

JUDICIAL PROTECTION FROM DISCRIMINATION IN BOSNIA AND HERZEGOVINA: ANALYSIS OF LAWS AND PRACTICE BASED ON INITIAL CASES IN THIS FIELD ¹

In the course of 2011 and 2012, Analitika conducted a research on the key issues regarding the protection of individuals from discrimination, based on the (rather limited) court practice in this area in Bosnia and Herzegovina (BiH). The research has shown, *inter alia*, that courts often misunderstand and incorrectly interpret key novelties in civil proceedings concerning the protection from discrimination, such as shifting the burden of proof on the defendant, and that the legally prescribed urgency of anti-discrimination proceedings is generally not respected. Moreover, some legal provisions, such as the ones setting extremely unfavourable costs of the proceedings for the victims of discrimination giving extremely short deadlines for filing anti-discrimination lawsuits, or determining that the territorial jurisdiction of the court be based on the place of residence of the defendant, and not the plaintiff, are not in accordance with best practice in this area, and as such, present an additional obstacle for the effective litigation against discrimination in BiH.

KEY FINDINGS

INTRODUCTION

The adoption of the Law on the Prohibition of Discrimination in BiH (LPDBiH) in 2009 represents a significant step towards improving protection of individuals from discrimination in Bosnia and Herzegovina.

Protection against discrimination through litigation foreseen by the LPDBiH is to be realised in two ways:

- a) Protection of rights within ongoing judicial or administrative proceedings,

- b) Protection of rights by initiating separate civil proceedings for protection from discrimination.

Such a separation of litigation protection in BiH generally reflects the distinction between incidental protection from discrimination provided through separate anti-discrimination lawsuits, where the ruling on discrimination represents a decision on the merits of the case.² Incidental proceedings deal with allegations that the violation of a right (e.g. labour-related right) for which protection is sought for in the proceedings, was



¹ This Policy Brief is based on the report of Analitika – Center for Social Research titled *Judicial Protection against Discrimination in BiH: Analysis of Laws and Practice Based on Initial Cases in This Field*, written by Adrijana Hanušić and published in 2013. The electronic version of the report is available at: <http://www.analitika.ba/en/publications/judicial-protection-discrimination-bosnia-and-herzegovina>. The preparation of the report and policy brief was supported by the Open Society Fund Bosnia & Herzegovina.

² See a contribution to a seminar on the Law on the Prohibition of Discrimination by Supreme Court of the Federation of BiH Judge Goran Nezirović, “Postupci za zaštitu od diskriminacije” [Proceedings for the Protection from Discrimination], 2012.

KEY RECOMMENDATIONS

1. It is necessary to introduce elective territorial jurisdiction of the court that would enable the victims to select the most suitable court to them, as a replacement for the current territorial jurisdiction of the court that is based on the place of residence of the defendant.
2. A legal intervention is necessary to ensure that the current restrictive deadlines for initiating protection from discrimination are not shorter than deadlines set for other, similar lawsuits.
3. It is necessary to ensure preconditions for complying with the important legal provision on the urgent character of proceedings concerning protection from discrimination, which is currently completely ignored by courts in BiH.
4. In cases concerning discrimination, it is necessary to introduce costs of proceedings that are more favourable to the victims and, in particular, ensure the reduction or exemption from payment of court fees.
5. It is necessary to intensify efforts in educating the judicial community in BiH, in particular defence attorneys and lawyers working in free legal aid centres.
6. It is necessary to take further steps in promoting legal novelties in this area, as well as the practice of initiating lawsuits in cases of discrimination in BiH.

a result of discrimination, and the existence of discrimination is deliberated as a preliminary issue, i.e. the final ruling in the particular case depends on the preliminary decision on the issue. However, the preliminary decision is not contained in the dispositive part of the final judicial decision, but only in its statement of grounds. The practical consequence of the nature of such a decision is its non-binding character, but it is precisely this that allows for a simultaneous or subsequent separate litigation on the existence of discrimination as the merits of the case. The main difference between the two is that a binding decision on the existence of discrimination as a decision on the merits will also have an obligatory effect upon the body that subsequently decides on the issue of discrimination in

proceedings where discrimination is observed as a preliminary issue.³

This policy brief, as well as the report that this policy brief is based on, focuses primarily on separate proceedings for the protection from discrimination, which entail a number of distinct rules in comparison to regular litigation. An important particularity of the anti-discrimination litigation is the rule of shifting the burden of proof. In accordance with this rule, it is sufficient that the plaintiff “states the facts”, and “substantiates allegations of violation of the prohibition of discrimination”⁴, whereafter the burden to prove that discrimination did not occur is shifted to the defendant. In addition, anti-discrimination litigation allows for interveners, i.e. the involvement of third

³ Nežirović, “Proceedings for the Protection from Discrimination,” p. 3–4.

