff in anti-discrimination lawsuits serves to strengthen the position of victims of discrimination, it is interesting to observe that the lawmaker did not choose to regulate the institute of *amici curiae* – friend of the court.⁶⁷ This institute already exists in

⁶³ Also see in this regard observations related to this institute in the Croatian anti-discrimination system pointed out in Uzelac, “The Proceeding before Court”, pp. 100-101.

⁶⁴ Compare Horvat, “New Standards”, p. 1491.

⁶⁵ See above, p. 12.

⁶⁶ Also Goran Nežirović, “Postupak za zaštitu od diskriminacije” [The Proceeding for Protection against Discrimination], p. 22. Material prepared for judicial and prosecutorial training on the Law on the Prohibition of Discrimination, available on the website of the Center for Judicial and Prosecutorial Training of the RS and Center for Judicial and Prosecutorial Training of FB&H.

⁶⁷ For definitions of the institute of *amicus curiae* and the institute of intervener, see footnote 11.

Bosnian and Herzegovinian legislation in proceedings before the Constitutional Court of B&H⁶⁸ and is familiar in other countries' legal systems⁶⁹. Introducing the option of participation in the proceeding in the capacity of *amici curiae* could make it easier for many organizations to join the proceeding, because they would thus maintain the perception of neutrality which, in return, might lend more force to their arguments. In addition, the non-governmental organization would then be able to focus on the legal and theoretical issues without being burdened by relations between the parties in the proceeding. At the same time, its intervention would provide the court with an overview of international and comparative standards, as well as court practice relevant to the case at hand.⁷⁰ All that could result in judgments based on good sources and as such able to cross the boundaries of the specific case and serve as a reference point for decision-making in similar situations. This would particularly be significant in light of the complexity of the legal system in Bosnia and Herzegovina, the very demanding conceptual and practical link between individual and collective rights on one hand and discrimination on the other, the wide-spread practice of so-called structural discrimination in Bosnia and Herzegovina, and the limited capacities of the Bosnian and Herzegovinian judiciary with regard to this new and complex matter which often requires complex, sectoral analysis and an informed value judgment regarding the justification, or lack therefore, of the difference in treatment.

On the other hand, it should be noted that the present solutions allowing the intervention of third parties in proceedings do not prevent non-governmental organizations or other human rights bodies from intervening in the proceeding and acting as independent friends of the court during the proceeding. However, the existing solutions do not offer courts the option to invite non-governmental organizations to join the proceeding. Experience from foreign and international court practice demonstrates that courts have often relied on third party interventions in complex discrimination cases. This is especially evident in common law systems, European Court of Human Rights practice, as well as practice in civil law countries such as Lithuania or Romania.⁷¹

Bearing in mind the presented arguments, it is reasonable to expect that introducing the procedural institute of *amicus curiae* would further contribute to

⁶⁸ See Constitutional Court of Bosnia and Herzegovina, *Pravila Ustavnog suda BiH* [Rules of the Constitutional Court of B&H] (Sarajevo: Constitutional Court of Bosnia and Herzegovina), Article 47.

⁶⁹ For example, anti-discrimination law in Lithuania grants non-governmental organizations and the Ombudsman the right to join the proceeding as *amici curiae*. See Jolanta Samuolyte, "Applying situation testing successfully to prove discrimination based on ethnicity", in *The Role of NGOs and Trade Unions in Combating Discrimination*, ed. Richard Poláček (Luxembourg: Publications Office of the European Union, 2009), p. 17.

⁷⁰ Ilieva, "The Role of NGOs in the Implementation of Anti-discrimination Law", p. 16.

⁷¹ Horvat, "New Standards", p. 1491, and Chopin and Uyen Do, *Developing Anti-discrimination Law in Europe*, pp. 71–72.

the efficiency of judicial anti-discrimination protection in Bosnia and Herzegovina. In that case, it would also be important to adequately regulate the issue of reimbursement of costs of persons appearing in the capacity of *amicus curiae*. Possible solutions to this issue are offered by the procedural rules in Bosnia and Herzegovina. Namely, under the rules of procedure of the former Human Rights Commission of the Constitutional Court of B&H, the costs of *amici curiae* are borne by the Commission if the *amici* appeared in the proceeding on the Commission's request.⁷² In addition, the provisions of the laws on civil proceedings in Bosnia and Herzegovina on reimbursement of costs of the ombudsman in the civil proceeding (according to which the ombudsman is entitled to reimbursement of costs, but not remuneration, pursuant to the general rules on reimbursement of costs)⁷³ could also be expanded by appropriate amendments to cover the institute of *amicus curiae* in the anti-discrimination proceeding.

2.3. The Collective Anti-Discrimination Lawsuit

Another form of combating discrimination through judicial proceedings that stands out is the conduct of abstract collective protection proceedings. Collective protection of rights has been familiar for a long time in the field of consumer protection or proceedings concerning protection of the environment,⁷⁴ but in recent years abstract judicial protection has also been introduced in the field of protection of human rights, i.e. anti-discrimination protection. The LPD of B&H follows this trend by introducing the institute of the collective lawsuit.

Comparing collective judicial protection with litigation in the name or on the side of an individual party, many authors point out the advantages of collective protection as a mechanism for implementing anti-discrimination norms. One of the advantages of this institute that is pointed out is the fact that collective protection mechanisms do not depend on the need to identify the most suitable case and, in relation to that, the most suitable plaintiff, instead placing emphasis on institutional and structural problems.⁷⁵ In addition, as there is no individually

⁷² "Pravila procedure Komisije za ljudska prava pri Ustavnom sudu Bosne i Hercegovine" [Rules of Procedure of the Human Rights Committee of the Constitutional Court of Bosnia and Herzegovina], *Official Gazette of B&H*, 23/05, Rules 31 and 42.

⁷³ "Civil Procedure Law of the Federation of B&H" and "Civil Procedure Law of the Republika Srpska", Article 394; "Civil Procedure Law of B&H", Article 331.

⁷⁴ Lilla Farkas, "Limited Enforcement Possibilities under European Anti-Discrimination Legislation – A Case Study of Procedural Novelties: Actio Popularis Action in Hungary", *Erasmus Law Review* 3, no. 3 (2010), p. 186.

⁷⁵ *Ibid.*

named victim, collective protection becomes less of a financial burden too, because non-governmental organizations interested in a particular discriminatory issue are able to save a lot of financial resources and time that are normally needed to identify the most suitable victim and to provide legal, psychological and other aid to that victim. This again gives greater freedom to non-governmental organizations to develop a litigation strategy, including a media strategy.⁷⁶

With the introduction of the institute of the collective lawsuit in the anti-discrimination system in Bosnia and Herzegovina, non-governmental organizations were recognized standing to provide protection against discrimination to a larger number of people through the judicial proceeding. Under the provision of Article 17 of the LPD, a collective lawsuit may be filed by associations, bodies, institutions or other organizations established in compliance with regulations regulating the association of citizens in Bosnia and Herzegovina that have a “justified interest” in protection of rights of a certain group or that deal with protection against discrimination of a certain group of persons in the scope of their activities. Generally speaking, it should be pointed out that there are some differences in understanding the concept of justified interest in this regard. For example, Dika, commenting on the institute of the collective lawsuit from Croatian anti-discrimination law, points out that the existence of justified interest on the part of organizations authorized to file a collective lawsuit “is to be judged from the aspect of what is their function, the harm to or the vulnerability of the group’s members”.⁷⁷ On the other hand, Vodinelić maintains that the very act of recognizing the standing of such organizations at the same time recognizes their legal interest in filing a lawsuit, and that they do not have to state the “reason why they are appearing as plaintiffs in the specific case” nor “can the court deal with that”.⁷⁸

According to the legislative solution in Bosnia and Herzegovina, the plaintiffs in the collective lawsuit must make “plausible” that the alleged violator’s conduct discriminated “a large number of persons predominantly belonging to the group” whose protection is sought by the lawsuit. We may conclude from the above that this provision introduces in the legal system of Bosnia and Herzegovina a venue that allows an abstract anti-discrimination proceeding to be conducted,⁷⁹ as

⁷⁶ Ibid.

⁷⁷ Dika, “Judicial Protection in Discrimination Matters”, p. 88.

⁷⁸ Vodinelić, “Lawsuits for Protection against Discrimination”, p. 47. For more on the justified interest requirement for persons authorized to file collective lawsuits in Bosnian and Herzegovinian anti-discrimination legislation, see Section 2.3.1 of this report.

⁷⁹ Uzelac states the same, explaining the institute of the collective lawsuit from the Croatian anti-discrimination law. Uzelac, “The Proceeding before Court”, p. 103.

the above provision recognizes the legal standing of a broad circle of subjects⁸⁰ to seek the protection of rights of a large number of people. This characteristic differentiates the collective lawsuit from lawsuits for the exercise of individual legal protection of a specific person in a specific factual and legal situation and places it in the category of lawsuits that achieve group, representative or abstract protection, such as group, i.e. class action or popular action – lawsuits in the name of the people.

Taking into account that the *ratio* of the class action lawsuit in United States legislation is to provide an opportunity to a small group of plaintiffs to instigate a proceeding for protection of rights of a large number of individuals who share common interests,⁸¹ it is here that we find the main similarity between the institute of the collective lawsuit and the institute of the class action lawsuit. Under U.S. law, a class action lawsuit may be instigated by a group of people as well as an individual, provided that “the group of people that constitutes the class is so numerous that filing one lawsuit would be impractical” and that common factual and legal issues exist among the group members.⁸² In addition, specific conditions in the context of the class action lawsuit require that the “attack or defense used by the group representative⁸³ must be typical for all group members”, while the “group representative must adequately protect the interests of the group”.⁸⁴ Through this venue, the group representative may file a claim, including a claim for damages, even without the consent of the other group members. In case of a successful lawsuit, the damages are distributed among all members of the certified class previously determined by the court.⁸⁵ Class certification is

⁸⁰ The circle of subjects that have standing to file a collective lawsuit certainly includes classical non-governmental organizations. However, in the circle of authorized subjects we may also include a variety of other organizations such as religious organizations and bodies and institutions such as, for example, the Institution of Ombudsman of B&H. For more, see Faris Vehabović, Adnan Kadribašić and Midhat Izmirlija, *Komentar Zakona o zabrani diskriminacije: sa objašnjenjima i pregledom prakse u uporednom pravu* [Comments on the Law on the Prohibition of Discrimination: With Explanations and an Overview of Practice in Comparative Law] (Sarajevo: Human Rights Center of the University of Sarajevo, 2010), p. 115 (hereinafter referred to as: *Comments on the LPD*); and Uzelac, “The Proceeding before Court”, p. 104.

⁸¹ Lyn K. Slater and Kara R. Finck, *Social Work Practice and the Law* (New York: Springer Publishing Company, 2012), p. 350.

⁸² Monika Milošević, “Pravo na tužbu i pravo na žalbu u sistemu građanskog sudskog postupka SAD” [The Right to a Lawsuit and the Right to an Appeal in the Civil Judicial Proceeding in USA], *Strani pravni život* [Foreign Legal Life], no. 2 (2009), pp. 127-137.

⁸³ To clarify, it should be emphasized that *representative* of the group (class) does not mean an agent, but an authentic member of the group who adequately represents the characteristics of each one of its members.

⁸⁴ Milošević, “The Right to a Lawsuit and the Right to an Appeal in the Civil Judicial Proceeding in USA”, p. 425.

⁸⁵ *Ibid.*

carried out in a separate court proceeding and its aim is to define the potential circle of identifiable group members.⁸⁶ Court certification of the group produces effects on individual lawsuits and courts cannot act on individual lawsuits due to the preclusive effect of class certification (*collateral estoppel*), except with regard to lawsuits filed by those group members who used their right to opt out of the group and are thus not bound by the class action ruling.

Class action lawsuits are a very popular tool in the United States and are used to protect a variety of interests in different legal fields – from unfair competition, through protection of consumer and ecological rights, to the field of combating discrimination. Class action lawsuits are often used as a means of solving structural issues and problems.⁸⁷ Certainly one of the most famous cases in this field is the *Brown case*,⁸⁸ in which the practice of racial segregation was declared unconstitutional. We might say that a particular advantage of class action lawsuits is their procedural justification because a judgment in one case provides legal protection not only for the individuals who participated in the proceeding, but also for other individuals whose interests the defendant injured in a similar way. This provides protection for multiple individuals, including those who are not interesting in protecting their rights in a judicial proceeding, either due to ignorance or because they do not have sufficient resources.⁸⁹

On the other hand, the class action lawsuit in U.S. law has been under considerable criticism. Namely, ending the proceeding in the class action lawsuit has preclusive effect on all potential individual lawsuits⁹⁰ filed by members of the class, unless they unequivocally opted out of the class. This is a particularly important consequence bearing in mind that the option to opt out is seldom used, as many members of the group are not even aware of the existence of the class action lawsuit.⁹¹ Moreover, this often encourages defendants to reach a more favorable deal for them with the class representatives (plaintiffs). A further objection that is pointed out in relation to the class action lawsuit is reliance of U.S. courts on retributive damages, which often does not achieve proportionate compensation of damages. Finally, the major criticism regarding the institute of class action

⁸⁶ For example, all buyers of a specific product made by a specific manufacturer in a specific period or all employees of a specific company of a specific ethnic background, etc.

