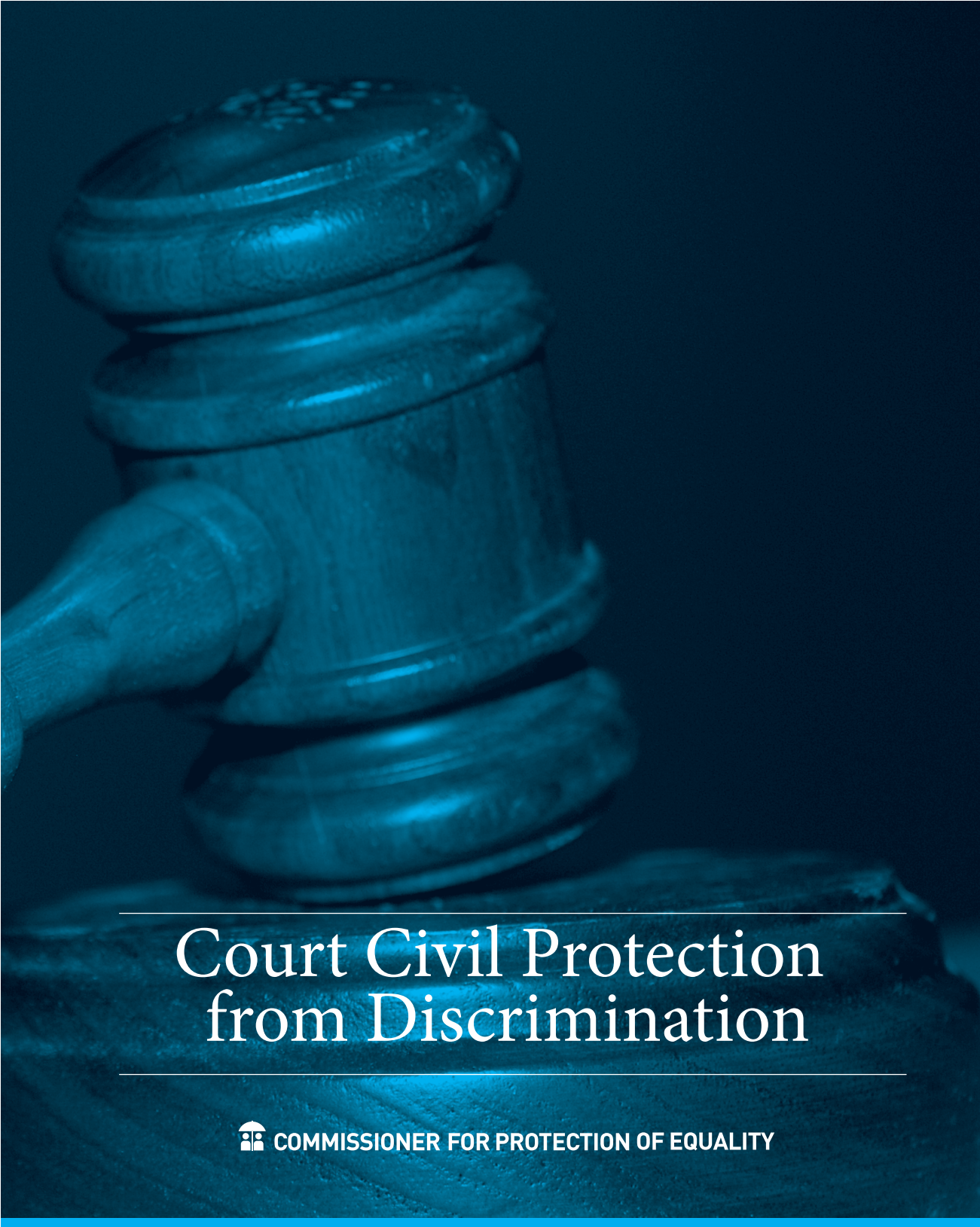

Court Civil Protection from Discrimination

COMMISSIONER FOR PROTECTION OF EQUALITY

REPUBLIC OF SERBIA

JUDICIAL ACADEMY

OSCE Organization for Security and Co-operation in Europe
Mission to Serbia

Commissioner for Protection of Equality
Judicial Academy

Court Civil Protection From Discrimination

Belgrade, 2012

COMMISSIONER FOR PROTECTION OF EQUALITY

JUDICIAL ACADEMY

COURT CIVIL PROTECTION
FROM DISCRIMINATION

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All the terms in the male grammatical gender that are used in the text include the masculine and feminine gender of the persons they are referred to.