⁴ “Zakon o zabrani diskriminacije BiH” [The Law on the Prohibition of Discrimination in BiH], *Official Gazette of BiH* 59/09, Article 15.

parties (e.g. non-governmental organisations) supporting the plaintiff, as well as the possibility of initiating a so-called collective lawsuit. An organization may initiate a collective lawsuit in its own name if it has a legitimate interest in cases where actions of the defendant have violated the right to equal treatment of a number of persons.⁵ The LPDBiH also provides for the possibility of initiating revisions in all anti-discrimination proceedings⁶ (thus departing from the usual property threshold of BAM 10,000 as a requirement to address entity Supreme Courts), the obligation of urgency in conducting proceedings in cases of discrimination⁷, as well as protection from victimisation, i.e. the principle according to which the persons who report discrimination or are in any other role involved in legal proceedings for protection from discrimination must not suffer negative consequences because of this.⁸

Most provisions of the LPDBiH indicate that this law is for the most part inspired by good comparative practice and mostly harmonised with international standards, i.e. relevant Directives of the European Union⁹ and European treaty law. However, the application of these generally advanced provisions in the practice of the judiciary of Bosnia and Herzegovina is still not satisfactory. In that sense, it is certainly indicative that even three years after a comprehensive legal framework for the protection of discrimination was established, court practice on the issue still remains rather scarce. Namely, only

a number of lawsuits have thus far been recognized to have been adopted pursuant to the LPDBiH. In addition, in cases where LPDBiH was applied, despite some positive examples, a number of challenges are evident, which have made it difficult or completely impossible to fully utilise the potentials for protection that the LPDBiH offers.

This policy brief presents a summary of some of the key issues in the area of judicial protection from discrimination, both in relation to legislation and practice in the initial court cases in this area. It further suggests possible solutions that could help overcome these identified issues.

KEY CHALLENGES IN THE AREA OF JUDICIAL PROTECTION FROM DISCRIMINATION IN BOSNIA AND HERZEGOVINA

A System of Adverse Litigation Costs

A significant burden that victims of discrimination face is the general principle of civil proceedings in Bosnia and Herzegovina, whereby the party that loses the lawsuit also bears the necessary costs of the proceedings incurred by the other side, pursuant to success achieved in the particular case. In addition, when initiating the lawsuit, the individual as plaintiff and the person in whose interest actions are taken in the proceedings, is obliged to pay for the court fees, court decisions,

⁵ “The Law on the Prohibition of Discrimination in BiH,” Articles 16 and 17.

⁶ “The Law on the Prohibition of Discrimination in BiH,” Article 13, para. 2.

⁷ “The Law on the Prohibition of Discrimination in BiH,” Article 12, para. 2.

⁸ “The Law on the Prohibition of Discrimination in BiH,” Article 18.

⁹ In particular, the Racial Equality Directive – “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin,” *Official Journal of the European Union*, L 180/2000; 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.

enforcement motions, and possible costs of a court expert.¹⁰ In accordance with the available information, the court fees often jeopardise the efficiency of the judicial mechanism of the protection from discrimination. The experience of the non-governmental organisation “Vaša prava” apoint to the problematic practice of certain courts that undertake further actions in the proceedings only after being provided with a proof of payment of court fees. Such a rigid approach of courts to the issue of the payment of fees results in unnecessary delays of the proceedings, and often leads to victims’ withdrawal from taking any further steps in the proceedings. Especially problematic is the possibility of applying the legal provision that allows for the dismissal of a particular claim due the failure to pay court fees, where such a claim shall be deemed to have never been filed.¹¹ Especially important is that such action may result in the application of a statute of limitation for seeking protection from discrimination.¹²

Inadequate Territorial Jurisdiction of the Court

The principle regulating general territorial jurisdiction of the court is applied in the discrimination-related proceedings in Bosnia and Herzegovina. This implies that the jurisdiction of the court is based on the place of residence or of the defendant – i.e. the alleged discriminator. This legal provision fails to adequately protect the victim, considering that the victim and the alleged discriminator often have

a different place of residence. For a significant number of victims, the very recognition of the need to travel and travel-related costs in order to make of use of the judicial mechanism of protection from discrimination may have a deterrent effect. This problem particularly affects socially vulnerable victims and other persons belonging to marginalised groups, for whom one may generally assume to frequently take the role of the plaintiff in cases of discrimination.