⁸⁷ Slater and Finck, *Social Work Practice and the Law*, p. 351.

⁸⁸ Supreme Court of the United States, *Brown v. Board of Education*, May 17, 1954.

⁸⁹ For a detailed overview of the advantages and shortcomings of the class action lawsuit, see Peter K. Cashman, *Class Action Law and Practice* (Sydney: The Federation Press, 2007), pp. 22–26; as well as Rachel P. Mulheron, *The Class Action In Common Law Legal Systems: A Comparative Perspective* (Portland: Hart Publishing, 2004), pp. 47–68.

⁹⁰ Preclusive effect means that a separate individual lawsuit cannot be filed on a matter settled by a ruling in a class action.

⁹¹ Mulheron, *The Class Action In Common Law Legal Systems*, p. 37.

concerns common situations in which class action lawsuits are conducted for the lucrative goals of lawyers, i.e. agents of the groups' representatives, who file class action lawsuits by finding an individual who meets the requirements for adequate group representative guided solely by their own interests rather than by the interests of the class members.⁹²

Unlike the class action lawsuit in U.S. law which is filed by one or several named group members, i.e. named plaintiffs, in their own names and in the names of identifiable group members, the collective lawsuit from the LPD of B&H is filed by an authorized plaintiff, in the capacity of the plaintiff⁹³, in the name of protection of rights of members of a specific group who are not named individually. In this regard, the collective lawsuit, as defined in Bosnian and Herzegovinian legislation, stands in the middle between the *actio popularis* and the regular class action known in U.S. law. As Article 17 of the Law on the Prohibition of Discrimination authorizes non-governmental organizations to instigate a judicial proceeding in their own name but in someone else's interest, i.e. in the interest of individually unidentified persons, this gives the collective lawsuit in Bosnian and Herzegovinian anti-discrimination legislation a characteristic of the *actio popularis*, which is also familiar in Hungarian, Bulgarian and Romanian legislation. This specification of the collective lawsuit in the LPD of B&H, which largely matches the specification adopted in Croatia's Law on the Suppression of Discrimination, makes it a particularly suitable tool for combating those forms of discrimination in which there is no individually identified or identifiable victim, such as, for example, in case of publication of discriminatory articles, notices or statements.⁹⁴

Introduction of the institute of the collective lawsuit for protection against discrimination is truly refreshing in the Bosnian and Herzegovinian legal system. This institute, with proper use and reliance on experience from practice developed in other countries, may serve as an excellent tool in the hands of non-governmental human rights organizations in combating institutional or structural discrimination in a variety of fields. As an important argument in favor of this assertion, we might point out the fact that the collective lawsuit as an abstract form of protection does not depend on the existence of a specific victim, allowing the organization that files the lawsuit to focus on arguments attacking the discriminatory consequences that result either from the law itself, from its implementation, or simply

⁹² For more, see Pierluigi Congedo and Michele Messina, "European 'Class' Action: British and Italian Points of View in Evolving Scenarios", *Europa e Diritto Privato* 1, no. 1 (2009), pp. 6–7; also see Christopher Hodges, "Some observations on Multi-party Claims", in *Procedural Laws in Europe, Towards Harmonisation*, ed. Marcel Storme (Antwerp-Apeldoorn: Maklu, 2003), pp. 403–404.

⁹³ Citizens association, body, institution or other organization.

⁹⁴ Compare Horvat, "New Standards", p. 1481.

from practice and conduct.⁹⁵ This characteristic of the collective lawsuit is a particularly suitable means for protecting the rights of marginalized or vulnerable groups in the Bosnian and Herzegovinian context, such as, for example, Roma.⁹⁶

Comparative experience offers many useful examples of the potentials of the collective lawsuit. In Hungary, for example, non-governmental organizations combating structural discrimination, especially in the field of education, often rely on the instrument of abstract protection prescribed by Hungarian anti-discrimination legislation. An interesting example to mention is an *actio popularis* filed by the Chance for Children Foundation (CFCF) against a local self-government unit. The lawsuit alleged that the city government which has jurisdiction over elementary schools was conducting a discriminatory policy on Roma students. Namely, two local elementary schools had three buildings in which classes were held – a main building and two secondary buildings. Whereas the main building was well-equipped with educational resources, the secondary buildings did not even have a gymnasium for physical education, a library or computers. Data indicated that most of the student body in the secondary buildings consisted of Roma. Expertise that was performed showed that the percentage of Roma students in the main building was extremely small, whereas in the secondary buildings it was extremely high, ranging between 86% and 96% in one building to as much as 100% in the other secondary building. In line with that, Hungarian courts established the existence of direct discrimination against students from the Roma population and ordered the city authorities and school to take the necessary steps to eliminate segregation.⁹⁷ In addition to the fact that discrimination was established, it is important to note that the first-instance court in this case rejected the objection of the defendant which had collected signatures of Roma students' parents to

⁹⁵ Compare Mark Bell (who describes the advantages of the system of collective protection established by the European Social Charter). Bearing in mind that there are some similarities between the collective anti-discrimination lawsuit and the system of collective complaints envisioned by the European Social Charter, non-governmental organizations that want to attack institutional forms of discrimination through the collective lawsuit may be advised to consult the practice of the European Economic and Social Committee in this field. A particularly illustrative example that demonstrates the impact of collective protection on institutional discrimination is *Autisme-Europe vs. France*. See Mark Bell, "Combating discrimination through collective complaints under the European Social Charter", *European Anti-Discrimination Law Review*, no. 3 (2006), pp. 13–19.

⁹⁶ For more on cases of discrimination of Roma in Bosnia and Herzegovina, see, for example: Institution of the Human Rights Ombudsman of B&H, *Izveštaj 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 B&H, 2012).

⁹⁷ András Kádár, *Hungary – Country 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), pp. 45–47. Case: Supreme Court, *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v. Hajdúhadház Város Önkormányzata, Bocskai István Két Tanítási nyelvű Általános Iskola, Dr. Földi János Általános és Művészeti Iskola*, November 19, 2008.

support its claim that CFCF did not have a legal interest in filing the lawsuit.⁹⁸ The case served as a model for filing other lawsuits related to discrimination of minorities in the exercise of the right to education in Hungary.

We find similar examples in other countries too. In Bulgaria, *actio popularis* have been used for example to take to court a politician (Siderov case) who had used racist and insulting comments about various minorities in his speeches.⁹⁹ The first three collective lawsuits in Croatia filed by non-governmental organizations based on the Law on the Suppression of Discrimination regard precisely situations of this kind. The lawsuits were filed by several non-governmental organizations¹⁰⁰ against natural persons who had made homophobic statements in their blog (first lawsuit) or for public media (second and third lawsuits). The first lawsuit was successful and the relevant court in Rijeka established that the defendant had committed the prohibited discrimination, but in the two latter cases the claims were rejected by the first-instance court in Zagreb and are currently being deliberated by the relevant second-instance court.¹⁰¹

The above examples from neighboring Croatia particularly illustrate the potentials of the collective lawsuit in the field of combating discrimination. First, with the filing of these lawsuits and their acceptance by the courts, all dilemmas are removed with regard to the legal standing of non-governmental organizations to file lawsuits for protection of collective interests even in the context of making insulting statements. Second, the successful completion of the first lawsuit was an important sign to other non-governmental organizations that they can achieve the goals of their organizations in the context of combating discrimination through judicial proceedings. Third, the successful completion of the first lawsuit demonstrates that anti-discrimination law is not just a dead letter and that prohibition of discrimination even in the private sphere may be made practical and effective by obtaining a judicial decision, meaning that rights guaranteed by the law can be protected adequately. Fourth, despite the fact that the second and third lawsuits were rejected by the first-instance court, the very instigation of the judicial proceeding presented sufficient ground for encouraging public debate

⁹⁸ Farkas, "Limited Enforcement Possibilities under European Anti-Discrimination Legislation", p. 191.

⁹⁹ Ilieva, "The Role of NGOs in the Implementation of Anti-discrimination Law" p. 12. The Siderov case regards several separate cases related to discriminatory statements made by the politician. The case *Axinia Guencheva et al. v. Volen Siderov*, for example, is related to discrimination of LGBT persons and the case *Yuliana Metodieva vs. Volen Siderov* is related to racial discrimination. For more information on these cases, see the Fundamental Rights Agency (FRA) website: <http://fra.europa.eu/en> (accessed October 25, 2012).

¹⁰⁰ Center for LGBT Equality (comprising LORI, Zagreb Pride, Queer Zagreb and Center for Peace Studies).

¹⁰¹ See: <http://www.labris.org.rs/labris/aktivnosti/umrezavanje/4397-prihvacena-udruzna-tuzba-lgbt-organizacija> (accessed April 27, 2012).

on freedom to make statements of a discriminatory character. Fifth, despite the fact that the third lawsuit was rejected, the relevant court established beyond doubt in its judgment that the defendant's statement – that he can only imagine homosexual individuals as “ballet dancers, authors, journalists” and not as “people who go head-first against soccer-boots” – beyond doubt insults the “highest civilization” values such as “mutual tolerance and respect for diversity”¹⁰², which provides some satisfaction for the plaintiff.

2.3.1. Understanding “Justified Interest” in the Context of the Collective Lawsuit

An *actio popularis* in the traditional sense is a public interest lawsuit that anyone can file, without having to prove the existence of a specific justified interest in filing the lawsuit. What in a way diminishes the popular character of the collective lawsuit under the LPD of B&H is the obligation for non-governmental organizations to prove, for the purpose of admissibility of the lawsuit, the existence of justified interest in protection of rights of a particular group and to make at least plausible that the defendant'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.

It should be emphasized that the Law does not prescribe that the plaintiff must exclusively deal with protection of interests of a particular group (rights of Roma, rights of LGBT population, rights of a specific ethnic group, etc.). Namely, even organizations dealing with protection of human rights in general might meet this requirement.¹⁰³ In this regard, non-governmental organizations may very easily demonstrate the existence of justified interest in filing the collective lawsuit by submitting to the court excerpts from their constituent or similar documents or information on their activities and projects, from which it is evident that the plaintiff in the scope of its activities deals with protection of human rights or rights of persons belonging to the group whose protection of rights to equal treatment is sought in the proceeding.

This is confirmed by initial experience in using the institute of the collective lawsuit in Bosnia and Herzegovina. Namely, in the proceeding conducted upon the first collective lawsuit filed pursuant to the LPD of B&H in the capacity of the plaintiff by the non-governmental organization “Vaša prava” against Herzegovina-Neretva Canton, Elementary School Stolac and Elementary School Čapljina to establish discrimination in education institutions through the existence of a so-called “system of two schools under one roof”, the defendants objected on grounds

¹⁰² Lina Budak, “Udružna tužba br. 2 i br. 3 – prezentacija” [Joint Legal Action no. 2 and no. 3 – A Presentation], Center for Peace Studies, February 17, 2012.

¹⁰³ Compare Uzelac, “The Proceeding before Court”, p. 100.

of legal standing on the part of the plaintiff. However, upon inspecting the Statute of the plaintiff, the court of first instance established that the non-governmental organization works, among other things, on “advocating and raising awareness on human rights and civil society issues” and recognized its full legitimacy to file the lawsuit.¹⁰⁴

However, in addition to being obligated to prove justified interest in filing the lawsuit, a non-governmental organization must prove at least the plausibility that the defendant’s conduct violated the right to equal treatment of a large number of persons. In other words, in order for the collective lawsuit to be admissible, the plausibility of discrimination against a large number of persons is required. It should be pointed out that the Croatian anti-discrimination law contains a similar provision, whereas relevant anti-discrimination laws in Serbia adopted an entirely different solution. Namely, the provisions of the Law on the Prohibition of Discrimination of the Republic of Serbia speaking about a so-called organizational lawsuit recognize non-governmental human rights organizations the right to file a lawsuit for protection of a specific person against discrimination.¹⁰⁵ The Law on Gender Equality of the Republic of Serbia¹⁰⁶ grants standing to “trade unions and associations whose goals are related to promotion of gender equality” in case of discrimination of a large number of persons.¹⁰⁷ This approach recognizes the legal standing of non-governmental organizations in lawsuits for protection against discrimination violating the rights of a large number of persons by reason of public interest, “because they perform their activities also through these lawsuits”. Therefore, they have no obligation to prove the existence of a specific legal interest in filing this type of lawsuit. In contrast to Bosnian and Herzegovinian anti-discrimination law, the Law on Gender Equality of the Republic of Serbia does not impose on non-governmental organizations the obligation to make plausible already at the moment of instigating the proceeding of abstract protection against discrimination that the defendant’s conduct discriminated a large number of persons. Instead, as commentators point out, it is sufficient “that they only claim that the defendant’s conduct violated the right of a large number of persons”.¹⁰⁸

¹⁰⁴ Mostar Municipal Court, Judgment no. 58 PS 08563 11 Ps of April 27, 2012.

