



How to protect yourself against **discrimination?**

Report on implementation of the Anti-discrimination law in BH

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November 2010

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1. Introduction

Prohibition of discrimination and equality of all people before law are general principles and central norms in connection with protection of human rights in all international documents. Non-discrimination is natural and fundamental human right of every person and everyone has it from birth, and it may be restricted only in exceptional cases and only when explicitly provided for in law. Article 1 of the United Nations' Universal Declaration of Human Rights is about this principle, and it says:

„All human beings are born free and equal in dignity and rights.“

Constitution of BiH¹, guaranties the highest level of internationally recognized human rights and fundamental freedoms. Almost all major international instruments for protection of human rights are incorporated in the constitutional system. Obligation of BiH to apply the highest internationally recognized human rights standards also stems from the Dayton Peace Accord². Constitution of BiH stipulates³ da that “general principles of international law integral part of legal system of Bosnia and Herzegovina and its entities.”

The discrimination on any grounds is prohibited and enjoyment of rights and freedoms is guaranteed to all, without any distinction. Therefore, in accordance with the Constitution of BiH, the state has to secure liberties and freedoms to all “without discrimination on any grounds such as sex, race, color, language, religion, political or other opinion, national or social background, association with a national minority, property, birth, or any other status.”⁴

Constitution of FBiH⁵, obliges to implementation of the highest level of internationally recognized rights and freedoms specified in the Annex to the Constitution where all international documents are listed. It is particularly important for implementation of those documents that “international treaties and other agreements in force with respect to the Federation of BiH and general rules of international law are integral parts of legislation of the Federation of BiH. In case of any discrepancy between international treaties and national laws, international treaties shall prevail⁶.”

Constitution of the Republika Srpska also guarantees protection of human rights and liberties in accordance with international standards⁷, explicitly guaranteeing equal protection before courts and other state bodies and authorities. In Article 10, Chapter II, Human Rights and

¹ Article II of BiH Constitution: Human Rights and Fundamental Freedoms

² Annex VI of the Dayton Peace Agreement: Human Rights

³ Under Article III, paragraph 3(b) of Constitution of BiH

⁴ Article II, paragraph 4: Non-discrimination

⁵ In part II Article 2 (“Human rights and fundamental freedoms”)

⁶ Part VII, Article 3 of Constitution of the Federation of BiH

⁷ Part II of the Constitution of the Republika Srpska is devoted to human rights and fundamental freedoms,

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Liberties, everybody shall be equal in “their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status and other personal attributes.”⁸ In case of discrepancy of provisions on rights and freedoms in the Constitution of RS and Constitution of BiH, the provisions that are better for the individual shall apply.

At present, Bosnia and Herzegovina is in the process of acceding to the European Union (EU). All the EU member countries as well as the potential member countries, one of which is BiH, are obliged to fully harmonize their national legislation with the EU legislation, and this particularly applies to the EU directives.

The EU directives establish the basis for protection from discrimination at the level of all member countries of the European Union, as well as on the level of potential member countries, while the practical implementation is left to the member countries to develop in more details. Many directives have been adopted to date prohibiting discrimination on various grounds and obliging member countries to harmonize their national legislation with the principle of equal treatment and protection standards foreseen in the anti-discrimination directives, and to do so, among other things, by amending the various laws and decrees.

Although BiH has signed numerous international documents providing mechanisms for protection against discrimination, and BiH had also been under standing obligation to prevent and remedy such occurrences, discrimination is still widely spread and met with almost no institutional response.

Because of this experience, and particularly the lack of reaction on the part of the legal system in cases of discrimination, the civil society organizations have already in 2007 started initiative for adoption of a single Law on Prohibition of Discrimination in BiH. Adoption of such law would enable introduction of unified and clear standards for recognizing and sanctioning discrimination in time.

It took almost two years to have the Law on Prohibition of Discrimination⁹ adopted in BiH, and it entered force in August 2009. Certainly, one of key values of this law is that it gathers all anti-discrimination provision that had been in existence, but stipulated in various BiH laws, and provides for relatively harsh sanctions for discriminatory actions. Adoption of this law has established a framework for everybody in BiH enjoying equal rights and possibilities and set up a system of protection against discrimination.

⁸ Article 10, which initially applied to citizens Republika Srpska was amended with Article 49 that concerns everybody.

⁹ “Official Gazette of Bosnia and Herzegovina” number 59/09

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However, adoption of a single Law on Prohibition of Discrimination introduced a new concept in the legal system of BiH, one requiring understanding of notions of various types of discrimination that are described in the law, as well as of methods of conducting court and other proceedings in implementation of law both by the government bodies, institutions and judicial bodies, and by the victims of discrimination.

The purpose of this report is:

- to familiarize the non-governmental organizations that are working on protection of rights of vulnerable groups that are most frequently and most seriously exposed to discrimination with the new law so that they can explain new possibilities of receiving protection provided under the law to their beneficiaries;
- give examples of discrimination and obstacles in exercising the right to equal treatment and equal possibilities the beneficiaries of services of non-governmental organizations are faced, often becoming victims of discrimination;
- initiate dialogue between non-governmental organizations providing protection to their beneficiaries exposed to discrimination and instruments available to BiH authorities responsible for providing protection against discrimination in accordance with this law.