Besides not being in the best interest of the victims of discrimination, this legal solution regulating territorial competence of courts in discrimination proceedings in Bosnia and Herzegovina is also not in accordance with regional trends in this field. Namely, laws on the prohibition of discrimination in Croatia, Serbia and Montenegro foresee elective territorial jurisdiction in cases of discrimination, which means that the lawsuit may be filed with the court with territorial jurisdiction based on the residence of either the defendant or the plaintiff.

Inadequate Deadlines for Filing Anti-discrimination Lawsuits

Legal deadlines to address the court in Bosnia and Herzegovina in cases of discrimination are too short, and as such do not provide for efficient protection of victims of discrimination. The objective one-year and the subjective three-year deadline from learning about discrimination are too restrictive and are not harmonised with the best practice in this area.

¹⁰ In case that this is proposed as an evidence in the proceedings (e.g. costs of engaging a court psychologist or psychiatrist in cases of mobbing).

¹¹ Vaša prava, *Sprječavanje diskriminacije strateškim parničnjem, bh. antidiskriminacioni tim: narativni izvještaj* [Prevention of Discrimination by Strategic Litigation, BiH Anti-Discrimination Team: Narrative Report], July 30, 2012, available in the archives of Analitika. Article 4 of the Law on the Court Fees in the Sarajevo Canton is provided as an example.

¹² *Ibid.*

Although the practice of European Union member states in this area varies significantly, European Union law allows for the application of deadlines for judicial protection from discrimination only if such deadlines are not less favourable than the deadlines provided for similar domestic lawsuits, and if they do not present an obstacle to the enjoyment of rights in the area of prohibition of discrimination in practice.¹³ Thus, in the countries of the region, general statute of limitations that are applicable to other similar lawsuits also apply with respect to anti-discrimination lawsuits, which are also applicable to other similar lawsuits.

On the other hand, the deadlines applied in Bosnia and Herzegovina for other lawsuits are incomparably longer. For example, the general statute of limitations to claim damages is three (subjective deadline) and five years (objective deadline). It is true that victims have the possibility to claim protection against discrimination in ongoing proceedings to be observed as a preliminary issue, in which case other time limits applicable for these proceedings would apply. However, defining deadlines in this way could be interpreted as an implicit suggestion of the Law that, in fact, it is better for the victim to seek protection of its right in a regular proceedings, and not in civil proceedings for the protection from discrimination. However, such a message would have a number of negative implications for the efficiency of protection, such as the non-application of specific procedural institutes that the LPDBiH provides only for separate anti-

discrimination lawsuits and, especially important, the non-binding effect of the decision confirming discrimination. In addition, short deadlines for judicial protection against discrimination may lead to the evasion of the mechanism of protection from discrimination before the Institution of Human Rights Ombudsman of BiH, for fear of subsequently missing legal deadlines, which would hamper the development of the otherwise constructive practice of preliminary address to this institution.¹⁴

Failure to Respect Rules on Urgency of Proceedings in Practice

The Law provides another very important measure to protect victims of discrimination – the urgency of proceedings. While the Civil Procedure Code provides for urgency in conducting proceedings only in labour disputes, and in some trespassing disputes, the LPDBiH obliges the court and other bodies conducting proceedings to act with urgency, ensuring that all allegations of discrimination are looked into as soon as possible.¹⁵ The urgency in this context is not interpreted only as taking actions in the proceedings without delay, but also as giving priority to lawsuits for protection from discrimination “in relation to cases for which urgency is not prescribed by law”.¹⁶ Such wording is justified by the fact that victims of discrimination often suffer extremely negative consequences on a daily basis, and it is therefore very important to ensure adequate protection as soon as possible. For example, in cases where children are

¹³ For more details, see Adrijana Hanušić, *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Laws and Practice Based on Initial Cases in This Field* (Sarajevo: Analitika – Center for Social Research, 2013), p. 27-29.