¹⁰⁵ The Law on the Prohibition of Discrimination in Montenegro does not grant legal standing to non-governmental organizations as such, instead authorizing non-governmental organizations to file an anti-discrimination lawsuit in the name of a discriminated individual. See Section 2.1.

¹⁰⁶ “Zakon o ravnopravnosti polova Republike Srbije” [Law on Gender Equality of the Republic of Serbia], *Official Gazette of the Republic of Serbia*, 104/2009.

¹⁰⁷ “Law on Gender Equality of the Republic of Serbia”, Article 43, paragraph 3.

¹⁰⁸ Marijana Pajvančić, Nevena Petrušić and Senad Jašarević, *Komentar Zakona o ravnopravnosti polova* [Comments on the Law on Gender Equality] (Belgrade: Center for Modern Skills, 2010), p. 110. Also compare Vodinelić, “Lawsuits for Protection against Discrimination”, p. 47.

The essential problem with the way this issue is currently regulated in the LPD of B&H lies in the fact that it requires the plaintiff, when proving the *admissibility* of the lawsuit, to also prove the existence of plausible discrimination. This kind of evidence, by the nature of things, should be a subject of the evidentiary procedure. In this situation, non-governmental organizations will already in this phase have to resort to often complex and demanding methods such as presentation of statistical data or so-called situation testing in order to prove the existence of this requirement for the admissibility of the lawsuit. Indeed, in the already mentioned judgment on the collective lawsuit for protection against discrimination in Bosnia and Herzegovina¹⁰⁹, the first-instance court did not debate whether the plaintiff at the time the lawsuit was filed had made it plausible that the defendant's conduct violated the right to equal treatment of a large number of persons. However, as this is the first and so far only judgment on a collective lawsuit under the LPD, one cannot say with certainty that the courts will continue to take such a permissive stand in the future, which in any case does not result from the current provision of the law.

2.3.2. The Collective Lawsuit and Damage Compensation

Although the collective lawsuit is an entirely new procedural venue in anti-discrimination protection, the Bosnian and Herzegovinian lawmaker did not clearly prescribe what types of damage claims may be made in the collective lawsuit. Therefore, it remains up to practice to interpret whether legal standing in this field refers to all types of claims envisioned by the LPD, including a claim for damage compensation.

Such an open legislative solution was not adopted in neighboring countries. The Law on the Suppression of Discrimination of the Republic of Croatia, for example, prescribes that claims that may be made in the collective lawsuit are a claim to establish the existence of discrimination, a claim to prohibit discriminatory actions, a claim to carry out activities which eliminate discrimination or its consequences, as well as a claim to publish in the media the judgment establishing discrimination.¹¹⁰ Similar solutions were adopted in comprehensive anti-discrimination laws in Serbia¹¹¹ and Montenegro.¹¹² It is also noticeable that these laws reserve the option to claim damages for the victim of discrimination, precluding this option for other persons authorized to file the lawsuit.

Arguments that are pointed out in favor of such separation of collective anti-discrimination protection from the issue of damage compensation are the nature

¹⁰⁹ Mostar Municipal Court, Judgment no. 58 PS 08563 11 Ps of April 27, 2012.

¹¹⁰ "Law on the Suppression of Discrimination of the Republic of Croatia", Article 24, paragraph 2.

¹¹¹ "Law on the Prohibition of Discrimination of the Republic of Serbia", Article 46, paragraph 1.

¹¹² "Law on the Prohibition of Discrimination of the Republic of Montenegro", Article 30.

and function of damage compensation as a special form of protection which is inevitably tied to an individually identified person.¹¹³ Namely, under the general principles of obligatory law, pecuniary damage implies reduction in someone's assets (ordinary damage) and/or halting its increase (loss of earnings), whereas non-pecuniary damage is damage to the injured party due to suffered physical or mental anguish or fear. Pursuant to this, in order to claim damage compensation, in terms of the rules of law of obligations it is necessary to establish the act which caused the damage, the damage, the responsible person, the injured party, and the causal link between the act which caused the damage and the damage, as well as the liability of the responsible person. Establishing these facts implies individualizing the injured party, while the compensation awarded should be proportionate to the concrete damage suffered.¹¹⁴

The next argument that we may point out in favor of precluding the possibility of claiming damages in the collective anti-discrimination lawsuit are its potential counter-productive effects. Namely, if we characterize the collective lawsuit as a powerful tool for raising public awareness on institutional and structural discrimination, making lucrative claims in this field may undermine in the eyes of the public the image of non-governmental organizations as benevolent intermediaries in the procedure of exercising protection against discrimination and even reinforce calls for the creation of some sort of mechanisms for collective protection of persons who are claimed to act in a discriminatory way.¹¹⁵

¹¹³ Vodinelić, "Lawsuits for Protection against Discrimination", p. 39; see also Pajvančić, Petrušić and Jašarević, *Comments on the Law on Gender Equality*, pp. 110–111.

¹¹⁴ "Law on Civil Obligations", Article 190. On compensation of non-pecuniary damage, see Ivica Crnić, "Povrede prava osobnosti i neimovinska šteta" [Violation of the Right of Personality and Non-pecuniary Damage], in *Primjena antidiskriminacijskog zakonodavstva u praksi* [Implementation of Anti-discrimination Legislation in Practice] (Zagreb: Center for Peace Studies, 2011).

¹¹⁵ Recent amendments to *Zakon o parničnom postupku Republike Hrvatske* [Civil Procedure Law of the Republic of Croatia] (*Official Gazette of the Republic of Croatia*, 53/11) and the new *Zakon o parničnom postupku Republike Srbije* [Civil Procedure Law of the Republic of Serbia] (*Official Gazette of the Republic of Serbia*, 72/11) regulate special proceedings for the exercise of collective protection. However, these provisions also authorize persons who are claimed to be in violation of collective rights to file a lawsuit seeking to establish that their conduct is not discriminatory, i.e. that it does not violate collective rights, and to file a lawsuit for the prohibition of certain conduct and compensation of damage, including compensation of damage caused by the claim made in the collective lawsuit that was rejected as unfounded. The Coalition for Access to Justice, which comprises several non-governmental organizations in Serbia, has assessed these provisions of the Civil Procedure Law of the Republic of Serbia as unconstitutional because they violate the principle of equality of the parties in the proceeding and freedom of speech and because they essentially discourage the conduct of a collective protection proceeding. The Coalition has submitted an initiative for assessment of constitutionality of these provisions. The non-governmental organizations' initiative has been supported by the Human Rights Ombudsman and Commissioner for Information of Public Importance. For more on this case, see "Zakon u korist države, protiv građana" [The Law in Favor of the State, against Citizens], Peščanik.net, January 25, 2012, available at: <http://pescanik.net/2012/01/zakon-u-korist-drzave-protiv-gradana/> (accessed October 20, 2012).

On the other hand, the act of discrimination often inflicts damage¹¹⁶ on individual members of the group who have the right to be compensated. Therefore, requests for finding an appropriate way to compensate damage through collective protection mechanisms are not rare. In addition, the possibility of accumulation of multiple anti-discrimination damage claims is often attributed a preventive effect because of its ability to positively influence the conduct of the potential discriminator who would otherwise be faced with the possibility of being obligated to pay a high damage amount.

In an effort to reconcile requests for creating an efficient system for achieving damage compensation through collective protection mechanisms with rules on individualization of the damage suffered, many countries have adopted interesting solutions. According to these solutions, injured parties may join an organization authorized to file a collective lawsuit as co-plaintiffs, while a judgment passed in a collective judicial protection proceeding is given a prejudicial effect in any individual lawsuits.¹¹⁷ Such solutions aim to ensure collective protection of rights using as a model the class action in U.S. law while at the same time trying to avoid its negative characteristics. Thus, effort is made to prevent observed examples of abuse of the class action in the United States by recognizing legal standing to trade unions or other associations that represent or protect interests of group members. In addition, effort is made to try to prevent the negative effects of preclusion of class certification by allowing members of the group to opt in the lawsuit, in contrast to the regular class action approach and obligation of the class members to unambiguously state that they are opting out. This feature ensures that compensation for pecuniary and non-pecuniary damage is proportionate to the act which caused the damage with regard to each group member, while at the same time providing the possibility of accumulation of damage claims in one proceeding.¹¹⁸

In relation to this issue, it is worth pointing out potentially beneficial solutions adopted in the Law on Gender Equality of the Republic of Serbia. According to this solution, as we have already mentioned,¹¹⁹ “trade unions or associations

¹¹⁶ It should be stressed, however, that the mere existence of damage is not a condition for existence of discrimination. Vodinelić, “Lawsuits for Protection against Discrimination”, p. 39.

¹¹⁷ This solution is contained in Article 502c of the Civil Procedure Law of the Republic of Croatia and Article 504 of the Civil Procedure Law of the Republic of Serbia. According to these solutions, if the plaintiff is a member of a group and if the defendant is the person who was established to have acted toward that group in a discriminatory way, the court in an individual lawsuit is bound by the established existence of discrimination against that group and therefore there is no need in the individual lawsuit to again decide on the defendant’s liability.

¹¹⁸ Compare Fabio Polverino, “A Class Action Model for Antitrust Damages Litigation In European Union”, published August 29, 2006, Social Science Research Network; and Congedo and Messina, “European ‘Class’ Action: British and Italian Points of View in Evolving Scenarios”, pp. 163–189.

¹¹⁹ See Section 2.3.1.

whose goals are related to gender equality” are accorded standing for instigating a civil proceeding for protection against discrimination in cases of discrimination violating the rights of a large number of persons. The law further prescribes that the trade union or association, after initiating the proceeding, may inform, through the mass media or in another adequate manner, other injured parties, trade unions and interested associations about the initiated proceeding and invite them to join the proceeding as a co-plaintiff or intervener.¹²⁰ In relation to the type of claims that trade unions and other associations may make in a lawsuit for protection against discrimination violating the rights of a large number of persons,¹²¹ the law did not introduce specific restrictions and therefore these organizations may also claim damage compensation. In that case, the claim must be made in the name of the discriminated person and must ask the defendant to compensate the damage. In this kind of situation, the court assesses the necessary elements for passing a decision on the amount and right to damage compensation in view of the circumstances related to the individually identified person. We should add that a trade union or association, in making a damage claim related to an individually identified person, must first obtain that person’s approval. This ensues from the provisions of the Gender Equality Act authorizing trade unions and non-governmental organizations to instigate civil proceedings for protection against discrimination with the consent of the discriminated person.¹²²

2.3.3. The Collective Lawsuit and Individual Anti-Discrimination Lawsuits

With regard to the collective lawsuit, a very important issue is raised concerning the execution of the judgment passed on this type of lawsuit and its effect on individual anti-discrimination lawsuits filed by the group members. This issue is not explicitly regulated by relevant legislation in Bosnia and Herzegovina. True, in response to the issue, a number of authors maintain that all dilemmas in this field may be resolved by creative activity of judicial practice.¹²³ Basically, it is pointed out that a judgment passed in a proceeding to establish discrimination should be recognized an effect broader than the effect between the parties (*inter partes*) and given an expanded subjective effect and a binding character. According to

¹²⁰ “Law on Gender Equality of the Republic of Serbia”, Article 43, paragraph 4.

¹²¹ This concerns the so-called organizational lawsuit, compare Vodinelić, “Lawsuits for Protection against Discrimination”, pp. 46–48; and Pajvančić, Petrušić and Jašarević, *Comments on the Law on Gender Equality*, p. 110.

¹²² “Law on Gender Equality of the Republic of Serbia”, Article 43, paragraph 2.

¹²³ Horvat, “New Standards”, p. 1489; Uzelac, “The Proceeding before Court”, p. 105, both referring to Mihajlo Dika, “Udružna tužba kao instrument apstraktne zaštite potrošača” [The Joint Action as an Instrument of Abstract Protection of Consumers], *Hrvatska pravna revija* [Croatian Law Review], no. 10 (2003), pp. 37–43.

these opinions, the court in any individual lawsuits between the perpetrators of discrimination and members of the group would be bound by the fact of established discrimination against the group. On the other hand, such a subjective effect should not be given to a judgment rejecting the claim in that case the individual victims of discrimination would not be able to exercise protection in individual lawsuits. With regard to execution of the judgment, commentators¹²⁴ stress that execution of a judgment passed on a collective lawsuit may be requested both by the plaintiff as well as by each individual group member. At the same time, the conduct of a proceeding in a collective lawsuit should not be an obstacle to the conduct of separate individual lawsuits.