2. Notion of discrimination

The term *discrimination* is often heard in public speech in BiH society. However, what “discrimination” actually means and what is understood by this term is still unclear or unknown to many. The discrimination is mostly interpreted as making unjustified differences between a person or group of persons with regards to their personal attributes. However, not every differentiation is prohibited. Sometimes it can be justified and considered allowed. And that is what makes discrimination such a complex thing.

Discrimination takes various forms; it is often concealed, and subject of different interpretation by courts or other bodies. Because of this a special unified law is needed to provide precise definition of the notion, types and forms of discrimination, and the fact that BiH has actually adopted one such law is of utmost importance.

Discrimination according to the Law on Prohibition of Discrimination in BiH

Law on prohibition of discrimination under its Article 2 defines discrimination very broadly and there is almost nobody who is not subject to this law:

*„every different treatment, including every **exclusion, limitation or preference** based on real or assumed features to-wards any person or group of persons on grounds of their race, skin color, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life.“*

In essence, every different treatment or unjustified differentiation towards one person or group of persons based on their different attributes does constitute discrimination and as a rule it is reflected in exclusion, limitation or preference.

This means that by such treatment ones are always put in a better position than others, or they are put in a worse position than others. It is completely clear that such unequal treatment always has for a consequence that placing ones in a better position simultaneously places others in a worse position and vice versa. Therefore, such treatment always gives privileges to ones over others who are in such a case deprived of their rights.

Exclusion is seen as prohibiting ones to enjoy some rights and freedoms that belong to others. So for example exclusion exists when access to public swimming pool is prohibited to some persons solely because of some personal attribute of theirs, such as being member of an ethnic minority.

Limitation is seen as limitations in enjoying certain rights or freedoms in scope and in way as they are enjoyed by other persons. For example, if some public services are accessible to specific categories of population only at a given time, while to anybody else, the same services are accessible at any time without any limitation.

Giving preference is seen as having illicit preference for some persons although there are no legal conditions for granting such preference. So for example, giving advantage in employment to some persons only because they are members of a political party.

Discrimination may be committed by doing or by not doing. So for example, if in a public place, such as for example a public swimming pool, a plaque is put up saying that certain persons are prohibited from entering that constitutes discrimination by doing. However, if nothing is done by responsible authorities to remove architectural barriers or other obstacles for persons with disabilities to move or access to the faculty etc., that would constitute discrimination by not doing.

The same article specifies who the prohibition of discrimination applies to, and it covers all public authorities as well as physical or legal persons in public or private sectors in all areas, and particularly with respect to: employment, membership in professional organizations, education, training, housing, health, social protection, access to goods and services intended to general public, and performance of public activities and public services.

This is very important because nobody has the right to discriminate.

Forms of discrimination

Discrimination may take various forms of impermissible behavior. For that very reason, it is of critical importance that the law defines all possible types of discrimination. Second chapter of the Law does exactly this: it provides definition of various forms of discrimination, and it distinguishes and determines that there are *immediate or direct discrimination*, and *indirect discrimination* as the most frequent or key forms of discrimination.

Immediate or direct discrimination is typically easily recognizable and visible because those who are discriminating are not hiding their behaviors. Sometimes they even publically advocate and defend their positions and making distinction between persons often justifying that with some “higher” goals.

But, a much bigger problem is the **indirect discrimination**, which at the first sight may not be visible, it is concealed and it happens when the one who discriminates actually does not want their discrimination to be apparent. Naturally, that makes this kind of discrimination sometimes difficult to observe and harder to prove, because it is hidden behind apparently equal treatment, although the real goal is in fact to discriminate.

The law recognizes and defines **other forms of discrimination, as follows:** harassment, sexual harassment, mobbing, segregation, issuing orders to others to discriminate or encouragement of discrimination.

Harassment according to this law, harassment shall be considered discrimination in every situation when behavior is related to one of mentioned grounds from Article 2 that aims for or has an effect of harming person's dignity and creating intimidating, hostile, degrading, humiliating or offensive atmosphere.

Sexual harassment is every form of unwanted verbal, non- verbal or physical behavior of sexual nature which aims for or has effect of harming dignity of a person, especially when it creates fearful, hostile, degrading, humiliating or offensive environment.

It should be mentioned here that the definition of harassment and sexual harassment had already been introduced into national legal system before, in the Law on Gender Equality in BiH

However, this is the first time that the term mobbing finds its place in a law at the level of BiH. The law defines the **mobbing** as a form of non- physical harassment at working place with repetitive actions that have humiliating effect on a victim and aim for or has degradation of employee's working conditions or professional status as a consequence.

Generally speaking, "mobbing" is a kind of harassment at working place. The essential difference between the "mobbing" and "harassment" is in that in case of "mobbing", it is not of decisive importance to establish a connection or relation with a specific discriminatory basis provided under Article 2 of the Law, while that has to be done in case of harassment. So, a victim of "mobbing" is exposed to systematic humiliation the purpose or result of which is degradation of conditions of work or professional status of a person only because of their status of employee, and not any other personal attribute of that individual (for example, age, sex, ethnic background, etc.) Because of that, there is no obligation to invoke Article 2 of this Law in procedures to prove mobbing.