¹⁴ For detailed elaboration on this issue, see Adrijana Hanušić, *The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems* (Sarajevo - Analitika Center for Social Research, 2012), chapter on “Deadlines, Ombudsman and Judicial Protection,” p. 44.

¹⁵ “The Law on the Prohibition of Discrimination in BiH,” Article 12, para. 2.

¹⁶ Nezirović, “Proceedings for the Protection from Discrimination,” p. 9.

exposed to discrimination, the outcome of the proceedings may determine the continuation of their regular schooling.¹⁷ Court practice in the area of discrimination in Bosnia and Herzegovina shows that the rule on the urgency of proceedings in anti-discrimination cases is not respected. Representatives of the non-governmental organisation “Vaša prava” estimate, namely, that anti-discrimination proceedings last between one and a half to two years on average.¹⁸ Therefore, anti-discrimination judicial proceedings roughly fit the average duration of regular civil proceedings in Bosnia and Herzegovina— which last, on average, 781 days, much longer than the similarly urgent, labour-related proceedings, which last 313 days on average.¹⁹

It is important to emphasise that the legislation in Bosnia and Herzegovina also foresees the possibility of accelerating the process of enforcement of court decisions in cases of discrimination. Namely, the LPDBiH explicitly grants the court the discretionary right to set shorter deadline for the enforcement of actions ordered to the defendant (*tempus iudicati*) by the court decision in cases of discrimination. In these cases, the court may also decide that an appeal to the decision shall not suspend its enforcement until the second instance decision is issued, which makes that part of the decision during the *tempus iudicati* final and enforceable.²⁰ Such a solution has several important purpos-

es: deterring the defendant from using the legal remedy only to delay the proceedings, eliminating the consequences of confirmed discrimination in a timely manner, and removing the possibility that these consequences become even more serious.²¹

However, in the currently known cases of confirmed discrimination in Bosnia and Herzegovina, the legal possibility of accelerating the enforcement of anti-discrimination judicial decisions appears to be insufficiently used. Cases where shorter *tempus iudicati* for the enforcement of judicial decisions were applied are rare. It is important to emphasise that plaintiffs also play an important role in ensuring the accelerated enforcement of rulings in these cases, and they should be encouraged to file such claims. On the other hand, when it comes to the discretionary right of a court to order a non-suspensive effect of the appeal, its application in the ruling of the Municipal Court of Mostar pertaining to ethnic segregation of pupils in schools is commendable.

Failure to Understand the Rules on Shifting the Burden of Proof

The practice of the judiciary in Bosnia and Herzegovina shows wrong understanding and interpretation of rules on shifting the burden of proof inherent to anti-discrimination law.

¹⁷ See the Constitutional Court of BiH, Decision AP 1859/11, June 13, 2012, in relation to proceedings for protection from discrimination of a child with special needs initiated by the non-governmental organisation “Vaša prava.”

¹⁸ Hanušić, *Judicial Protection from Discrimination in BiH*, p. 35-36.

¹⁹ High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Ljiljana Filipović and Rusmir Šabeta, *Analiza 4. Izvješća Europske komisije za efikasnost pravosuđa o evropskim pravosudnim sustavima* [Analysis of the Fourth Report of the European Commission for the Efficiency of Justice on European Judicial Systems], edition 2010 (Sarajevo: High Judicial and Prosecutorial Council of Bosnia and Herzegovina, March 4, 2011), p. 10.

²⁰ “The Law on the Prohibition of Discrimination in BiH,” Article 13, para. 3.

²¹ Nezirović, “Proceedings for the Protection from Discrimination,” p. 11.

Analysis of the proceedings for the protection from discrimination conducted by the non-governmental organisation “Vaša prava” clearly points to the problem of misinterpretation, even a lack of knowledge of the specific rule on the burden of proof in civil proceedings in cases of discrimination by certain courts.²² For example, in one ruling by which the claim was refused, the Municipal Court of Zavidovići states several times in the reasoning of its decision that the “plaintiff failed to prove...”, implying that by inertia, the court interpreted the procedural obligations of parties to the litigation in line with the general rule of the Civil Procedure Code, and not the special provisions of the LPD-BiH.²³ A ruling by which the claim was refused, issued by the Municipal Court Mostar, is also indicative, given that the reasoning of the decision suggests that the “plaintiff failed to provide, to that effect, any evidence to substantiate and make probable its claim that a failure to make payments was a direct or indirect result of the omissions of the defendant”.²⁴ The court disregarded the fact that the matter at hand in this particular case pertained to a structural problem of lack of payment of wage contributions to a particular category of the population in accordance with their legal right that the defendants – the Government of the Federation of BiH and the government of the competent canton – can undoubtedly be charged of.