All these arguments appear convincing and are in the best interest of victims and thus reasonable court practice would be expected to follow them. However, it would be more than advisable to incorporate these provisions into legislation, for such intervention would ensure greater legal security and greater protection for victims of discrimination. Regional trends in this field support that. In the legislations of Serbia and Croatia, namely, new provisions have been incorporated into civil procedure legislation in relation to proceedings for protection of collective rights and interests.¹²⁵ Thus, pursuant to the provisions of Article 502c of the Civil Proceedings Law of the Republic of Croatia and Article 504 of the Civil Proceedings Law of the Republic of Serbia, if the plaintiff is a member of a group and the defendant is the person who was established to have acted with discrimination toward the group, the court is bound by the established existence of discrimination against the group and therefore does not need to decide again on the defendant's liability in an individual lawsuit.

Of course, a serious obstacle to effectively ensuring the prejudicial effect of a judgment on a collective lawsuit is the current subjective three-month deadline for filing an individual anti-discrimination lawsuit. The deadline is evidently too short and brings into question the mentioned model of the desirable relationship between the collective and the individual anti-discrimination lawsuits, bearing in mind that it is impossible to expect courts to make a final judgment on a collective lawsuit within just three months of the day discrimination was committed. In relation to this, it is worth emphasizing that anti-discrimination laws in Croatia and Serbia do not contain specific subjective deadlines for filing an anti-discrimination lawsuit.

¹²⁴ Uzelac, "The Proceeding before Court", p. 105; and Nezirović, "The Proceeding for Protection against Discrimination", p. 22.

¹²⁵ See "Civil Procedure Law of the Republic of Croatia", *Official Gazette of the Republic of Croatia*, 53/11; and "Civil Procedure Law of the Republic of Serbia", *Official Gazette of the Republic of Serbia*, 72/11.

3.

Participation of NGOs in the Anti-Discrimination Proceeding in Bosnia and Herzegovina: Key Obstacles and Potential Solutions

Supplementation of the existing anti-discrimination framework in Bosnia and Herzegovina with comprehensive anti-discrimination legislation is certainly an encouraging breakthrough in the field of protection against discrimination. However, despite the fact that the Law on the Prohibition of Discrimination gave explicit authorization to non-governmental organizations to participate as a third party in the proceeding for protection against discrimination and to file collective lawsuits, judicial practice related to this law is more than poor¹²⁶ and participation of the non-governmental sector in its implementation is, to put it mildly, invisible.

Bearing in mind that anti-discrimination law is a relatively new creation of the legal system, it may be expected that anti-discrimination litigation will not be an easy task for non-governmental organizations in Bosnia and Herzegovina. The most obvious obstacles that we might single out in this regard are underdeveloped domestic judicial practice on discrimination¹²⁷ and low awareness among members of the legal profession on comparative jurisprudence in the field of anti-discrimination claims, as well as on novelties introduced by the law that are related to the procedural roles of non-governmental organizations in anti-discrimination proceedings.

With regard to this, the issue that is inevitably raised is why non-governmental organizations in Bosnia and Herzegovina do not participate more actively in anti-discrimination judicial proceedings and what should be done to advance their engagement in this regard? To answer that question, we will point out some key aspects of this issue further on in the report.

¹²⁶ Nezirović, "The Proceeding for Protection against Discrimination", p. 22. By the time this report was produced, courts in Bosnia and Herzegovina had only passed three judgments pursuant to the LPD: 1) Mostar Municipal Court, Judgment no. P 58 0 P 056658 09 P of July 6, 2010 (*E. B.* case, related to discrimination in education on grounds of disability); 2) Livno Municipal Court, Judgment no. 68 0 P 017561 of October 7, 2011 (*Katović* case, related to discrimination on grounds of religion); and 3) Mostar Municipal Court, Judgment no. 58 PS 08563 11 Ps of April 27, 2012 ("two schools under one roof" case).

¹²⁷ Nezirović, *Ibid.*

3.1. Lack of a Stimulating Environment for Public Interest Litigation

Prevention of discrimination is a public interest activity and thus its suppression through judicial proceedings is a public interest activity as well.¹²⁸ Combating discrimination through judicial proceedings may therefore be identified as part of a phenomenon that we call public interest litigation¹²⁹. Yet, Bosnia and Herzegovina, like other countries in the region, is among countries where so-called public interest litigation is a relatively new phenomenon. Civil society is still getting used to the fact that it too is a lever for ensuring public interest through so-called legal activism.

Longtime perception developed during the single-party system had equalized public interest with state interest¹³⁰ and the role of defender of public interest had been entrusted upon state structures such as the prosecutor's office, public attorney's office¹³¹ or guardianship organs. The currently prevalent opinion that views civil society as an "anti-thesis to the state"¹³² and a corrective for the government whose primary function, by criticizing government structures, is to wait for the governmental sector to "offer solutions to all social challenges", does not contribute to shattering that perception.¹³³ However, the phenomenon of public interest litigation is precisely characterized by taking the monopoly of public interest protection from the hands of the state structures and entrusting it to civil society organizations. This strengthens mechanisms for the implementation of the law because civil society organizations are allowed to contribute to implementation of anti-discrimination legislation by using the judicial system. Recognition of legal standing for civil society organizations or recognition of the option to join a proceeding is the first necessary step in recognizing the importance of the procedural role of non-governmental organizations and their potential for public interest litigation.

However, mere recognition of the importance of non-governmental organizations' procedural role in public interest proceedings such as anti-discrimination

¹²⁸ Compare Vodinelić, "Lawsuits for Protection against Discrimination", p. 46.

¹²⁹ For a definition of public interest litigation, see footnote 6.

¹³⁰ Goran Žeravčić, *Analiza institucionalne suradnje između vladinog i nevladinog sektora u BiH* [Analysis of Institutional Cooperation between the Governmental and Non-governmental Sectors in B&H] (Sarajevo: Kronauer Consulting, 2008), p. 45.

¹³¹ A fact that supports this statement is that the mentioned institutions had been characterized as public and that the institutions of the public prosecutor's office and public attorney's office existed in Bosnia and Herzegovina until recently.

¹³² *Comments on the LPD*, Article 10.

¹³³ Žeravčić, *Analysis of Institutional Cooperation between the Governmental and Non-governmental Sectors in B&H*, p. 46.

proceedings is no guarantee that non-governmental organizations will take on a significant number of proceedings with the aim of protecting public interest. In addition to recognition of their procedural position, additional activities should be undertaken, especially in societies in transition, with the goal of changing the perception that protection of public interest primarily belongs to the state structures.

One way of overcoming this perception are activities related to creating a stimulating environment for development of civil society and boosting the capacities of non-governmental organizations in order to increase their engagement in public interest activities, such as participation in anti-discrimination proceedings. For example, in neighboring Croatia, with the goal of supporting efficient development of civil society and strengthening its capacities, a well-organized structure composed of three parts was built: Office for Cooperation with NGOs, Council for Development of Civil Society and National Foundation for Civil Society. These bodies, which comprise representatives of the governmental and non-governmental sectors, have undertaken numerous activities aimed at creating a conducive environment for development of civil society. In the field of combating discrimination, by offering information related to allocation of EU pre-accession funds such as IPA, resources have been provided for funding activities related to strengthening the role and capacities of non-governmental organizations in the field of anti-discrimination, including improvement of sanctioning of discriminatory actions through judicial proceedings.¹³⁴

Positive experience from the region suggests that creating a framework for institutional cooperation between the governmental and non-governmental sectors has the potential to contribute to development of civil society and thus to its improved engagement in public interest activities, including battling discrimination. Creating such a framework results in better cooperation and a more efficient relationship among civil servants, civil society organizations, donors and other actors in society.¹³⁵ Specifically, when it comes to combating discrimination, giving guidance and information on programs that provide financial or technical support to non-governmental organizations in activities in this field certainly has the potential to lead to strengthening NGO capacities in performing the important procedural roles accorded to them by the Law on the Prohibition of Discrimination. For example, in neighboring Croatia, the National Foundation for Development of Civil Society, together with the European Union, has supported projects of the non-governmental organization B. A. B. E. under the name "Raising local voices to the

¹³⁴ For more, see website <http://www.uzuvrh.hr/stranica.aspx?pageID=156> (accessed October 24, 2012).

¹³⁵ Atos Consulting, *Razvoj saradnje između vlasti i civilnog sektora u BiH: lekcije naučene iz hrvatskog iskustva* [Developing Cooperation between the Government and the Civil Sector in B&H: Lessons Learned from Croatian Experience] (Atos Consulting, 2009), p. 12.

national level: milestones toward efficient implementation of anti-discrimination legislation at the local and national levels". It is true that this project did not provide direct support for NGO participation in specific anti-discrimination proceedings, but it did produce several important conclusions related to a request to create civil society organizations dealing with protection of human rights at the level of every local community or amending laws on free legal aid with the goal of providing high-quality legal services to everyone regardless of social status.¹³⁶ Further, the National Foundation supported a Center for Peace Studies project entitled "Through information against discrimination in Split-Dalmatia County". Although these projects did not provide direct financial or technical support for NGO participation in specific anti-discrimination proceedings, they did result in expanding the expertise of staff of non-governmental organizations involved in the project in the field of discrimination and thus to building non-governmental organizations' capacities for efficient involvement in anti-discrimination judicial proceedings.

Admittedly, some experts have a different opinion on the need for the state to provide financial support to NGOs that want to participate in anti-discrimination proceedings. For example, Steinhard accentuates that these organizations should receive no money from state funds because, as a rule, they are fighting the state and its discriminatory practices. Novicki, on the other hand, points out with regard to such funding for NGO activities in this field that a distinction should be made between the educational and litigation needs of non-governmental organizations. According to him, receiving state funds for educational purposes would not bring NGOs into a conflict of interest.¹³⁷

Nevertheless, bearing in mind that anti-discrimination litigation is a public interest activity, receiving state support for the operation of NGOs with the goal of eliminating discrimination should not automatically and in itself imply a conflict of interest. After all, even the Institution of Ombudsman of B&H is funded from budget resources and its main task is combating discrimination. Prevention of discrimination is a matter of public interest and it is therefore in the state's most direct interest to support this activity, including non-governmental organizations' activities in this field.

However, the general framework and state institutionalization of cooperation and support to non-governmental organizations may create a suitable environment, but that by itself will not bring urgent and needed measures for advancing the engagement of NGOs in battling discrimination. Therefore, creating a special

¹³⁶ For more information, see <http://www.babe.hr/hr/putevima-diskriminacije> (accessed October 25, 2012).

¹³⁷ For more, see Public Interest Law Initiative in Transitional Societies, *Symposium on Public Interest Law in Eastern Europe and Russia: June 29th - July 8th, 1997, University of Natal, Durban, South Africa: Symposium Report* (New York: Columbia Law School, Public Interest Law Initiative in Transitional Societies, 1997), pp. 14–16.

foundation modeling Croatia's National Foundation for Civil Society may be able to play an important role in providing financial support to non-governmental organizations that want to become involved in activities aimed at preventing discrimination through judicial proceedings.

It should be stressed in this context that the Council of Ministers of B&H back in May 2007 signed an agreement with civil society representatives, envisioning the creation of an institutional framework for cooperation based on the Croatian model. However, the agreement has been implemented only to insignificant extent¹³⁸ and thus the non-governmental sector will continue in the future to find support for its activities, including support for participation in judicial proceedings, from foreign donors.¹³⁹

3.2. The Need for a Better Organized and More Cooperative Civil Sector

With the multitude of registered non-governmental organizations in Bosnia and Herzegovina, one might conclude at first glance that there is some potential in Bosnia and Herzegovina for public interest litigation.¹⁴⁰ On the other hand, indicators on the number of lawsuits in the discrimination field instigated by non-governmental organizations do not offer sufficient reason for optimism.¹⁴¹

Limited resources should not be a universal excuse for insufficient activity of the civil sector in this field. Examples from practice confirm that non-governmental organizations working on protection of human rights have developed

¹³⁸ For more information, compare Žeravčić, *Analysis of Institutional Cooperation between the Governmental and Non-governmental Sectors in B&H*.

¹³⁹ A potential source of support for non-governmental organizations that may be mentioned is Open Society Fund's *Human Rights and Governance Grants Program*. Information on the program can be found at the following address: <http://www.soros.org/about/programs/human-rights-governance-grants-program> (accessed October 23, 2012).

¹⁴⁰ It is estimated that the number of registered organizations in Bosnia and Herzegovina is around 12,000, of which between 500 and 1,500 are active. Source: <http://www.delbih.ec.europa.eu/Default.aspx?id=33&lang=BS> (accessed October 23, 2012).