Segregation according to the Law is „an act by which (natural or legal) person separates other persons on basis of one of the grounds given in Article 2 of this Law, in compliance with the definition of discrimination from the Article 2 of this Law.“

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It is also important to mention that the Law also considers that issuing orders to others to discriminate or helping others to discriminate also constitute discrimination. In addition, every advocating of ethnic, racial or religious hatred is considered encouragement of discrimination and is prohibited.

Exception from the principles of equal treatment

As it has been already said above, not every different treatment automatically constitutes discrimination. So every country has been given the possibility to provide for certain measures that will not be considered discrimination. However, there are certain conditions to be met, and that has to be explicitly stated in law. So for example, Article 5. of the Law states that legal measures and actions will not be considered discriminatory when reduced to unfavorable distinction or different treatment “if based on objective and reasonable justification“.

Therefore, only the behavior that has objective and reasonable justification and when such behavior aims to achieve legal goal, or when the used means are justified and proportional to the desired goal shall not be considered discriminatory. Such measures are also popularly called “affirmative measures” or “positive discrimination measures”. The purpose of introducing the possibility for having such measures is to try to improve position of some disempowered groups to put them in equal position to everybody else in realizing and exercising the rights. Such measures are inherently of limited duration, generally until the purpose they are designed to achieve is achieved.

Scope of application of the Law

Chapter III is about the scope of application of the Law. Fifteen different areas of implementation of the law are listed specifically. However, it needs to be said that this list of the scope of application of the Law is not limited to those specific areas, because Article 6 first states that the law is applied “*in all spheres of life...*” and then continues listing the specific areas. We are of the opinion that the legislator had in mind that the discrimination mostly happens in those listed areas, but that they may not be considered the only areas where discrimination may happen. So if a discrimination happens in practice against a person in any other sphere of life, which is not covered by the list, the provisions of this Law shall still apply accordingly.

3. Institutions responsible for protection against discrimination

Institution of Ombudsman for Human Rights in BiH

Central institution competent for protection from discrimination is the Ombudsman for Human Rights of Bosnia and Herzegovina (hereinafter: BiH Ombudsman). Institution of Ombudsman is certainly also the critical body in combating discrimination in BiH.

Pursuant to provisions of this Law, this institution is competent to:

- Receive individual and group complaints related to discrimination;
- Provide needed information to natural and legal persons who filed a complaint for discrimination about their rights and obligations, and possibilities of judicial and other forms of protection;
- The BiH Ombudsman may decide not to accept a complaint or to initiate an investigative procedure;
- Propose initiation of process of mediation in compliance with provisions of the Law on Mediation

Still, the role of BiH ombudsman also includes a whole series of important activities in the area of registering and combating discrimination in BiH society. So the BiH ombudsman is also competent to, among other things:

- Collect and analyze statistical data on discrimination cases;
- Deliver annual and if necessary extraordinary reports on discrimination to the Parliamentary Assembly of BiH, FBiH Parliament, RS National Assembly and Brcko District Assembly;
- Inform the public on discrimination manifestations;
- Conduct surveys in the field of discrimination on its own initiative;
- Give opinions and recommendations aiming to prevent and combat discrimination, and suggest appropriate legal and other solutions to the competent Institutions in BiH;
- Have the right to initiate and participate in a proceedings for protection from discrimination for misdemeanors prescribed by this Law;

Very importantly, this Law provides for obligation of the BiH Ombudsman to submit annual reports on cases of discrimination to the responsible parliaments in BiH because that would certainly contribute to, first of all, establish the level of discrimination in BiH society, but also to discuss it before the various parliaments. This will definitely contribute to familiarizing the

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elected members of the parliament with the situation in the area of human rights, but also the general public to whom the information would thus become available. Regular annual reports will also contribute to monitoring the situation in this sphere, and to identify possible progression or regression in respect for human rights in BiH, what had not been possible to do in this way so far.

It is extremely important that this law provides for establishment of a special department in the BiH Ombudsman who would exclusively consider cases of alleged discrimination. Also, this includes the obligation of the ombudsman to act on individual complaints that concern actions of "...all legal and natural persons, in all spheres of life" in cases of alleged discrimination, thus protecting individuals from physical persons too, not only from authorities.

For civil society organizations of BiH, the obligation of the BiH ombudsman to cooperate with organizations working on protection of human rights and protection of human rights exposed to high risk of discrimination when writing their regular reports. Certainly, it remains to be seen in future in what way the mechanisms of this cooperation would be set, and to what extent all information on discrimination the civil society organizations collect would find their way into this report.

Ministry of Human Rights of BiH

Implementation of this Law shall be monitored by the Ministry of Human Rights of BiH (the Ministry).

The Ministry shall also have other important obligations concerning implementation of this law. So for example, the Ministry is under obligation to:

- In accordance with its competences defined by the law, and based on collected data on manifestations and scope of discrimination, to produce a report for the Council of Ministers of BiH at least once a year, and special reports containing proposal of measures for prevention and suppression of manifestations of discrimination in Bosnia and Herzegovina.
- to report once a year through the Council of Ministers and the BiH Parliamentary Assembly about manifestations of discrimination and with regards to that, propose concrete legislative or other measures, once a year

In addition, special records shall be established in legislative, executive and judicial bodies for the purpose of registering cases of discrimination determined in criminal, civil, non-litigation and enforcement proceedings, and the central data base on discrimination offenses shall be established within the Ministry.