This also raises the potential issue of limited application of this important rule

only to the specific anti-discrimination proceedings. Namely, the literal interpretation of Article 15, Paragraph 1, of the LPD-BiH, which refers to the burden of proof, namely refers only to proceedings initiated on the basis of specific anti-discrimination lawsuits, and not on the allegations of discrimination raised in ongoing court proceedings, administrative proceedings and administrative disputes. Such an interpretation would significantly narrow down the application of the relevant Directives of the European Union, and as suggested by some commentators, this would be “contrary to the spirit and purpose of the law”.²⁵ In Croatia, the burden of proof rule is applied both in civil and in administrative proceedings.²⁶ The Directives of the European Union on equality also require the application of this rule before “civil courts or any other competent body”²⁷.

Scant Jurisprudence in the Area of Discrimination

A major issue in this area is the fact that significant court practice on the application of the LPD-BiH has not been developed to date. Since the adoption of the law, the non-governmental organisation “Vaša prava” has conducted and is conducting 22 cases in total before the courts and administrative bodies of Bosnia and Herzegovina, out of which three have resulted in positive first instance decisions to date.²⁸ When this figure is compared with the overly present discrimination

²² Vaša prava, *Pregled slučajeva Antidiskriminacionog pravnog tima NVO Vaša prava* [Overview of Cases of the Anti-discrimination Team of the NGO Vaša prava], May 2012, available in the archives of Analitika.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Nežirović, “Proceedings for the Protection from Discrimination,” p. 4.

²⁶ Lovorka Kušan, *Croatia – Country Report 2010: Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC: State of Affairs up to 1 January 2011* (European Network of Legal Experts in the Non-Discrimination Field, 2010), p. 56.

²⁷ The Racial Equality Directive – “Council Directive 2000/43/EC,” Article 8.

²⁸ Vaša prava, *Overview of Cases of the Anti-discrimination Team of the NGO Vaša prava*.

in Bosnia and Herzegovina²⁹, it reveals a startling discrepancy between the number of recorded instances of discrimination and those brought before courts.

This situation is primarily conditioned by the problems of individuals, and possibly their legal representatives, to recognise that they are the victims of discrimination. In addition, an important limiting factor, considering the experiences of the European Union member states³⁰, is the lack of readiness to initiate judicial proceedings for the protection from discrimination, due to a lack of knowledge about the available mechanisms of protection, a fear of victimisation, a lack of an effective system of free legal aid, the deterrent effect of the obligation of paying court fees and bearing the costs of the proceedings, as well as the length of the proceedings. Also, problems of a lack of trust of victims of discrimination in the legal system have been observed, their expectation of lengthy proceedings, and scepticism concerning the real prospects of changing the discriminatory practice by initiating proceedings.³¹ However, the lack of court practice in anti-discrimination protection cannot be linked only to a lack of information or the unwillingness of victims of discrimination to confront such a negative social phenomenon in this manner.

A large part of responsibility lies with the judiciary, given that proceedings that have been initiated before the judiciary with the view to protect from discrimination are not being processed in a timely manner, thus objectively casting a doubt on the effectiveness of judicial protection from discrimination.

Insufficient Education of the Judicial Community

In Bosnia and Herzegovina, not enough attention has been paid to the education of the judicial community on the application of the LPDBiH, including both the defence attorneys and the representatives of the competent bodies.³²

The education of judicial bodies is especially important, given that they are the ones who are required to protect victims in the most efficient manner. However, in practice, provisions of other laws are frequently applied (e.g. the Labour Law) in discrimination cases as well, disregarding the novelties in proceedings provided for by the new law in this area, which have been introduced with the very aim of relieving the position of discrimination victims.³³ Thus, for example, in one case, the acting judge violated the provisions

²⁹ See, for example, European Commission, *Bosnia and Herzegovina 2012 Progress Report* (Brussels: European Commission, October 10, 2012), SWD(2012) 335 final; Human Rights Watch, *Second Class Citizens: Discrimination Against Roma, Jews, and Other National Minorities in Bosnia and Herzegovina* (New York: Human Rights Watch, 2012); Helsinki Committee for Human Rights in Bosnia and Herzegovina, *Izveštaj o stanju ljudskih prava za period januar – decembar 2011 [Report on the State of Human Rights: January - December 2011]* (Sarajevo: Helsinki Committee for Human Rights in Bosnia and Herzegovina, 2012).