¹⁴¹ Despite numerous reports on ubiquitous discrimination in Bosnia and Herzegovina – e.g. Helsinki Committee for Human Rights in Bosnia and Herzegovina, *Izveštaj o stanju ljudskih prava u Bosni i Hercegovini 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, 2011); or European Commission against Racism and Intolerance (ECRI), *ECRI Report on Bosnia and Herzegovina* (Strasbourg: European Commission against Racism and Intolerance, February 2, 2011) – the number of anti-discrimination judicial proceedings is relatively small. According to data of the non-governmental organization “Vaša prava”, this organization is currently involved in merely 20 or so such cases.

their credibility and have survived thanks to commitment to their mission and enthusiasm of their members, as well as by overcoming limited resources through development of mutual cooperation. Thus, non-governmental organizations that mostly perform work related to the law and provision of legal aid can appear directly before courts, whereas organizations working on documentation and collection of data can perform collection and processing of statistical data or other kinds of research needed for successful implementation of procedural roles under the LPD.¹⁴² As a positive example in Bosnia and Herzegovina, we might point out the activities of the “Open Society B&H” Fund in launching a several-year anti-discrimination program, which first identified fundamental aspects of combating discrimination in the context of the Law on the Prohibition of Discrimination (monitoring and documentation, policy analysis, strategic litigation and advocacy) and then set up teams committed to implementing specific tasks within these four program segments.¹⁴³ In addition to this program, in May 2012 the first steps were taken toward creating a network of civil society organizations under the name Equality Forum, comprising 25 organizations. The network’s main goal is combating discrimination and implementation of laws and regulations pertaining to prohibition of discrimination.¹⁴⁴

In addition to that, establishment of cooperation between NGOs and legal clinics created at law schools or student organizations with a similar profile stands out as one way of operating more successfully in this sphere in the context of limited resources.¹⁴⁵ This way, students are able to carry out needed research, thus giving experienced jurists from the organization more time to prepare better for cases. Additionally, organizations that do not have jurists among their employees but want to support victims can receive help from law clinic students with regard to procedural matters. Finally, of course, the most important point – this kind of cooperation creates staff that is able to provide support to both organizations and victims of discrimination in their further professional work.¹⁴⁶

¹⁴² In the Czech Republic, for example, non-governmental organizations acted precisely this way in conducting judicial proceedings for protection of Roma rights. For more on this, see European Roma Rights Center, Humanitarian Law Center and Minority Rights Center, *Handbook for Attorneys on Representation of Roma Victims of Discrimination*, p. 113. Also compare European Roma Rights Centre, Interights and Migration Policy Group, *Strategic Litigation of Race Discrimination in Europe: from Principles to Practice* (Budapest: European Roma Rights Centre; London: Interights; Brussels: Migration Policy Group, 2004), p. 62.

¹⁴³ For more on this, see <http://www.diskriminacija.ba/> (accessed October 23, 2012). “Analitika” Center for Social Research is part of the initiative and production of this report was made possible by an “Open Society B&H” Fund grant.

¹⁴⁴ For more, see <http://www.bh-hchr.org/> (accessed October 23, 2012).

¹⁴⁵ Compare Goldston, “Public Interest Litigation in Central and Eastern Europe”, p. 527.

¹⁴⁶ Ibid.

3.3. Misconceptions about NGO Capacities and Requirements for Participation in the Judicial Proceeding

An additional factor that may be singled out which impacts the relatively low level of engagement of non-governmental organizations in preventing discrimination through judicial proceedings is a widespread perception that this form of combating discrimination is solely meant for organizations that employ jurists and primarily deal with providing legal services and legal aid. However, experience from other countries shows that this is not entirely true, because public interest litigation, although as a rule implying the participation of legal experts, is not exclusively reserved for jurists.¹⁴⁷ Combating discrimination often implies conducting research, producing a variety of studies and monitoring specific trends with the goal of detecting and documenting discrimination patterns. Such activities are often carried out by non-governmental organizations that primarily employ sociologists, social psychologists or other individuals without legal know-how.

The fact that such organizations do not employ jurists and that they do not exclusively deal with providing legal aid, however, does not mean that they cannot provide support to victims of discrimination in the judicial proceeding. Their participation in the proceeding as an intervener, for example, may be a decisive factor for success in the anti-discrimination lawsuit because in that capacity these organizations can provide the court with explanations regarding different forms of discrimination such as, for example, reasonable adjustments failure or manifestations of mobbing. Additionally, during the proceeding such organizations can present the results of their research in this field and statistical data on discrimination in various sectors or for different categories of the population. Such data, according to European Court of Human Rights practice for example, has a key role in transferring the burden of proof to the defendant.¹⁴⁸

Of course, it should be emphasized that efficient participation of NGOs in the anti-discrimination judicial proceeding as a rule implies active participation of educated jurists. Experience from other countries demonstrates that organizations that do not have legal teams in their ranks as a rule go to organizations

¹⁴⁷ Rekosh, Preface of *Symposium on Public Interest Law in Eastern Europe and Russia*.

¹⁴⁸ Compare, for example, Ana Horvat, "Segregacijom do integracije? Mogućnosti integriranog obrazovanja Roma" [Through Segregation to Integration? Opportunities for Integrated Education of Roma], *Zbornik radova Pravnog fakulteta u Splitu* [Compendium of the Law School of Split] 46, no. 2 (2009), p. 451.

dealing with the law or having specifically concluded contracts with lawyers.¹⁴⁹

Information provided by the Association “Sjaj” on its website may serve as a vivid example of proper reasoning regarding the role of a non-governmental organization in the judicial proceeding for protection against discrimination. This civil society organization deals with protection of rights of persons with mental disabilities and states in its internet presentation that all persons with mental disabilities who believe they are discriminated may go to it for help. The organization further explains that it can join an existing judicial proceeding as an intervener “if it possesses additional arguments” that may help the plaintiff in the proceeding. It also points out that, as a rule, it does not join a proceeding as an intervener if it has provided the plaintiff with sufficient financial help to pay lawyer fees and will do so only if there are “additional reasons and arguments for such involvement”. Finally, the non-governmental organization explains that it can also file a collective lawsuit if discrimination was committed against a “group of citizens even when there is no specific victim of discrimination”.¹⁵⁰ It has already been explained that in terms of the procedural role of non-governmental organizations in the anti-discrimination proceeding, the LPD of B&H contains virtually identical solutions as Croatia’s anti-discrimination law. Therefore, the above activities of Association “Sjaj” demonstrate what kind of roles non-governmental organizations can have in anti-discrimination proceedings in Bosnia and Herzegovina.

3.4. The Costs of Judicial Protection against Discrimination

Discrimination litigation can often be an activity that requires considerable financial resources and long and extensive engagement of staff. This fact by itself may deter many non-governmental organizations from taking advantage of the possibility of participating in anti-discrimination judicial proceedings. The situation is additionally complicated in structural discrimination cases, which in order to be proven as a rule require activities related to collecting and processing statistical data, undertaking complex situation testing procedures or instigating several similar lawsuits.

¹⁴⁹ For example, in Serbia, Roma non-governmental organizations providing legal aid to members of the Roma nationality have addressed non-governmental organizations that had concluded contracts with individual lawyers, such as Humanitarian Law Center. Compare Humanitarian Law Center reports on the “Krsmanovača” case. The reports are available on the Humanitarian Law Center website: <http://www.hlc-rdc.org/?s=krsmanovaca> (accessed February 12, 2012). We observe similar examples in Lithuania, compare, e.g. Samuolyte, “Applying situation testing successfully to prove discrimination based on ethnicity”, p. 17.

¹⁵⁰ See <http://www.sjaj.hr/pravna-zastita/diskriminacija/> (accessed July 14, 2012).

On the other hand, non-governmental organizations that want to end a specific type of discriminatory conduct may find themselves in a situation when instigating a judicial proceeding is the only technique they have left.¹⁵¹ We may characterize as such the first collective lawsuit filed under the LPD of B&H by the non-governmental organization “Vaša prava” against Herzegovina-Neretva Canton, Elementary School Stolac and Elementary School Čapljina for the purpose of establishing discrimination in education institutions through the existence of a so-called “system of two schools under one roof”.¹⁵² Namely, although numerous international bodies, including the Committee on the Elimination of Racial Discrimination, have characterized as segregation the existence of the system of “two schools under one roof”, according to which children in 52 schools in the Federation of Bosnia and Herzegovina are physically separated along ethnic lines and follow classes according to different curricula,¹⁵³ the practice has not been eliminated to this day.

In an effort to minimize financial barriers and facilitate the exercise of anti-discrimination protection as a public interest activity, some jurisdictions have introduced in their anti-discrimination laws a provision on release from advance payment of the costs of proceedings.¹⁵⁴ For example, Article 48 of the Law on Gender Equality of the Republic of Serbia contains such a provision.

In the context of Bosnia and Herzegovina, the costs of the proceeding in an individual or collective anti-discrimination lawsuit are related to fees for the lawsuit and judgment, any costs for attorney representation and costs related to presentation of suggested evidence such as expert or witness costs. As for the costs of court fees, they are calculated based on the value of the subject of litigation which the plaintiff is obligated to define in the lawsuit. The amount of court fees as well as attorney fees also depends on the value of the subject of litigation. According to the Tariff on Fees accompanying the Law on Court Fees of

¹⁵¹ Edwin Rekosh, Kyra Buchko and Vessela Terzieva. *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (New York: PILI, 2001), p. 110.

¹⁵² This first collective lawsuit filed under the Law on the Prohibition of Discrimination was approved by the relevant court in Mostar. For more information, see “Sud je presudio – diskriminacija!!!” [The Court has Ruled – Discrimination!!!], “Vaša prava”, available at: <http://www.vasaprava.org/?p=1345> (accessed June 11, 2012).

¹⁵³ Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by states parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Bosnia and Herzegovina, CERD/C/BIH/CO/6 (Geneva: Committee on the Elimination of Racial Discrimination, June 11, 2006), point 23, p. 7.

¹⁵⁴ Pursuant to the provisions of the Civil Procedure Law, each party is obligated to cover its costs in advance (Article 384 of the CPL of RS/RB&H). These costs are related to lawsuit and ruling fees, as well as depositing the amount required for covering the costs incurred by the presentation of evidence, such as expert or witness costs.

the Republika Srpska,¹⁵⁵ the lowest fee for filing a lawsuit is 50 KM for lawsuits that are worth under 1,500 KM, whereas the highest fee is 1,000 KM for lawsuits that are worth between 50,000 and 100,000 KM.¹⁵⁶ The attorney fee is also defined on the basis of relevant attorney tariffs. For example, according to the Tariff for Attorney Services of the Bar Association of FB&H¹⁵⁷, the lowest tariff for composing a lawsuit, representation in a preparatory and main hearing is 240 KM for proceedings whose value is less than 5,000 KM, whereas for lawsuits worth over 5 million KM the fee would be over 37,000 KM.

In the context of combating discrimination, it should be stressed that the value of a lawsuit with claims related to establishment of discrimination is often inestimable. In two out of the three judgments passed on anti-discrimination lawsuits¹⁵⁸, the plaintiffs defined the value of the lawsuit as 3,000 KM and 12,000 KM respectively, but without a specifically visible explanation on what basis the value was calculated.

The issue of costs, needless to say, is directly related to the status of NGOs in the proceeding. According to the solutions adopted in Bosnia and Herzegovina, non-governmental organizations may directly appear in the judicial proceeding as plaintiffs if they file a collective lawsuit or as interveners. If an NGO appears as a party in the proceeding, it would be required to deposit the amount covering all of the above costs and if it loses the case it would be required to cover the other party's costs as well. This is certainly a discouraging factor for greater legal activism of NGOs in the field of combating discrimination.

In contrast to participation in the capacity of a party, participation in the capacity of an intervener should not pose an excessive financial burden for the organization. In that case, namely, non-governmental organizations may directly intervene in the proceeding using their current findings and skills, without needing to hire an attorney or employ staff that meets requirements for representation.¹⁵⁹

¹⁵⁵ "Zakon o sudskim taksama Republike Srpske" [Law on Court Fees of the Republika Srpska], *Official Gazette of the Republika Srpska*, 73/08, 49/09.

¹⁵⁶ The fee for lawsuits worth over 100,000 KM is 1% of the defined value of the lawsuit, but no more than 10,000 KM.

¹⁵⁷ Bar Association of the Federation of Bosnia and Herzegovina. *Tarifa o nagradama i naknadi troškova za rad advokata Federacije Bosne i Hercegovine* [Tariff on Remuneration and Compensation of Costs for Attorneys' Work of the Federation of Bosnia and Herzegovina] (Sarajevo: Bar Association of FB&H, 2004).

¹⁵⁸ E. B. case and "two schools under one roof" case. For an overview of all judgments, see footnote 126.

¹⁵⁹ This does not mean that non-governmental organizations will have no costs in this regard (they may have costs related to printing letters for the court in which they express interest in participating in the proceeding, costs of transport, any costs of attorney services if they file legal remedies and any costs of research and obtaining statistical data). However, in order to get support for performing this role, NGOs may apply to donors who support such activities or they may integrate them in their ongoing projects.