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Further on, the Ministry shall issue a Rulebook on methods for collection of data on cases of discrimination in Bosnia and Herzegovina within 90 days after the Law enters into force, that shall define content and form of a questionnaire for collecting data on cases of discrimination and other issues related to procedure for collecting necessary data

All this is very important from the aspect of collecting and registering all cases of alleged discrimination in a single place, what had not been done to date. That would, first of all, provide for determining the level of discrimination that exists in BiH society and contribute to designing necessary legislative and other measures to provide adequate response to the most frequently registered forms of violation of human rights and discrimination.

Article 10 of the Law imposes the obligation of cooperation of all competent authorities with civil society organizations dealing with protection and promotion of human rights, and protection of rights of persons and groups of persons exposed to a high risk of discrimination when developing reports, preparing laws, strategies and other plans related to situation in human rights and discrimination-related issues. This will certainly be a challenge for the competent institutions, as well as for the civil society of BiH, particularly as the cooperation to date when adopting various strategies and laws could be considered only sporadic and incomplete. So far, what it meant was only informing civil society on already designed legislative proposals, without offering them any real possibility to have any effective say on them. Therefore, now we will have to wait and see in what way and by what mechanisms the cooperation would be established and when. Particularly since the law uses a very general term „competent bodies“, without specifying which are these bodies, what leaves open the possibility of one „competent bodies“ saying that other „competent bodies“ are in fact responsible for this, and vice versa.

4. Procedures for protection from discrimination

Filing charges for protection from discrimination

Article 11 of the Law states that every person or a group who consider to be discriminated shall be able to seek protection of his/ her rights through the existing judicial and administrative proceedings. In addition, the Law also provides that any person or group of persons exposed to any form of discrimination shall be authorized to submit a lawsuit and claim protection against discrimination. This practically means that the suit shall initiate the litigation procedure and put in motion the whole system of exercising legal protection in civil cases. Therefore, the procedure is started by the injured party, and never ex-officio.

Filing the suit for protection against discrimination will certainly be a challenge also for the judges who will rule on such cases because until now there were almost no such procedures, although a possibility for that had been provided considering the human rights protection instruments that are in force in BiH. Unfortunately, victims of discrimination have in the past rarely decided to file such charges, so one may say that there is almost no experience or case law on discrimination cases. The Law instructs the courts to use emergency procedures in discrimination cases, and this is particularly important for the cases of discrimination and important rights that are sought to be protected.

Transfer of burden of proof

Another very important thing is certainly one absolute novelty in our legal system – introduction of transfer of burden of proof in discrimination cases under Article 15 of the Law.

The principle of transfer of burden of proof was introduced because the European legislation had recognized how difficult it was to prove discrimination for the injured person or the victim of discrimination. Very often the direct evidence of discrimination is missing, or the statistics are otherwise very difficult to access by the victims of discrimination. Principle of transfer of burden of proof in fact enables the injured party to prove before the court or other competent body, such as administrative body facts from which one may conclude that discrimination has taken place. If they succeed in this, the defendant is the one who has to prove that there has been no discrimination.

Primary purpose of this is to provide protection to the weaker party. Very often, victim of discrimination has no access to all relevant information that are of importance for proving discriminatory actions because those are concealed actions conducted by the defending party. Therefore, according to the Law, it shall suffice that the victim makes the discriminatory

action probable, at which point the burden of proof is transferred to the defendant, who then has to prove in the proceedings that the discrimination had not taken place, and this is in fact the only way to provide judicial protection to the injured party.

Class suits for protection from discrimination

Under its Article 17, the Law provides for possibility of submitting collective suit for protection from discrimination by: associations, bodies, institutions and other organizations established in compliance with appropriate regulations, and have a justified interest for protection of interest of a certain group, or they deal with protection from discrimination of a certain group of persons in scope of their activities. In this respect, those persons again only have to make it probable that the actions of the defendant had violated the right to equal treatment, i.e. that there had been discrimination; again, the allegations need only to be made probable, after which the proceedings continue in accordance with the principle of transfer of burden of proof. What is particularly important in this case is that the suit may be filed only if rights of several persons have been violated by the discriminatory action, and that is why it is being called „collective suit“.

Strategic litigation

Articles 16 and 17 of the Law that provide for possibility of involvement of third persons as well as submission of collective suit practically open the possibility for conducting the so-called strategic litigations. In order to start and conduct such cases, it is necessary that group of persons exposed to any form of discrimination or an organization providing protection from discrimination to a certain group of persons files a suit against the person who had violated the right to equal treatment.

Conducting such procedures has several purposes. So for example, by filing suit and conducting procedures one may point at the necessity of changing a discriminating law or practice; one may draw attention to particularly important cases of discrimination affecting a large number of persons or a group of persons; or they may be used as a part of advocacy strategy the purpose of which is to influence broader community. Conducting such litigations provides for broader protection of human rights of not only those who were discriminated against in a particular case, but also the persons or groups who are not able to protect themselves by starting individual proceedings.