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FOREWORD

The principle that all people have the same rights, regardless of sex, race, color, religion, ethnic or national origin, or other characteristics of their own, is a key moral and legal value. Therefore, in the contemporary society the principle of equality and non-discrimination is the basic postulate of the legal order, and the right to freedom from discrimination is elevated to the level of basic human rights.

Despite proclaiming the principles of equality and prohibiting violation of human rights, discrimination phenomenon is found in all cultures, societies and countries. It also occurs in countries with stable and developed democratic institutions.

Research shows that discrimination is widespread in Serbia and that the most frequent is against women, the Roma population, persons with disabilities and sexual minorities.

Discrimination, illegal distinction of people based on their personal characteristics, has many forms and manifestations. As a social phenomenon, discrimination is subject to change because social stereotypes and prejudices that cause it change over time. Individuals and social groups are exposed to discrimination, but it produces negative consequences to the entire society.

Discrimination undermines modern democratic values, it is an obstacle to development, peace and security, social inclusion and improving the quality of life of people in the community. Discrimination is also a criminogenic factor because it creates a climate conducive to the commission of crimes motivated by hate crime and other criminal forms of intolerance, which, over time, can make social relations worse and lead to the collapse of society.

Experience shows that for successful suppression of discrimination, equality and tolerance towards other and different people have to become the common values that society knowingly accepts, understanding that without it there is no peaceful coexistence, social stability and progress. It involves the establishment of the system of values in which differences are accepted, respected and understood as wealth and potential for development.

Suppressing discrimination requests, however, effective instruments of legal protection from discrimination, which sanction the discrimination, prevent its further expression and eliminate the harmful effects caused by it.

Understanding the importance of suppressing discrimination and achieving

equality, Serbia has in recent years built up a good legal framework for preventing and suppressing discrimination, respecting international standards and relying on experiences in comparative law.

Discrimination is prohibited by the Constitution of the Republic of Serbia (Article 21), and by general and specific anti-discrimination laws any form of direct or indirect discrimination on any basis is prohibited, the protection from discrimination is regulated and measures to promote equality are prescribed. The establishment of the institution of the Commissioner for Protection of Equality completes the system of protection from discrimination, which consists of various instruments of civil law, criminal law and misdemeanor law protection.

In the national system of protection from discrimination, the significant role belongs to the instruments of civil protection from discrimination, intended to stop and prevent discrimination and eliminate consequences. The civil protection against discrimination is regulated by the general and basic anti-discrimination law- the Law on Prohibition of Discrimination, and special anti-discrimination laws- the Law on Prevention of Discrimination against Persons with Disabilities and the Law on Gender Equality.

An effective use of civil protection instruments against discrimination requires that judges, lawyers and other legal professionals understand discrimination as a social phenomenon, as well as all elements of the legal concept of discrimination.

The legal concept of discrimination, of both direct and indirect, is very complex because it consists of a series of related elements. Therefore, determining discrimination in court procedure is a complex thinking process, which requires specific theoretical and practical knowledge, and the corresponding valuing judgments.

Experience shows that for effective and efficient civil protection from discrimination, a good knowledge and understanding of complex legal concepts and anti-discriminating standards set by international and national regulations is crucial.

Bearing in mind the need for offering relevant educational materials to legal professionals that will help them to understand and correctly interpret the regulations that regulate court civil protection from discrimination, the institution of the Commissioner for Protection of Equality initiated the preparation of the publication "Court civil protection from discrimination" The Judicial Academy joined the realization of this idea, and the financial support was provided by the

European Commission and the OSCE Mission to Serbia.

The publication consists of 12 units, and it was elaborated by 13 domestic authors. It provides relevant information on discrimination as a social and legal phenomenon, different forms and cases of discrimination, as well as on international and domestic anti-discrimination standards.

Besides, it provides to readers the information on the contents and forms of civil protection from discrimination, as well as the specifics considering proving discrimination and court proceedings on protection from discrimination. The publication is primarily designed for judges, but it may be useful to lawyers, corporate lawyers and all other legal professionals.

We hope that this publication will contribute to improving the effectiveness and efficiency of civil protection from discrimination and to a more efficient suppressing of this negative and dangerous social phenomenon.