In general, we differentiate two types of non-governmental organizations operating in this field: one type that tries to provide help to a large number of individuals in a specific region or in a specific field of law and the other type that focuses on reforms through legal activism and brings strategic cases to court, i.e. cases that have the potential to lead to social change and thus provide help to a larger number of people.¹⁶⁰ Many organizations try to overcome financial limitations precisely by focusing on so-called strategic litigation, a sub-type of public interest litigation which, according to one of many definitions, is aimed at producing systematic social change in the name of individuals belonging to vulnerable or insufficiently represented groups.¹⁶¹ This activity potentially produces the biggest effects on the largest number of people, but it is a rather complex task that may require considerable human and financial resources.

In the Bosnian and Herzegovinian context, the experience of “Vaša prava”, for now the only organization in Bosnia and Herzegovina that has undertaken anti-discrimination judicial proceedings, speaks about the adequate approach to the problem of the financial burden of litigation in this field. In providing legal aid in individual discrimination cases, the organization “Vaša prava” as a rule files a motion for release from payment of court fees as its clients are generally indigent. With the goal of minimizing the negative financial effects that potential loss of the lawsuit would have on the plaintiff, the organization has created a fund with the support of the “Open Society B&H” Fund to cover costs in case of losing the lawsuit.¹⁶²

Along with providing legal aid in individual cases, the organization also appeared as the plaintiff in a collective lawsuit filed in the case of the phenomenon of “two schools under one roof”. It should be emphasized that the organization is dedicated to educating its employees both in the field of combating discrimination and in the field of strategic litigation.¹⁶³ In addition, it is important to point out that “Vaša prava” has secured the support of the

¹⁶⁰ Barry Steinhardt, describing the work of ACLU (one of the oldest human rights protection organizations in USA), Public Interest Law Initiative in Transitional Societies, *Symposium on Public Interest Law in Eastern Europe and Russia: June 29th - July 8th, 1997, University of Natal, Durban, South Africa: Symposium Report* (New York: Columbia Law School, Public Interest Law Initiative in Transitional Societies, 1997), p. 15.

¹⁶¹ See Helen Hersckoff, “Public Interest Litigation: Selected Issues and Examples”, quoted in Goldston, “Public Interest Litigation in Central and Eastern Europe”, p. 496. Others, on the other hand, emphasize that strategic litigation refers to “law-based advocacy which aims to secure court decisions with the goal of clarifying, expanding or implementing the law for a broader circle of individuals than the ones mentioned in the specific case”. See Goldston, “Public Interest Litigation in Central and Eastern Europe”, p. 496.

¹⁶² Mervan Miraščija, Coordinator of the Legal Program at “Open Society B&H” Fund, e-mail correspondence, September 3, 2012.

¹⁶³ For an overview of the organization’s activities, see <http://vasaprava.contentcontainer.net/?paged=4> (accessed July 12, 2012).

“Open Society B&H” Fund for its strategic litigation program, in the framework of which the mentioned collective lawsuit was filed. The filing of the lawsuit was preceded by extensive preparation, analysis and selection of cases, which most likely would not have been possible without concrete financial and other support. The combination of support and good selection of instruments of evidence led to the first judgment on a collective lawsuit and establishment of discrimination due to existing segregation¹⁶⁴ in schools, all with minimal costs of the judicial proceeding. Namely, the plaintiff “Vaša prava” based most of its evidence on readily available reports by international organizations, concluding observations of bodies that monitor implementation of human rights treaties and testimony by only a handful of witnesses.¹⁶⁵ This experience confirms that even a proceeding conducted upon a collective lawsuit, in other words when the effects of the judgment may refer to a large number of people, may be held without considerable financial costs related to court fees, suggesting and obtaining public documents or witness costs.

3.5. The Need for the Existence of Records on Judicial Proceedings

In order for non-governmental organizations to operate in this field, they need to have enough information on current lawsuits conducted under the LPD of B&H. These organizations’ capacities to monitor and keep records of all anti-discrimination proceedings conducted in courts in order to identify the ones in which they may become involved are certainly limited. Therefore, creating easily available records on judicial proceedings instigated under the LPD might serve as an essential foundation and stimulus to non-governmental organizations to contact the plaintiffs in the instigated proceedings and to inform them about the possibility of their involvement in the lawsuit. A good step in this direction that may be pointed out is a 2011 initiative by non-governmental organizations forwarded to the High Judicial and Prosecutorial Council (HJPC) of B&H to create such records.¹⁶⁶ But the initiative has not yet produced the expected results. It should be emphasized, however, that along with HJPC, additional effort in creating

¹⁶⁴ According to Mostar Municipal Court’s judgment 58 PS 08563 11 Ps of April 27, 2012, in addition to establishing discrimination in schools, clear steps were ordered which the defendants must take to end the established discrimination and deadlines were set for the execution of these actions.

¹⁶⁵ During the proceeding, “Vaša prava” did not file a request for reimbursement of costs, due to which the actual amount of costs could not be established by analyzing the judgment.

¹⁶⁶ Institution of the Human Rights Ombudsman of B&H, *Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011*, p. 9.

such records would also have to be made by the Institution of Ombudsman of B&H¹⁶⁷ and Ministry of Human Rights and Refugees of B&H.¹⁶⁸

3.6. The Importance of Mutual Cooperation of Non-Governmental Organizations and Cooperation with Media and the Ombudsman of B&H

For a successful anti-discrimination lawsuit, especially one of strategic significance, it is especially important to develop a media strategy and, in some cases, to create wider coalitions. The *Siderov* case in Bulgaria may serve as an illustration. Around 70 non-governmental organizations, along with 20 or so individuals, acted as plaintiffs in the case, thus emphasizing that a whole network of civil society organizations, not just organizations working on protection of minorities and homosexuals, was acting together against racist and homophobic statements made by the defendant, a prominent politician, and demonstrating that there is no room for hate speech in a democratic society, that it is damaging to everyone and in contravention of the very principle of freedom from discrimination.¹⁶⁹ Even greater significance and legitimacy was lent to the lawsuit by organizing press conferences in which well-known and respected experts from public life presented their views. All these activities helped both the success of the lawsuit and the creation of a positive social image of civil society actions.¹⁷⁰ It should be emphasized in this regard, as one of the goals of strategic litigation is to provoke public debate, that the very initiation of social discussion on a particular matter may mean that the goal is achieved, regardless of the outcome of the specific lawsuit.¹⁷¹

It is important to point out that instigating a strategic lawsuit is often just part of a comprehensive strategy to bring about true change aimed at achieving the well-being of the whole society.¹⁷² Successful completion of the proceeding and obtaining a decision does not necessarily mean that the desired change will occur

¹⁶⁷ The argument results from the provision of Article 7, paragraph 2, subsection (e), of the LPD, under which the Institution of Ombudsman has an obligation to collect and analyze statistical data on discrimination cases.

¹⁶⁸ The Ministry has an obligation to create these records under Article 8 of the LPD.

¹⁶⁹ Ilieva, "The Role of NGOs in the Implementation of Anti-discrimination Law", p. 16.

¹⁷⁰ *Ibid.*, p. 17.

¹⁷¹ Rekosh, Buchko, Terzieva, *Pursuing the Public Interest*, p. 109.

¹⁷² *Ibid.*, p. 110.

immediately upon getting the court decision.¹⁷³ Victory in the courtroom will often require developing a strategy for implementing the judgment, including relying on enforcement mechanisms as well as a range of other advocacy activities to support the achievement of social change.¹⁷⁴ For example, victory in the *Brown* case, by which segregation in the education system in the United States was declared illegal, was just one tactic for ending segregation that non-governmental organizations started in the 1930's.

A useful tactic that organizations of civil society apply in strengthening their procedural role in anti-discrimination proceedings is cooperation with ombudsman institutions. These institutions are able to provide civil society organizations with necessary statistical data or they can, through their own activities, establish the relevant facts in an individual case or become involved in the proceeding as interveners and thus lend support to the non-governmental organization, whether it is appearing in the proceeding as the plaintiff or acting as support to the victim of discrimination. For example, the European Roma Rights Center received from the Ombudsman Institution statistical data needed to prove discrimination in the education field.¹⁷⁵ Reports from Lithuania also indicate that the ombudsman's intervention in the capacity of a third party had crucial impact on success in the first case of racial discrimination brought to Lithuanian courts.¹⁷⁶

On the model of the above examples, the Institution of Ombudsman of B&H, the national institution for protection of human rights and the central institution for protection against discrimination, although faced with financial and staffing difficulties that are disrupting its work in full capacity,¹⁷⁷ may play an important role in providing assistance to organizations of civil society in lawsuits under the LPD of B&H. Some progress in this regard has already been made as the Institution of Ombudsman has adopted a platform for cooperation with the non-governmental sector, published guidelines and criteria for such cooperation and called on non-governmental organizations to express interest in cooperating with the Institution of Ombudsman in 2012 in various fields, including the field of prevention of

¹⁷³ See European Roma Rights Centre, Interights and Migration Policy Group, *Strategic Litigation of Race Discrimination in Europe*, p. 181.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., p. 84.

¹⁷⁶ See Samuolyte, "Applying situation testing successfully to prove discrimination based on ethnicity".

¹⁷⁷ Institution of the Human Rights Ombudsman of B&H, *Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011*, Also see Hanušić, *The Ombudsman in the System of Protection against Discrimination in B&H*.

all forms of discrimination.¹⁷⁸

These documents constitute a legal obligation of the Institution of Ombudsman of B&H¹⁷⁹ and are a good foundation for formalizing cooperation between the Institution of Ombudsman and non-governmental organizations in the field of prevention of discrimination through judicial proceedings. Creation of this form of partnership relations has the potential to enable non-governmental organizations and the Institution of Ombudsman to join their resources and thus strengthen the procedural role of non-governmental organizations in anti-discrimination proceedings.

It should be emphasized, however, that creation of partnership relations with the Institution of Ombudsman does not necessarily have to take place through the above mechanisms which it has suggested. Nothing prevents non-governmental organizations from going to the Ombudsman for help in each specific case, asking the institution for necessary advice, to become involved in the proceeding in the capacity of an intervener or to monitor the trial.

3.7. NGOs and Proving Discrimination: The Need to Regulate Situation Testing

The non-governmental sector, both generally and in Bosnia and Herzegovina, gained important skills quite some time ago in the field of monitoring respect for human rights. However, observed manifestations of discrimination, especially in the context of proving discrimination in court, may further require a specific form of monitoring in the form of so-called situation testing. The situation testing technique has developed in the last several years in court practice¹⁸⁰ as one of the main forms of proving the plausibility that discrimination exists, especially in the field of access to employment, public spaces, institutions, catering establishments or sports and cultural facilities.¹⁸¹ In situation testing, volunteers are used as testers (volunteer testers of discrimination) who establish in the field

¹⁷⁸ These documents are available on the website of the Institution of the Human Rights Ombudsman of B&H, <http://www.ombudsman.gov.ba/Default.aspx?jezik=Bos&URL=26> (accessed October 25, 2012).

¹⁷⁹ The Institution of Ombudsman of B&H, pursuant to Article 7, paragraph 3, of the LPD, has an obligation to cooperate with civil society organizations working on protection and promotion of human rights.

¹⁸⁰ For more on this, see Isabelle Rorive, *Proving Discrimination Cases: The Role of Situation Testing* (Stockholm: Centre for Equal Rights; Brussels: Migration Policy Group, 2009).

¹⁸¹ 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. 47.

using the method of observation whether discriminatory actions are present. “One or more persons together” may be found in the role of testers “when personally or directly they become involved in a situation in order to check personally and on the spot if prohibition of discrimination is violated in the specific situation.”¹⁸² In the proceeding, the testers are heard as witnesses who present their observations to the court. Situation testing is an important way for making plausible that discrimination occurred¹⁸³, thus shifting the burden of proof to the defendant. This technique has become widely used precisely through the activities of non-governmental organizations.

In Serbia, back in 2000 non-governmental organizations used the situation testing technique to verify claims regarding the existence of racial discrimination against Roma related to access to a sports and recreational center. The courts, despite the lack of specific provisions on the use of situation testing, recognized testers as an appropriate personal instrument of evidence.¹⁸⁴ In Hungary, the use of situation testing is especially widespread in the non-governmental sector¹⁸⁵ and systematic use of testers in this sector has led to numerous victories in proceedings related to discrimination on racial or ethnic grounds.¹⁸⁶

Situation testing is also turning out to be an important technique that non-government organizations are using in selecting strategic cases. Interpreting situation testing as a technique for selecting strategic cases, Ilieva explains that “instead of using ready cases that may have shortcomings in terms of the “factual situation, available evidence, personality or personal situation” of the victim of discrimination or “procedural measures that have already been taken or omitted”, non-governmental organizations may use monitoring or situation testing to “construct their case and thus control all of its characteristics” with the aim of maximizing their chance of success in the lawsuit.¹⁸⁷ In the context of Bosnia and Herzegovina, use of situation testing, combined with the rule on shifting the burden of proof¹⁸⁸ and use of statistical data,¹⁸⁹ may turn out to be

¹⁸² Vodinelić, “Civil Law Protection against Discrimination”, p. 41.