In addition, conducting such procedures may give a major contribution to strengthening cooperation between civil society organizations protecting human rights and fighting discrimination and become one of key elements of advocacy campaigns for amending specific laws or practices.

Protection of persons who report discrimination

Article 18 of the Law provides that a person who reported discrimination or participated in legal proceedings for protection from discrimination shall not suffer the consequences of such report or participation. In practice, this is most frequently called victimization, although our law does not use that particular term. It is very important to provide protection from possible adverse consequences to all who report discrimination or are involved in the process of proving discrimination.

This is particularly important for BiH context as the victims of discrimination are reluctant to go to court to seek protection of their right because of their fear from possible consequences the defendants may expose them to. Procedures for protection against discrimination really do have to be conducted in accordance with abbreviated procedure as provided in the Law, but it is particularly important that the judges fully understand and properly apply this law because only confidence in judicial system can make people file such suits, and that would ultimately lead to improved protection of human rights in BiH.

Therefore, it is essential to make sure that nobody would decide against reporting discrimination and participating in the procedures for protection from discrimination, particularly when the violated right is from the area of provision of public services, such as, for example, area of social protection or health care, as this concerns people who will remain in position to decide on rights of individuals, possible plaintiffs in cases of alleged discrimination.

Penalty provisions

The next to last, Chapter VI of the Law deals with sanctions for committed discrimination considering it exclusively as misdemeanor, although the Law specifies that these are criminal/misdemeanor provisions. Those provisions apply differently depending whether physical or legal persons were involved, and whether the person is a responsible official in a state, entity or cantonal institution, an institution of Brcko District of BiH, municipal institution, etc. In addition, the Law contains a provision concerning the case of violation of Article 18 and placing into difficult position persons who had reported discrimination or took part in the process for protection from discrimination.

According to the Law, protective measures may also be pronounced for misdemeanor, including prohibition of performing certain professional activity. In addition, final decision on misdemeanor passed in accordance with this Law shall be published in public media available at the whole territory of Bosnia and Herzegovina.

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The Law also stipulates that all laws have to be harmonized with provisions of this Law within a year from the day of entry into force of this Law, and in case of discrepancy between this Law and other Laws, in proceedings on actions that fall under this Law the provisions of this Law shall apply.

5. Implementation of the Law on Prohibition of Discrimination of BiH –Observed Problems

The Law on Prohibition of Discrimination has been implemented for just over a year. That is not yet a sufficient period to enable a detail analysis of its implementation, particularly with respect to cases of court proceedings under this Law. However, experiences in implementation of this Law in practice of the BiH ombudsman, legal practitioners and non-governmental organizations, as well as the actions of institutions competent for implementation of the Law may already be reviewed and analyzed. This is very important because this analysis points at key problems and challenges in implementation of the Law to date with regards to all said stakeholders, and it also shows some observed trends in action of some competent institutions, what all together reflects on practical implementation of the Law.

Observed forms of discrimination go into several directions, as follows:

- discrimination on the basis of belonging to a group such as: national minority, primarily the Roma, persons with disabilities, women, returnees when they live in the areas where they are minority constituent peoples, rights of the LGBTIQ, etc.;
- discrimination in use of certain rights, such as the right to and from work and employment, education, right to health care and social protection, and quickly increasing number of mobbing and sexual harassment cases.

Discriminatory provisions in the laws and discrimination in implementation of law

The Law provides that all laws and general regulations must be harmonized with this Law within one year. However, although this deadline has passed, the laws are still implemented in practice, particularly at the entity level, that are directly discriminating specific groups of persons. In addition, a number of laws contain seemingly neutral provisions that result with practical discrimination of certain groups or persons.

The *Constitution of BiH* and the *Election Law of BiH* may both be considered discriminatory as they directly discriminate against members of national minority in their access to political rights. In spite of the ruling of the European Court of Human Rights in the case *Sejdić and Finci vs. BiH*, the state has not taken necessary steps to abolish discriminatory provisions of the Constitution and law and it has failed to secure the right of national minorities to elect and be elected on equal footing and in the same way as the members of constituent peoples.

Another problem are the laws treating the *area of social protection* in FBiH that directly discriminate against persons with disabilities on the basis of origin of disabilities. So for

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example, the amount of benefit paid to persons who have equal level of disability is not determined on their actual needs, but exclusively on whether the disability were result of their status of civilian war victim, military war disabled, or person whose disability originated irrespective of the war. In addition, the amount of disability benefit significantly varies according to the place where the disabled person lives.¹⁰

Civil society organizations have been pointing at this problem for some time now and advocating a comprehensive reform in the social protection sector. The reform would, among other things, lead to abolishment of such discriminatory provisions from the law. One needs to emphasize that the competent authorities in FBiH have started the procedure to amend the Law on Basics of Social Protection, Protection of Civilian War Victims and Protection of Families with Children, and they are currently working on drafting the Preliminary Draft Law on Protection of Civilian War Victims and Preliminary Draft of the Law on Fundamental Rights of Persons with Disabilities. However, the currently available drafts still contain discriminatory provisions and provide for different treatment of persons with disabilities based on origin of disability, and for different scope of rights and explicit difference in amounts of personal disability benefit, allowance for care and assistance by third person and orthopedic allowance.¹¹

Without prejudice to any right or will of the State to provide special recognition and support to persons whose disability originated as a consequence of war or war events, the methods of the State's doing this needs to be reexamined as it should not discriminate against all other persons with disabilities and violate the Law on Prohibition of Discrimination.