Nevena Petrusić PhD
Editor

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1

Discrimination as a social phenomenon*

* The author of this chapter is Aleksandra Vesić Antic, an independent consultant.

1.1 DISCRIMINATION AS A SOCIAL RELATION

1.1.1 What is discrimination

The word *"discrimination"* means making a distinction between a person / group of people based on their personal characteristics. The unallowed discrimination occurs when a person (or group of persons) are treated unequally and at their own expense, just because they belong to a certain group of people. Discrimination unfairly burdens or takes away opportunities from individuals or groups on irrelevant grounds such as race / skin color, nation / ethnic origin, nationality, language, religion, gender, family / marital status, physical or mental disability, political beliefs, sexual orientation, specific diseases (HIV-positive), financial status, age, appearance, etc.. As long as this list might seem, something could always be added to it, because practically every personal characteristic could be a basis for discrimination.

Discrimination results in inequality, subordination and / or subtraction of political, educational, social, economic and cultural rights of specific groups of people.

Considering that discrimination is done on different grounds, and many groups of people can be exposed to discrimination, a terminology is developed so that one name could mark those very different groups. Some of the most common used terms are:

- *marginalized groups* - because they are considered to be put on margins of society
- *minority groups* - because they are often, but not always, a minority in certain society
- *vulnerable groups* - because they are subject to unequal treatment
- *discriminated groups* - because they are subject to discrimination.

Similarly, for those who do not belong to these groups, used terms are:

- *dominant groups*
- *majority groups*

It is especially important to understand a few important facts:

- *The characteristic that causes the inequality cannot be changed*. This means that people cannot change the fact that they are Roma, have a disability, are female, are of certain age, have a different sexual orientation, or an illness. What CAN be changed is the attitude about it.
- *Discrimination is not only active committing, but also a passive allowing of the discrimination to happen*. If we are present or aware of the act of discrimination, and do nothing to draw attention to it, or prevent it, we become participants in the discrimination.

• *People from discriminated groups do not need care and protection, but equal opportunities* to control their lives, jus as people who are not or are less discriminated do.

1.1.2 Why do we need to fight discrimination

Due various personal problems, the issue of discrimination often seems unimportant, or like an issue that does not concern each of us personally. So, why it is important that everyone is involved in the fight against discrimination?

Discrimination or unequal treatment of people is dangerous. Though it appears that discrimination may be harmless, it leads to loss of human life - whether these are some individual examples (e.g. skinheads who have repeatedly murdered Roma in Serbia), or mass murders, pogroms and genocides (millions of Jews and Roma who died in the concentration camps). Even today, people lose their lives or are subjected to physical violence because they are members of a discriminated group.

Discrimination leads to the loss of contributions valuable to the whole society, including the human race as a whole. When individuals are disabled to fulfill their potential as human beings, all society loses. We may wonder how many Stephen Hawkings are lost because many people with disabilities were not able to overcome the obstacles placed to them. How many Maria Curies are lost because for centuries women were not allowed to go to school? So, by discrimination of others, every one of us loses, as a part of human society.

Discrimination affects a large number of people. Opinion that discrimination affects an insignificant number compared to one nation or humanity is a plain delusion: women are a half of the human race, people with disabilities at least ten percent, gay people are also about ten percent, only in our country there are more than half a million Roma, and besides that a large number of members of ethnic minorities and elderly persons live in our country. When we count these numbers, it is certain that, only in our country, over half of the population is discriminated on some of the grounds, which is far from negligible.

As much as some person thinks that he/she is safe, everyone is a potential target for discrimination. Considering that almost every personal characteristic could be a ground for discrimination, each of us is in a certain situation its target. Let's recall the last twenty years of our history: when a large number of people from the for-

mer Yugoslavia left their country of origin, they automatically became easily susceptible to discrimination because they belong to a large group of "newcomers / immigrants" who have different customs or religion or simply didn't speak well enough the language of the country they came to. It can happen to everyone, whatever group he/she belongs to, to find him/herself in a situation in which he/she will be a subject of discrimination because of characteristics that cannot be changed.

It is therefore important that all of us try to perceive our own attitudes related to discrimination, and develop empathy for others, in other words, it is necessary to try to understand the position of others. We should ask ourselves: Whom do I treat differently and why? How would I feel in the same situation? What consequences could my action/decision have? The fight against discrimination means to take responsibility for our own actions in everyday life, at the work that we do and therefore for shaping the world we live in.