¹⁸³ European Roma Rights Center, Humanitarian Law Center and Minority Rights Center, *Handbook for Attorneys on Representation of Roma Victims of Discrimination*, p. 47.

¹⁸⁴ This regards the so-called *Krsmanovača* case, Supreme Court of Serbia, Judgment no. 229/04 of April 21, 2004. See: Vladimir Sudar, “Šabački geto” [The Šabac Ghetto], *NIN*, no. 2586, July 20, 2006; and Humanitarian Law Center reports on the first-instance judgment and Supreme Court judgment. The reports are available on the Humanitarian Law Center website: <http://www.hlc-rdc.org/?s=krsmanovaca> (accessed February 12, 2012).

¹⁸⁵ András Kádár, *Hungary – Country Report on measures to combat discrimination*, p. 38.

¹⁸⁶ Rorive, *Proving Discrimination Cases*, p. 58.

¹⁸⁷ Ilieva, “The Role of NGOs in the Implementation of Anti-discrimination Law”, p. 14.

¹⁸⁸ LPD, Article 15.

¹⁸⁹ LPD, Article 15, paragraph. 2.

useful in revealing discriminatory patterns of conduct in a variety of fields such, for example, in the field of recruitment of civil servants.

General rules of evidence and presentation of evidence contained in laws on civil proceedings, which also apply to anti-discrimination proceedings, do not contain provisions prohibiting the use of situation testing. However, in order to avoid discussions on the admissibility of using this method of uncovering discrimination, explicit prescription of this method of proving discrimination¹⁹⁰ would be very important in this early stage of implementation of the LPD of B&H.

¹⁹⁰ The LPD has already in Article 15, paragraph 2, allowed the use of statistical data and established the rule on shifting the burden of proof.

4.

Concluding Observations and Recommendations

The primary intention of this report is to contribute to advancing the legislative framework and practice in Bosnia and Herzegovina in the field of protection against discrimination in the direction of materializing the important role, in line with comparative experience, which organizations of civil society are able to perform with the goal of ensuring efficient implementation of judicial protection against discrimination. In accordance with that, the report attempted to carry out a comparative analysis of provisions of the LPD of B&H related to the procedural roles of non-governmental organizations. The analysis indicated that certain legislative interventions, based on best comparative practice, could strengthen the role of organizations of civil society in this field. In addition to analyzing legislative solutions regarding the procedural roles of non-governmental organizations, the report also attempted to point out the key practical obstacles that prevent non-governmental organizations from participating more actively in judicial proceedings for protection against discrimination.

In relation to that, the following recommendations ensue from the above analysis:

Legislation

- 1) Non-governmental organizations as such, not just named individuals in them, should be given a procedural opportunity to appear as representatives of victims of discrimination in the judicial proceeding. This will facilitate representation of victims of discrimination.
- 2) Non-governmental organizations should be accorded standing to appear in their own name even in individual cases, provided they obtain the consent of the victim of discrimination. A provision of this kind would be very useful in the current scenario in Bosnia and Herzegovina, in which fear of additional victimization for reporting discrimination is still widespread. In addition, this would further strengthen the position of non-governmental organizations in the proceeding.
- 3) Legal standing should be accorded under the same conditions to voluntary discrimination testers and use of situation testing as a means of proving

the plausibility of discrimination should be allowed clearly and explicitly. Namely, introduction of explicit provisions on admissibility of use of situation testing in anti-discrimination proceedings, following the model of Hungarian legislation¹⁹¹, or according legal standing to the voluntary discrimination tester to file an anti-discrimination lawsuit, as prescribed by the Law on the Prohibition of Discrimination of the Republic of Serbia, would be a good and useful solution for Bosnia and Herzegovina. This would expand and additionally strengthen the scope of potential NGO activities in combating discrimination.

- 4) Options of providing support to victims of discrimination should be expanded by introducing the institute of *amicus curiae*, along with the institute of intervener. The court would then be able to independently bring third persons into the proceeding with the aim of clarifying individual institutes, giving opinions or presenting relevant information.
- 5) A welcome supplement to the law would be the specification of claims that may be made in the collective lawsuit. This would clearly show that non-governmental organizations as persons authorized to seize courts have a broad range of claims at their disposal and it would remove dilemmas related to the question of whether the standing of non-governmental organizations to file a collective lawsuit includes making a claim for compensation of damage.
- 6) A requirement of admissibility of a collective lawsuit demanding the plaintiff to prove the plausibility that the conduct of the defendant violated the rights of a large number of persons to equal treatment should be erased. This would clearly point out that establishing the plausibility of discrimination against a large number of people is a subject of the evidentiary procedure and not, as the current provision prescribes, a subject of assessment of admissibility of the lawsuit.
- 7) Provisions requiring justified interest to exist on the side of subjects authorized to initiate a lawsuit in order to file a collective lawsuit should be erased. Instead, the law might merely prescribe that a collective lawsuit may be filed by associations, organizations and bodies dealing with protection of human rights or rights of a particular group.¹⁹² With this specification, i.e. with the

¹⁹¹ In Hungary, use of situation testing was strongly criticized for a long time by the legal public, primarily judges. However, thanks to continuous efforts by the non-governmental sector, situation testing was introduced in legal life. After the Hungarian government adopted the general legal act in 2004, the relevant national body for combating discrimination was authorized to use situation testing in its investigations and to use the results of its investigations in judicial proceedings. For more on this, see Rorive, *Proving Discrimination Cases*, p. 67.

¹⁹² A similar solution with regard to lawsuits filed by other persons was adopted in the “Law on the Prohibition of Discrimination of the Republic of Serbia”, Article 46, paragraph 1.

elimination of the vague and arbitrary criterion of 'justified interest', the standing of non-governmental organizations in this context would be both unambiguous and broadly defined more explicitly.

- 8) With the goal of clarifying procedural dilemmas, necessary provisions should be adopted in relation to the execution of the collective lawsuit, which would unambiguously specify that instigation of a collective lawsuit does not affect the course of proceedings instigated by individual lawsuits. In this regard, it would also be useful to adopt a provision according to which the court in an individual lawsuit, if the plaintiff is a member of a group and the defendant is a person who was established to have acted in a discriminatory manner against the group, would be bound by the established existence of discrimination against that group. With such a ruling, there would be no need in an individual lawsuit to decide again on the defendant's liability.
- 9) The excessively short subjective three-month deadline for exercising judicial protection against discrimination should be eliminated, particularly because the deadline prevents judgments passed in a collective lawsuit from having an optimal impact on individual lawsuits instigated in relation to the same discrimination case.
- 10) Relevant legislation should be supplemented with a provision releasing plaintiffs in the anti-discrimination proceeding from paying court fees and covering in advance the costs of the proceeding, in order to further facilitate the processing of discrimination. This kind of solution has already been accepted in labor proceedings, in which the value of the subject of litigation is also difficult to determine, and it would therefore be justified to apply it in anti-discrimination proceedings too.

Recommendations for the State – How to Stimulate NGOs

- 1) The governmental sector should take the necessary steps to create a stimulating environment for more efficient and active involvement of NGOs in anti-discrimination proceedings. These activities might include creating mechanisms to support the development of civil society, such as setting up a foundation providing support to organizations of civil society in anti-discrimination proceedings. This kind of body, which would be run by representatives of the governmental and non-governmental sectors, would raise funds to be used for specific non-governmental organizations' activities in processing anti-discrimination cases, such as preparation and legal analysis of cases, collecting material and other necessary costs. Of course, a foundation of this kind would have to lay down clear and transparent criteria

for providing support to non-governmental organizations in the judicial proceeding.¹⁹³

- 2) Relevant institutions in Bosnia and Herzegovina (primarily the Ministry of Human Rights and Refugees, High Judicial and Prosecutorial Council and Institution of the Human Rights Ombudsman of B&H) should create easily available records on judicial proceedings instigated under the LPD, which will enable non-governmental organizations to adequately monitor these proceedings and make decisions on selection of cases in which they will provide support to the plaintiff using the options envisioned by the LPD.

Recommendations for NGOs

- 1) Non-governmental organizations should give special attention to continuing training of their staff with regard to regulations prohibiting discrimination so that more and more organizations can responsibly take on the role of intervener in individual anti-discrimination lawsuits and strengthen their capacities for filing collective lawsuits.
- 2) Efforts should continue on creating coalitions and networks of non-governmental organizations for combating discrimination, which will enable synergy, division of roles and maximizing the effects of NGO engagement in anti-discrimination proceedings.
- 3) Lobbying should be undertaken for the purpose of creating a legal and institutional framework for civil society development, including the creation of a foundation that will support civil society organizations in anti-discrimination proceedings.
- 4) Particular attention should be given to strengthening cooperation with the Institution of the Human Rights Ombudsman of B&H by making timely cooperation proposals in line with the Platform on Cooperation with Non-Governmental Organizations of the Institution of the Human Rights Ombudsman of B&H, as well as by informing the Institution about the lawsuits filed and asking it to become involved in proceedings in the capacity of an intervener or by monitoring the trial.
- 5) Strategies and platforms for cooperation with law clinics or similar student associations should be developed and their creation at law faculties in Bosnia and Herzegovina where they do not exist should be advocated.

¹⁹³ The suggestions presented here are based on James Goldston's proposal on setting up a special fund for public interest litigation in countries of Central and Eastern Europe. Goldston, *Public Interest Litigation*, p. 526.

ANNEX 1: Anti-discrimination laws in Bosnia and Herzegovina, Croatia, Serbia and Montenegro: Participation of third parties in proceedings

B&H	Law on the Prohibition of Discrimination		Law on Gender Equality
	<p>Article 16: (1) During proceedings ... a person or a group of persons claiming to be victims of discrimination may be joined in the capacity of a third party by a body, organization, institution, association or other person whose scope of activities includes protection from discrimination of the person or group of persons whose rights are being decided upon in the proceeding.</p> <p>(2) The court shall allow participation of a third party only with the consent of the person in whose case the third party wants to intervene.</p> <p>(3) Regardless of the outcome of the proceeding, the third party shall cover its expenses for participation in the civil proceeding.</p>		<p>This law does not contain specific provisions on the participation of third persons in the proceeding for judicial protection.</p>
CROATIA	Law on the Suppression of Discrimination		Law on Gender Equality
	<p>Article 21: (1) In a litigation ... a plaintiff may be joined by an intervener, being a body, organization, institution, association or another person that, within its scope of activities, deals with the protection of the right to equal treatment in relation to groups whose rights are decided upon in the proceeding. The court shall decide on the participation of an intervener by applying accordingly the provisions of the Civil Procedure Law.</p> <p>(2) The court shall allow participation of the intervener ... only with the plaintiff's consent.</p> <p>(3) The intervener ... shall have all rights belonging to an intervener in the proceeding.</p>		<p>This law does not contain specific provisions on the participation of third persons in the proceeding for judicial protection.</p>
SERBIA	Law on Gender Equality	Law on the Prohibition of Discrimination	Law on the Prevention of Discrimination against Persons with Disabilities
	<p>Article 43: "...a trade union or associations whose objectives are related to promotion of gender equality ... may join the plaintiff in the capacity of the intervening party."</p>	<p>This law does not contain specific provisions on the participation of third persons in the proceeding for judicial protection.</p>	<p>This law does not contain specific provisions on the participation of third persons in the proceeding for judicial protection.</p>
MONTENEGRO	Law on the Prohibition of Discrimination		
	<p>This law does not contain specific provisions on the participation of third persons in the proceeding for judicial protection.</p>		

Sources: "Law on the Prohibition of Discrimination", *Official Gazette of B&H*, 59/09; "Law on Gender Equality of B&H", *Official Gazette of B&H*, 16/03; "Law on the Suppression of Discrimination of the Republic of Croatia", *Official Gazette of the Republic of Croatia*, 85/08; "Law on Gender Equality of the Republic of Croatia", *Official Gazette of the Republic of Croatia*, 82/08; "Law on Gender Equality of the Republic of Serbia", *Official Gazette of the Republic of Serbia*, 104/2009; "Law on the Prohibition of Discrimination of the Republic of Serbia", *Official Gazette of the Republic of Serbia*, 22/09; "Law on the Prohibition of Discrimination of the Republic of Montenegro", *Official Gazette of the Republic of Montenegro*, 46/2010.