Further on, implementation of some laws, particularly those at the entity levels, results with practical discrimination of certain groups of persons, such as the returnees, the unemployed, members of the Roma ethnic minority, in their access to the right to education or employment, and social and health care.

Non-governmental organization "Vaša prava" ("*Your Rights*") shows a whole list of laws that have discriminatory effect in practice, such as the Law on Refugees and Displaced Persons of BiH, Law on Protection of Members of National Minorities in BiH, Law on Pension and Disability Insurance of FBiH, etc.¹²

¹⁰ More details on differences in amounts of benefits can be found in publication: "Why aren't We Equal in Rights under Social Protection – Situation Analysis and Recommended Actions" ICVA and Prava za sve, November 2010;

¹¹ Analysis of the pre-draft showed that if the law were adopted, "... monthly personal disability cash benefit for a person who has bodily damage of first category and who is civilian victim of war (560 KM) would equal five times the cash benefit payable to person with disability that was not caused by war-related events (110 KM). Ibid;

¹² „Vaša prava,“ Magazine of the Association „Vaša prava BiH,“ December 2008, available at <http://www.vasaprava.org/Home.htm>;

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The returnees are still faced with unsustainability of their return sixteen years after signing the peace agreement. According to information provided by the “Vaša prava”, only one percent of the returnees are employed. Returnees are largely excluded from the privatization process, they have problems exercising the rights as civilian war victims they had been granted before they returned, or have problems in accessing assets intended for reconstruction and return, etc. Those persons are exposed to unequal treatment solely because of their status of returnees.

In addition, Law on Health Care of FBiH as well as relevant cantonal laws regulating this area differ in both normative sense and in implementation. This results with discrimination of beneficiaries on territorial grounds¹³ and unequal access to rights under health care for specific vulnerable groups of persons. So for example the unemployed do not have equal access to health care in entities; lists of essential drugs are different in different cantons and at the entity level; cantons do not have equal approach to patient’s participation in costs of health care provision, etc.¹⁴

In exercising their right to health care, persons with disabilities are additionally discriminated on the basis of physical (un)accessibility of health care institutions because there are no lower counters for persons in wheelchairs, sound signals for the blind, appropriate equipment for gynecological examination of women confined to wheelchairs, etc. On top of this, the level of training and skills of medical and paramedical staff to provide assistance to persons with disabilities is inadequate; specialist examination are not equally accessible in all cantons, etc.

Institutional response to obligations provided under the Law

As it had already been said, the Law designates the Ministry of Human Rights and Refugees of BiH (the Ministry) as the authority obliged to establish a central data base of discrimination cases, and to adopt the Rulebook on methods for collection of data on cases of discrimination in Bosnia and Herzegovina within 90 days after the Law enters into force. A special registries in legislative, executive and judicial bodies need to be established to register the cases of discrimination determined in criminal, civil, non-litigation and executive proceedings. Competent institutions are obliged to regularly register all reported cases of discrimination and deliver the information collected to the Ministry.

Although the deadline of 90 days provided by the law for adoption of the needed Rulebook by the Ministry, this document has not yet been adopted, making it impossible to establish a central data base of discrimination cases. Other competent institutions have not fulfilled their obligations provided under the law either, so the determined cases of discrimination are still

¹³ Discrimination reflects in different scope of rights a person has depending on their place of residence: by entities/cantons or urban/rural communities;

¹⁴ More details on discrimination in health care may be found in publication “Why Aren’t We Equal in Our Health Care Rights? Situation Analysis and Recommended Actions”, ICVA and Prava za sve, November 2010;

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not being properly registered. Electronic data bases of cases received by courts do not allow for registering cases on the basis of this Law at this time.

Because of all this, it does not surprise that the first Annual Report on Discrimination Cases has not been made yet, which should have been done by the Ministry according to the Law.

Extremely concerning is the fact that the very Ministry that has such important obligations in implementation of the Law as well as the exclusive competence to monitor implementation of the Law in practice has completed none of their obligations under the Law and thus violates the Law by not doing. Unfortunately, although the adoption of this Law should have key role in improving protection of human rights in BiH and terminating discrimination, it will evidently take a long time for BiH citizens to start feeling real practical effects of this Law.

Experiences of BiH Ombudsman in implementation of the Law

The central institution responsible for protection from discrimination according to the Law is the BiH Ombudsman. Even before this Law was adopted, a special Section for Elimination of All Forms of Discrimination had been established within this institution to receive complaints and start investigations in discrimination cases. Even to date, the BiH Ombudsman has been pointing at problem of discrimination and unequal treatment in their regular and special reports and by adopting recommendations, and this is very important from the position of protection from discrimination, but also in the light of identifying directions to which the reform of national legislation needs to be aimed in order to root out discrimination in laws and practice.

Since adoption of the Law on Prohibition of Discrimination, the BiH Ombudsman has observed an increase in number of suits alleging discrimination. In late 2009, the BiH Ombudsman had 47 new and 26 cases of discrimination that had been open before the Law was adopted. Data from November 2010¹⁵ show that of 2070 cases currently in procedure, 162 are discrimination cases. Most of the new cases received by the BiH Ombudsman that fall under the scope of this Law involve the cases of mobbing and sexual harassment.