1.2
CAUSES AND WAYS OF MANIFESTING DISCRIMINATION

1.2.1 Stereotypes and prejudice as causes of inequality

The causes of discrimination are stereotypes and prejudices.

The term "stereotype" derives from the Greek word 'stereos' - solid, and 'typos' - the impression, quite literally, the stereotype means 'strong impression'. Stereotypes can be defined as "widely accepted but highly simplified images or ideas of a specific person or thing."[1] In other words, to have a stereotype means to consider that all members of a certain group of people will behave in a certain way and / or have the same characteristics, which are believed to belong to them.

Stereotypes are, therefore, the image, often widely accepted and adopted by the majority in a society, of certain groups of people. Most often it is the negative image such as: "Gypsies are filthy," "Women are stupid," "Muslims are terrorists". In cases where the image is very negative, as in the examples above, it is clear why they are the cause of discrimination.

However, some stereotypes are not negative at first glance; for example in our environment it can be heard: "Nobody has ever made cakes as Albanians" or "Gypsies are the best musicians." Although these stereotypes seem positive, they still represent the beliefs that provoke, stimulate and sustain discrimination, because they imply that members of certain groups of people are "good" only in certain things / occupations, usually less appreciated and / or paid. This is clearly confirmed in public opinion surveys in Serbia. (more on this under 1.4.).

The stereotypes are used whenever one tries to generalize, or, in other words, every time when one says something starting with "All ..." Generalizations are dangerous because they are easy: they generalize the opinion related to certain groups and so, in a way that does not require deliberation, certain social phenomena are explained. In other words, it is much easier to classify people with disabilities as" incompetent" for normal life and work, than to think about what conditions society should provide to make a normal life and work possible for them: it is much easier to explain the situation of Roma by saying that they are "all lazy and do not want to work" than to try to identify the barriers that society places to the Roma population. In that way the stereotypes are maintained and unfortunately continuously "feed" discrimination.

Stereotypes also maintain and "feed" prejudice. Word 'prejudice' derives from the

1 Oxford Dictionariesonline (http://oxforddictionaries.com/definition/english/stereotype)

Latin word "praejudicium", formed from 'prae'- 'forward' and 'judicium '- 'to judge', so literally meaning is the judgment in advance. Prejudice can be defined as a "preconceived opinion not founded on reasonable grounds or the actual state of things."[2] So, prejudice means to have an attitude/ opinion / judgment that is not based on knowledge about facts, or on serious contemplation.

Prejudices cause discrimination because they are (mostly) negative attitudes about certain groups of people, although these views are not based on facts, and often there was no basic contact or experience. Therefore common prejudices are against persons of homosexual orientation (that such persons are sick or perverted) or members of other races (e.g., that the members of the black race are less intelligent) although such opinions are not based on fact and often there was no contact with members of these groups.

On the other hand, one can have daily contact with a group of people, but still keep up prejudice. It is, for example, often the case when it comes to women. Most people have formed opinions about women's intelligence or ability to engage in certain occupations, and in doing so, they never really seriously thought about how and on what ground they've formed such views, or whether these opinions are based on facts.

1.2.2 Causes of prejudices and stereotypes

Although prejudices against certain groups have existed for a long time, there are reasons why they are easily adopted and expanded by each new generation. The most frequent causes of prejudice are: ignorance, power, vulnerability / fear, education and conformism (Clements, Spinks, 2000:9).

I*gnorance* represents inherent attitudes and opinions about specific groups that are not often based on knowledge of the facts. Considering that learning fact requires an investment of time and effort, the majority of people go the easy way that is, interpret facts on the basis of familiar stereotypes and prejudices. Ask yourself, for example, how much you really know about a particular culture or religion you have a certain attitude about.

Power is the ability to achieve the domination of someone's own goals, interests, and values over others. The ability to achieve dominance derives from our social status: each of our characteristics is the identity, and each of our identities car-

2 OxfordDictionariesonline http://oxforddictionaries.com/definition/english/prejudice

ries with it a certain social status and consequently, a certain degree/degrees of power ("I'm a mother," "I'm the director", "I'm heterosexual".) If by any of our identities we belong to a dominant group in society that increases our power. The power that comes from belonging to any dominant group carries the belonging to a specific group that has privileges. For example, to belong to the white race, to be a man, to be physically and mentally healthy person, to be a heterosexual orientation, to be a member of a majority religion means to belong to certain groups and have certain benefits over those who belong to a different race, minority religions, who have disabilities, or are homosexuals.