³⁰ For further identified obstacles in that sense, related recommendations see Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law in Europe. The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared* (Luxembourg: Publications Office of the European Union, 2011), p. 68–69.

³¹ *Zbirni izvještaj o pojavnim oblicima diskriminacije (decembar 2011 – septembar 2012)* [Summary Report on the Various Forms of Discrimination (December 2011 – September 2012)], drafted by partner organisations of the Open Society Fund B&H Anti-Discrimination Program as part of the “mapping discrimination in BiH” component of the program (ICVA, Prava za sve, Forum građana Tuzla, Helsinški parlament građana Banja Luka, Centar za ljudska prava Mostar, “Budi moj prijatelj”), available in the archives of Analitika.

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

³³ A typical example is the first instance decision of the Municipality Court of Travnik in the “two schools under one roof” case of pupil segregation in Central Bosnia canton, No. 51 0 P 054522 11 P, October 3, 2011, dismissing the lawsuit by the non-governmental organisation “Vaša prava” on the grounds of an alleged lack of standing that is, in fact, provided for by the LPDBiH.

of the LPDBiH by mistakenly considering the proceedings before the Ombudsman and before the court as mutually exclusive, rejecting the lawsuit for the protection from discrimination because of previously completed proceedings before the Institution of the Ombudsman of BiH.³⁴ The Ombudsman of BiH also found through its monitoring of court proceedings in discrimination cases that “different treatment by courts is very evident, which is a consequence of different levels of awareness among the judges themselves about discrimination as a prohibited social phenomenon.”³⁵

However, it is worth noting that education in this area is, as a rule, restricted to judges and legal officers in courts. On the other hand, ensuring adequate education on the standards for the protection from discrimination is particularly relevant for defence attorneys and lawyers who work in associations or competent bodies providing legal aid. This target group, whose education is currently neglected, is particularly important, because the decision on whether proceedings for the protection from discrimination will be initiated at all in large number of cases depends on their awareness of the specific instruments of protection that are available to victims under the LPDBiH.

CONCLUDING OBSERVATIONS

The LPDBiH, which has been in force since 2009, has introduced many novelties that, if adequately implemented, could result in a significant leap forward

in combating this pervasive social phenomenon in Bosnia and Herzegovina. However, numerous obstacles are in the way of achieving maximum effects of the new legislation in this area. A part of the problem lies in the legal solutions, which, in some important segments, are not in line with best practice or the best interests of the victims of discrimination. This pertains, in particular, to the lack of specific, more flexible rules on deadlines for filing lawsuits against discrimination, the inadequate territorial jurisdiction of courts, as well as the rules on bearing the costs of anti-discrimination proceedings that place too heavy a burden on the victims of discrimination and act as demotivating elements when deciding to file a lawsuit.

In addition, numerous problems in the practice of judicial protection from discrimination have been acknowledged, representing a serious obstacle to efficient anti-discrimination proceedings, and additionally threatening the already low level of confidence in the judiciary. Bearing in mind the numerous negative factors that victims of discrimination in Bosnia and Herzegovina currently must overcome when deciding on whether to initiate court proceedings to seek protection from discrimination – from the lack of adequate free legal aid to a lack of concrete and energetic protection against victimisation, as well as the potential negative consequences they may suffer within their communities if they report discrimination – courts simply must not allow to be one of many negative factors. An especially important problem in that regard

³⁴ First instance verdict of the Municipal Court of Goražde, No. 45 0 P 021035 11 P, June 8, 2012.

³⁵ The Institution of Human Rights Ombudsman of BiH, *Izveštaj o pojavama diskriminacije u Bosni i Hercegovini za 2011. godinu* [Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011], (Banja Luka: The Institution of Human Rights Ombudsman of BiH, February 2012), p. 26.

is the fact that the legally-prescribed urgency of the anti-discrimination proceedings is, as a rule, not observed. Such court practice is largely a reflection of the structural problems of the judiciary also in the field of judicial protection from discrimination; systematic preconditions would need to be established to address such practice.