Still, besides the already mentioned problems, such as alleging discrimination to increase the “weight” of the suit, (in) ability of considering admissibility of video and audio recording as evidence in investigation, what concerns is that the BiH Ombudsman states a dilemma with regards to their competence in cases when the alleged violator of the Law is a private company. One argument that contributes to this dilemma is that the Law on Ombudsman

¹⁵ Official data and statistics concerning the work of the Ombudsman Institution on this year will be available in early 2011 when the Institution is due to submit their annual Report on Results of their Activities to the Presidency of BiH, to the House of Representatives and House of Peoples of the Parliamentary Assembly of BiH, Parliament of the Federation of BiH and to National Assembly of the Republika Srpska;

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states that this institution would consider cases that concern “*poor functioning or violations of human rights and freedoms committed by any government authority*”.

In response, one should emphasize here the competence of the BiH Ombudsman to “protect rights of physical and legal persons in accordance with Constitution of BiH and international agreements...¹⁶” According to international human rights protection standards, the State is responsible for providing effective protection to citizens against violation of human rights, irrespective of whether the offender were public or private company.¹⁷

In addition, according to the Law on Prohibition of Discrimination, the “prohibition of discrimination applies to all public authorities as well as to all physical and legal persons, both in public and private sectors, and in all spheres...¹⁸”, and the BiH Ombudsman are central institution responsible for protection from discrimination.

Therefore, no-governmental organizations take position that the discrimination cases where the alleged offender is a private company do fall under competence of BiH Ombudsman as the central institution for protection from discrimination in BiH.

According to the Law, the BiH Ombudsman may propose initiation of mediation procedure in cases of discrimination, following the provisions of the Law on Mediation, which the BiH Ombudsman strives to promote. However, we wish to point out here that the mediation mechanism in the form it takes in BiH has a number of shortcomings. So the Law on Mediation Procedure does not stipulate the deadline by which the procedure has to be finished, the mediator is third neutral party that “assists the parties in their attempts to achieve mutually acceptable resolution of the dispute”, and the mediator may not impose solutions to the parties¹⁹ but only propose options to resolve the disputes. In addition, there are problems concerning the financing of the mediator’s and other mediation costs that are to be paid by both parties equally.

Protecting citizens from discrimination and securing extremely important principle of equal treatment are obligations of the State. By transferring the obligation to provide protection from violations of Law on Prohibition of Discrimination to mediation places an unreasonable burden on victims of discrimination who are not provided with equal treatment and protection in mediation processes. The State must show determination and effectiveness by systematically resolving discrimination cases and consistently applying the principle of equal

¹⁶ Article 1, paragraph 1 of the Law on Ombudsmen for Human Rights of BiH;

¹⁷ International Commission of Jurists, Geneva, Switzerland, Urban Morgan Institute on Human Rights, Cincinnati, Ohio, USA and Centre for Human Rights of the Faculty of Law of Maastricht University, the Netherlands: *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* – document adopted by a group of thirty experts on the 10th anniversary of the Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural Rights. This Guide is a generally accepted source of interpretation and implementation of human rights standards, particularly economic, social and cultural rights; Maastricht, January 22-26, 1997;

¹⁸ Law on Prohibition of Discrimination, Article 2, paragraph 2;

¹⁹ Article 2, paragraphs 1 and 2 of the Law on Mediation Procedure in BiH;

treatment. Only in this way the state may act preventatively to avoid cases of discrimination and violation of human rights in BiH.

With respect to this, the BiH Ombudsmen has a very important role, but also the responsibility to protect citizens from discrimination. If there is no readiness to accept this responsibility, the focus of action would be reduced to refer the victims of discrimination to mediation procedure, or otherwise declaring themselves incompetent to proceed, what would then require urgent amendments to the law to make it effectively implementable and meeting the purpose for which it had been adopted. Anything else would mean just another law that is not really implemented in practice.

Experiences of non-governmental organizations in implementation of the Law

So far, only some sporadic civil society organizations have used court proceedings as an advocacy tool for achieving broader influence in the society and as a direct advocating strategy for amending a law or changing a practice. With respect to this Law, strategic litigation may be of extreme importance as discrimination often affects groups of persons, and rulings in such cases may have effect not only on the plaintiff in the given case, but also on the wider group of persons affected by discrimination.

In case of newly adopted Law the organization “Vaša prava” has already in late 2009 filed individual charges to the Municipal Court in Mostar concerning discrimination of persons with disabilities in their right to access to primary education.

In July 2010, the first instance court ruled on this case confirming discrimination because the defendant, the Ministry of Education, Science, Culture and Sports of the Herzegovina-Neretva Canton “has violated the plaintiff’s right to equal treatment in education process by failing to take inclusive measures to meet the needs of the plaintiff as a person with special needs.”²⁰

This was the first time that a procedure on the basis of the Law on Prohibition of Discrimination a state institution was ordered to:

„...enable the plaintiff to continue education following special curriculum adjusted to his individual needs and providing support of a special expert team and an assistant who will be present during regular teaching for as long as the special educational needs of the plaintiff exist...”