ANNEX 2: Anti-discrimination laws in Bosnia and Herzegovina, Croatia, Serbia and Montenegro: Legal standing of NGOs

B&H	Law on the Prohibition of Discrimination (Article 17)	Law on Gender Equality
	<p>Plaintiffs and requirements: Associations, bodies, institutions and other organizations established in compliance with regulations regulating the association of citizens in Bosnia and Herzegovina, which have a justified interest in protection of interests of a certain group or which deal with protection from discrimination of a certain group of persons in the scope of their activities, may file a lawsuit against a person who has violated the right to equal treatment, if they make plausible that the action of the defendant violated the right to equal treatment of a large number of persons predominantly belonging to the group whose rights are protected by the plaintiff.</p> <p>Types of claims: not specified.</p>	<p>This law does not contain provisions on standing of organizations of civil society.</p>
CROATIA	Law on the Suppression of Discrimination (Article 24)	Law on Gender Equality
	<p>Plaintiffs and requirements: “Associations, bodies, institutions or other organizations set up in line with the law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment, if they make plausible that the defendant’s conduct has violated the right to equal treatment of a large number of persons who predominantly belong to the group whose rights the plaintiff defends.”</p> <p>Types of claims: (a) claim to establish discrimination (declaration claim); (b) claim to prohibit (prohibition claim) or eliminate discrimination (restitution claim), as well as (c) claim to publish the judgment (publication claim).</p>	<p>Article 30: (3) “In cases of discrimination, a collective lawsuit may also be filed.”</p>

SERBIA	Law on the Prohibition of Discrimination (Article 46 in connection with Articles 41 and 43)	Law on Gender Equality (Article 43)
	<p>Plaintiffs and requirements: Anti-discrimination lawsuits “may be initiated by the Commissioner and an organization engaged in the protection of human rights or the rights of a certain group of people”. If discriminatory treatment solely affects a particular person, a lawsuit may be initiated only with his/her consent given in writing.</p> <p>“A person who had deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of regulations pertaining to the prohibition of discrimination in a particular case” (voluntary discrimination tester) may also initiate a lawsuit and make the claims below.</p> <p>Types of claims: (a) claim for imposing a ban on the discrimination; (b) claim for establishment; (c) claim to redress the consequences of discriminatory treatment; and (d) claim that the decision be published.</p>	<p>Plaintiffs and requirements: Proceedings for protection against discrimination may be initiated, “with consent of the discriminated person, in his/her name”, by a “trade union or associations whose objectives are related to promotion of gender equality”, and in case of discrimination violating the rights of a large number of persons – also in its own name. A syndicate or associations after entering the proceedings or initiation of the proceedings may “inform, through the mass media or in other adequate manner, other injured persons, trade unions and associations about the initiated proceedings and invite them to join the plaintiff as the intervening party or co-plaintiff”.</p> <p>Types of claims: (a) to establish the violation made by the discriminatory act; (b) to prohibit the pursuing of activities threatening to inflict a violation; (c) to prohibit further undertaking and/or the repetition of activities having caused the discrimination; (d) to put out of use the means, namely the objects having made a violation (textbooks that are discriminatory or present a certain sex in a stereotype manner, printed matter, advertising aids, promotional material, etc.); (e) to eliminate the violation and establish the position, i.e. the state before the violation; (f) to receive compensation for pecuniary and non-pecuniary damages.</p>
MONTENEGRO	Law on the Prohibition of Discrimination (Article 30 in connection with Article 26)	
	<p>Plaintiffs and requirements: A lawsuit may be filed, on behalf of a discriminated person, also by organizations or individuals who are dealing with protection of human rights, with the written consent of the discriminated person or group of persons.</p> <p>Types of claims: (a) establishment of the fact of discriminatory conduct; (b) prohibition of exercising and repetition of the discrimination activity; (c) in case discrimination is performed through the media, publication in the media, at the expense of the defendant, of the judgment establishing discrimination</p>	

Sources: “Law on the Prohibition of Discrimination”, *Official Gazette of B&H*, 59/09; “Law on Gender Equality of B&H”, *Official Gazette of B&H*, 16/03; “Law on the Suppression of Discrimination of the Republic of Croatia”, *Official Gazette of the Republic of Croatia*, 85/08; “Law on Gender Equality of the Republic of Croatia”, *Official Gazette of the Republic of Croatia*, 82/08; “Law on Gender Equality of the Republic of Serbia”, *Official Gazette of the Republic of Serbia*, 104/2009; “Law on the Prohibition of Discrimination of the Republic of Serbia”, *Official Gazette of the Republic of Serbia*, 22/09; “Law on the Prohibition of Discrimination of the Republic of Montenegro”, *Official Gazette of the Republic of Montenegro*, 46/2010.

Annex 3: Summary overview of procedural roles of organizations of civil society (OCS) in European Union countries¹⁹⁴

Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Austria	The anti-discrimination law explicitly allows one OCS (Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern) to join the proceeding as a third party. That OCS is an association of several NGOs dealing with different grounds of discrimination. All other organizations that want to intervene in a proceeding, pursuant to general procedural rules, must prove the existence of a legal interest.	Under the anti-discrimination law for the field of disability one OCS (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR) has standing to file a group lawsuit.	NGOs may represent victims in cases when procedural law does not require mandatory representation by a lawyer.
Belgium	OCSs may join a civil proceeding provided they deal with protection of human rights or combating discrimination and provided they have existed for at least three years.	The concept of class action and representative action is unfamiliar in Belgian law.	Under the same conditions as for participation of third parties and with the consent of the victim.
Bulgaria	Organizations of civil society may enter a civil proceeding if they are formally registered and if they perform a public interest activity.	OCSs dealing with protection of interests of a particular group or a particular right may file a collective lawsuit if the conduct of the defendant violated the rights of more people.	Any registered body may represent victims of discrimination before equality bodies. Representation before courts is allowed for OCSs provided they are registered and they prove that they perform a public interest activity.

¹⁹⁴ The overview includes countries for which national legal experts submitted reports to the European Network of Legal Experts in the Non-discrimination Field. Unfilled boxes are related to information that is not contained in the pertinent report.

Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Czech Republic	x	Popular or representative actions are not allowed.	OCSs may represent victims provided they deal with protection against discrimination in the scope of their activities.
Denmark	x	A popular lawsuit is not allowed, but the option of filing a class action exists.	There is no legislation that generally regulates representation by legal persons. However, trade unions may represent their members.
Estonia	There is no option for OCSs to join a civil proceeding as a third party.	Popular or representative actions are not allowed.	OCSs that have a legal interest in protection against discrimination may appear as representatives in labor lawsuits.
France	Although there are no specific rules on the participation of OCSs as third parties, their appearance in proceedings before administrative courts is customary. In a criminal proceeding, OCSs that deal with combating discrimination on grounds of origin, race and religion may make property rights claims.	In the field of housing discrimination, OCSs may file a collective lawsuit. Generally, OCSs may file a lawsuit for protection of collective interests which they protect under their constituent documents.	OCSs may represent victims in labor anti-discrimination lawsuits provided they have existed for no less than five years.
Finland	OCSs may not intervene in a proceeding on the side of the victims, nor may they act in the capacity of amicus curiae.	Popular and representative actions are not allowed in anti-discrimination matters.	OCSs may represent victims if the victims empower them to do so.
Greece	OCSs may intervene in a proceeding provided they have a legal interest in ensuring the principle of equality and obtain the consent of the party in the proceeding.	Popular or representative actions are not allowed in the Greek judicial system.	OCSs may represent victims with prior written approval and provided they have a legal interest in ensuring principles of equality.

Concluding Observations and Recommendations

Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Netherlands	Intervention in line with general rules of procedure.	Collective lawsuits in anti-discrimination matters and public interest lawsuits may be filed by OCSs that have business capacity and whose statutes state that they deal with protection against discrimination.	OCSs that have business capacity and whose statutes state that they deal with protection against discrimination may represent victims of discrimination with their prior consent.
Ireland	The equality body is empowered to act as support to victims in proceedings before courts. However, in proceedings before specialized labor courts and equality tribunals, OCSs may also join proceedings in order to provide support to victims.	Popular and representative actions are not allowed in the Irish judicial system.	OCSs may perform representation before labor courts and equality tribunals. There are no formal requirements an OCS must meet.
Italy	OCSs dealing with protection of threatened rights and interests being discussed may intervene in the proceeding. In certain discrimination cases (race, ethnic background, disability), OCSs that are included in a list approved by the Ministry of Labor and Equal Opportunity have the right to act on behalf of victims and in support of victims.	The issue of class action lawsuits has provoked fiery debates in the Italian public. There is a theoretical possibility to file an anti-discrimination class action lawsuit in the field of consumer rights.	OCSs that have a legal interest in the implementation of anti-discrimination law (based on Directive 78/2000) may perform representation provided they obtain a written and notarized power of attorney.
Cyprus	OCSs that have a legal interest	The option to file a class action or popular lawsuit is not envisioned by Cypriot law.	OCSs that have a legal interest and written consent of the party.
Latvia		The option to file a class action or popular lawsuit is not envisioned.	OCSs that are registered and that deal with protection of human rights may file a lawsuit in the name of an injured party provided they obtain the party's consent.

Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Lithuania	An OCS that has a legal interest to become involved in the proceeding	Popular actions are not allowed. However, there is a theoretical option to file a class action lawsuit.	OCSs whose founding documents prescribe that they deal with protection and representation of victims of discrimination, provided they have the written consent of the party. However, due to the provisions of general procedural law, as a rule lawyers appear as representatives.
Luxembourg	OCSs dealing with protection against discrimination that have existed for at least five years and that are recognized by the Ministry of Justice as organizations that may act on behalf of victims and in support of victims.	Class action lawsuits do not exist in this system.	OCSs that deal with protection against discrimination and that have existed for no less than five years and are recognized by the Justice Ministry as organizations that may act in the name of victims and as support to victims, if they appear in the name of a specific victim with the victim's consent.
Hungary	OCSs dealing with protection of rights of vulnerable groups (named in their documents) and protection of human rights	Hungarian anti-discrimination legislation allows <i>actio popularis</i> , which may be filed by OCSs that represent vulnerable groups or deal with protection of their interests.	OCSs that deal with protection of rights of vulnerable groups (which are named in their documents) and protection of human rights, provided they are empowered by the victim.
Malta	Any association that has an interest in the implementation of labor legislation may participate in labor lawsuits.	Theoretically, there is a possibility to file a group lawsuit.	x
Germany	Associations composed of at least seven OCSs that deal with protection against discrimination and that have at least 75 members.	Class action lawsuits do not exist in German anti-discrimination law.	Associations composed of at least seven OCSs dealing with protection against discrimination that have at least 75 members.

Concluding Observations and Recommendations

Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Poland	OCSs whose statutes include goals related to combating discrimination	Class action lawsuits only exist in the field of consumer rights.	OCSs whose statutes include goals related to combating discrimination.
Portugal	Registered OCSs whose statutes include goals related to combating discrimination	Popular and class action lawsuits may be filed by OCSs that have a legitimate interest. However, practice on this matter is not developed.	Registered OCSs whose statutes include goals related to combating discrimination.
Slovakia	OCSs dealing with protection against discrimination	Anti-discrimination legislation empowers OCSs dealing with protection against discrimination to file a popular lawsuit if the right of more people is violated or if the violation is such that it seriously jeopardizes public interest.	OCSs that deal with protection against discrimination.
Romania	OCSs in cases of discrimination that are related to the field in which they work. A widespread judicial practice is the option for OCSs to file amicus curiae briefs in discrimination related cases. There is no obligation to prove justified interest. It is enough for OCSs to state in their documents that they deal with protection of human rights or combating discrimination.	Popular lawsuits are allowed for organizations dealing with protection of human rights.	OCSs may act in the name of the victim provided the victim asks them to do so in a written motion and for a specific case.

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Member state	Participation of third parties and other forms of support	Collective, class action and other group lawsuits	Representation and other models of acting on behalf of victims
Spain	In certain proceedings OCSs that deal with protection against discrimination on grounds of race or ethnic background may provide support to victims.	In principle, an <i>actio popularis</i> might be filed by OCSs dealing with protection against discrimination. However, neither doctrine nor practice in this regard is developed. Class action lawsuits are not present in Spanish law.	Legal persons may perform representation under Spanish law.
Slovenia	OCSs may join a proceeding. The anti-discrimination law does not prescribe specific requirements.	Anti-discrimination law does not contain provisions on class action or popular lawsuits.	Other than a law firm, legal persons may not perform representation work.
Sweden	Anyone can join a proceeding as support to victims provided the victim agrees.	In the field of consumer rights, there is the possibility of a class action lawsuit and in principle even organizations may instigate them. However, practice on this matter is insufficiently developed.	Non-profit organizations whose statutes state that they care for the interests of their members and which are assessed by the court to be able to adequately represent the victim.
United Kingdom	OCSs may provide support in a proceeding and courts have the option to allow OCSs to provide answers to theoretical and legal questions in the capacity of a third party.	OCSs may not file class or representative actions in the name of victims of discrimination.	OCSs that have a justified interest in protection against discrimination may file a lawsuit even if they are not directly affected by the discriminatory action.

Source: Reports by national legal experts on measures to combat discrimination submitted to the European Network of Legal Experts in the Non-discrimination Field. All reports are available at: <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>

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About the Author

Boris Topić has graduated from the Faculty of Law, University in Banja Luka and holds a Master's Degree in international human rights law from the University of Oxford, United Kingdom.

He has a wealth of experience in the field of human rights gained through his work at the Institution of Ombudsman for Human Rights of Bosnia and Herzegovina, Human Rights Department of the OSCE Mission to BiH and the European Court of Human Rights.

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