Other key problems in this area are of a general, structural nature: insufficiently stimulating environment for filing anti-discrimination lawsuits and inadequate promotion of protection mechanisms in accordance with the new legal framework, inadequate legal solutions for action and the adequate contribution of non-governmental organisations in judicial proceedings for the protection from discrimination³⁶, as well as insufficient education of the judicial community, resulting in the erroneous application of the Law and frequent examples of courts acting against the interests of the victims of discrimination. The problem could in part be solved through education; however, bearing in mind the recent adoption of the LPDBiH, in certain cases, the best solution may be to amend the Law, i.e. to define more precisely the legal provisions in a manner that would narrow down the possibility of their interpretation contrary to the internationally accepted highest standards for the protection of individuals against discrimination.

In light of the findings of our research, we believe that the consideration of the following recommendations would result in better legislation and practice in the field of judicial protection from discrimination in Bosnia and Herzegovina:

RECOMMENDATIONS TO THE LEGISLATOR

Costs of Anti-discrimination Proceedings

1. As demonstrated by the experience of the European Union member states, in order to stimulate the application of the LPDBiH, it is necessary to allow for the exemption from paying costs of proceedings or at least for the reduction of court fees in anti-discrimination proceedings as well.

Elective Territorial Jurisdiction

2. In order to facilitate access to justice for the victims of discrimination, it is necessary to introduce in the LPDBiH elective territorial jurisdiction of courts that best suit the victims, as has already been done in the countries of the region. This would reduce financial and technical obstacles in accessing courts to seek protection from discrimination, which is particularly important for members of marginalised groups.

Time Limits

3. It is necessary to harmonise the LPDBiH with the standards of the European Union law, which would require that the statute of limitation in these proceedings is no less favourable than the deadlines applicable in similar lawsuits. In the current legal framework in Bosnia and Herzegovina, this can be done either by a complete abolition of special deadlines and envisaging the application of the general statutory limitation for this form of protection as well, as is the case in the countries of the region, or by considerably

³⁶ See Boris Topić, *Unused Potential: The Role and Importance of Non-governmental Organisations in the Protection against Discrimination in Bosnia and Herzegovina*, (Sarajevo: Analitika – Center for Social Research, 2012).

extending the current, extremely restrictive time limits for filing anti-discrimination lawsuits.

RECOMMENDATIONS FOR COURTS AND JUDICIAL STRUCTURES

Application of Specific Rules of Anti-discrimination Judicial Proceedings to Existing Discrimination Protection Proceedings

4. It is necessary to apply more favourable procedural mechanisms for victims, provided for by the LPDBiH, to both types of proceedings for the protection of the victims of discrimination – both to incidental protection and protection within separate anti-discrimination proceedings. This especially refers to the rule of urgency of the proceedings and the rule on shifting the burden of proof.

Urgent Proceedings

5. It is necessary to ensure strict observance of the rule of urgency in dealing with the motions for judicial protection from discrimination. This primarily implies greater attention of acting judges when conducting such proceedings, but also enhanced supervision of these proceedings by the presidents of courts and the High Judicial and Prosecutorial Council BiH (HJPC BiH).

Proving Discrimination

6. It is necessary to apply specific stan-

dards developed under European treaty law and the European Union law for proving discrimination in proceedings for the protection from discrimination. In light of these standards, it is of particular importance to ensure the correct application of the rules on shifting the burden of proof.

Education of the Judicial Community

7. For the purpose of prompt and efficient judicial protection of individuals from discrimination, it is important to provide for adequate and continuous education of judges and legal officers in courts, as to ensure the correct application of the LPDBiH and relevant international standards for the protection from discrimination. At the same time, it is important to provide for adequate education of defence attorneys and lawyers dealing with the issues of human rights and the protection from discrimination, as well as for public offices and non-governmental organisations providing legal aid.

Promoting Anti-discrimination Litigation in Bosnia and Herzegovina

8. All of the recommendations above reach their full meaning only through adequate and extremely necessary promotion of anti-discrimination legislation and education of the public, with a special focus on vulnerable groups. This will enable individuals to recognise that they are victims of discrimination and to know of the protection mechanisms that are available to them.



Open Society Fund B&H Anti-Discrimination Program

The policy brief 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.

SOURCES

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