Although this is only a first instance ruling, it has a far reaching influence on the other 165 pupils with special educational needs in this cantons who have been, the same as the plaintiff, exposed to indirect discrimination and placed in unequal position with respect to other pupils’

²⁰ Ruling of the Municipal Court in Mostar number P 58 0 P 056658 09 P, of 06.07.2010.;

population since they were not “provided with equal access to education, gaining knowledge and adequate professional training at all levels of education, in all types of schools and other institutions...”²¹

It remains to be seen what will the appellat court decide, but in any case, it is good that the implementation of the Law has started before at least some of the competent courts, and we hope that they will not remain the only ones.

Challenges in practical protection from discrimination before institutions

Reporting discrimination

Despite of all above described provisions concerning discrimination in laws and practice, a very small number of judicial procedures has been started to date concerning the cases of discrimination; there is a number of reasons for this:

First of all, persons exposed to discrimination, in the opinion and experience of non-governmental organizations,²² are reluctant to use legal means, particularly court proceedings to protect their rights mostly because they fear losing their jobs, being isolated or exposed to other negative consequences in their jobs during the process and after they come back to work. It should also be said that citizens have experiences with generally time consuming court proceedings, and that there are still problems with enforcement of court rulings, additionally discouraging all those who would otherwise seek protection of their rights before courts. All this unfortunately indicates that there is a general lack of trust in judicial system and institutions of the system.

However, one should also say that not a small number of persons decide against starting the procedure because of unavailability of free legal aid on the whole territory of BiH and/or lack of financial means to cover the costs of attorneys and the courts.

According to observations of legal practitioners and non-governmental organizations, one additional problem that is related to broader implementation of this Law is that the citizens are insufficiently informed that one such specific Law had been adopted and what mechanisms of protection it provides for. Persons who do not know their rights and protection mechanisms can not seek protection of their rights warranted under this Law. Unfortunately, the competent institutions have not put enough effort into presenting this important law to general public.

²¹ Ibid;

²² Organization „Vaša prava“ emphasizes that they have already prepared suit for discrimination on behalf of persons who had addressed them for help, but that the victims pulled back when they were to submit the suit to the court;

Proving discrimination

Although the Law places the burden of proof onto the alleged discriminator, it has been observed that the victims of discrimination are required to prove enough fact in the evidentiary process that would make the discrimination probable, at which point the burden of proof is transferred onto the defendant, who has to prove that they had not committed discrimination.

Considering that transfer of burden of proof is an absolute novelty in BiH judicial practice, stating the fact would be extremely difficult for victims of discrimination on one hand, but on the other hand, it will present a challenge for the proceeding judge.

So for example, in mobbing or sexual harassment cases, the victims of discrimination will have it extremely hard to present sufficiently convincing facts that the discrimination had really happened because such offenses are mostly committed without witnesses and not documented.

In practice of the BiH Ombudsman, an increase in number of reported cases of these particular forms of discrimination, and it has already been observed that victims submit as evidence sound or video recordings in the attempt to substantiate the allegations of mobbing or sexual harassment. However, the BiH Ombudsman, as they state themselves, does not consider validity of such evidence in the proceedings they conduct, so it remains to be seen what position will take court in such cases the number of which is increasing.

6. Conclusions and Recommendations

- The Ministry of Human Rights of BiH must urgently start drafting the Rulebook on methods for collection of data on cases of discrimination as this is the Ministry's obligation under the Law that is of extreme importance for regular and effective monitoring of implementation of this Law, observing events of discrimination and taking timely actions to prevent it;
- Inter-sectoral and inter-entity governmental working groups should be established, which should also involve non-governmental organizations, with the aim of reviewing harmonization of the national legislation with the Law on Prohibition of Discrimination and proposing emergency amendments to concrete legal provisions that directly or indirectly discriminate against individuals or groups of persons in BiH;
- The Law on the Ombudsman for Human Rights in BiH, the central institution for protection from discrimination, needs to be amended in order to enable this Institution to use streamlined procedure in discrimination cases, and particularly, to precisely define competences of this Institutions in proceeding in cases where the alleged offender is a private company;
- Instructions for interpretation and implementation of the Law for victims of discrimination need to be adopted urgently in order to help them gather the facts to substantiate their allegations of discrimination, particularly in mobbing and sexual harassment cases;
- Amendments need to be adopted to the Law on Mediation to more precisely define the procedure in discrimination cases by, first of all, specifying deadlines for completion of the procedure, financing costs of the procedure and the mediator, and enforceability of the mediator's solution;
- Law on Free Legal Aid of BiH needs to be adopted urgently to provide equal access to court and other mechanisms of protection to all individuals who are exposed to discrimination in whole BiH;
- Institutions responsible for protection of human rights, and particularly the Ministry of Human Rights, should establish regular activities to inform general public on the Law on Prohibition of Discrimination, on how to recognize discrimination, on institutions competence to resolve the cases of discrimination, on legal possibilities that are at disposal to individuals or groups exposed to discrimination, etc.;

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- Competent institutions, particularly the Training Centers for judges and prosecutors, need to introduce regular and continual training of judges and prosecutors on the Law on Prohibition of Discrimination.