Abuse of any form of power can lead to unequal treatment of certain groups of people, especially those that are related to prejudice and stereotypes. At the same time, the prejudices and stereotypes provide an "explanation" why those people / groups who are outside of the circle of privilege, should remain there, and why they should be treated unequally. That is why "women are not made for politics," "homosexuals threaten the survival of the human species," "Gypsies steal," "Islam is aggressive and Muslims are fanatics".

Vulnerability / Fear is a reaction to one of the basic human needs and that is the need for a sense of safety (whether it is about life conditions that we want to have, or about a job, family, etc.). From the need for safety fears occur that "others" are going to jeopardize us (our family, job, position in society). To explain the fear as the cause of discrimination, it is easiest to use examples from our recent past and near environment: during the war a large influx of refugees became a threat, and the refugees were exposed to discrimination, because "they were coming with large amounts of money, but were also taking humanitarian aid and our jobs while we were living with two Deutschmarks per month." Similarly, prejudice related to the Albanians, for example. "They have high level of birthrate and will flood us all," is an expression of fear that things are going to change, and that those who belong to Serbian nationality will become a minority.

Education, because parents - both consciously and unconsciously - transfer their own attitudes and understanding of things to their children. That is why our attitudes, opinions and perceptions (which do not have to be related only with prejudice) are often similar or the same as the views within the environment that "raised" us - primary family, and then the school. Attitudes and opinions acquired in early childhood usually are never even reconsidered, but instead, taken for granted, as something that goes without saying.

Conformism is a behavior consistent with the norms and expectations of a relevant social group, and is associated with prejudice because it also corresponds to one of the basic human needs - the need to belong and the need to be accepted. In this sense, if a group of people with whom a person is in everyday close contact, expresses racism, sexism, or any other type of prejudice, there are great chances that the person in that environment is going to express same or similar attitude, that is, even when he/she thinks differently will not say it out loud.

1.2.3 Manifestations of discrimination

Since discrimination is deeply rooted in prejudice existing in a society and / or culture, it often takes forms that are not so clear and easy to see, but still results in unfair treatment of certain groups of people. Therefore, manifestations of discrimination can be classified into: 1) language, 2) behavior, and 3) direct violation / deprivation of rights.

In each case, there is a person/s who conduct discrimination, the person/s that are discriminated, and also the person/s who are not reacting to/remaining silent about discrimination. Persons who are not reacting or are in the position to punish the discriminator, but are not doing it, are also participating in discrimination.

1.2.3.1 Discrimination by language

In recent years, we, at least in public, have started to pay much more attention to the language, and phrases that are used in relation to marginalized groups (so-called "politically correct speech"). Insisting on a different language often causes dissatisfaction because it is considered unnecessary. Then why change the language, and pay attention about how we talk about marginalized groups?

Language can offend. Name/names that usually mark marginalized groups have so long been in use in a negative sense, that they acquired the meaning of insults. Think about how many times have you heard/said "do not act like a Gypsy"," dirty as a Gypsy"," Oh don't be/act like gay"," they are blind (meaning "stupid")" and so on. So, certain words carry so many negative connotations, that, when said in a regular communication to mark a person or group, they practically represent an insult (whether it is intentional or not).
Language can reinforce and confirm prejudices. Many of the words and structures that are used in relation to marginalized groups reinforce stereotypes, and by that, the prejudice itself. It is easiest to understand if we think about things that

certain words remind us of: what is the first thing that comes to your mind when you say crippled, disabled, Gypsy, gay? By using certain words and constructions, people unconsciously confirm and reinforce stereotypes; because they are constantly repeated in everyday life, stereotypes become so strong that they prevent us (or make it very difficult for us) from having objective judgments about a person who belongs to a certain group.

As one of the most common arguments against changing the language is that it is wrong to change the language or that it is difficult, or that new words/neologisms sound ugly, cumbersome and corrupt the language (that argument is often used especially when it comes to the transfer of certain nouns in feminine gender). This attitude implies that the language is rigid phenomenon, which never changes. However, today we are certainly not talking as our ancestors. Not only is the jargon not the same, but standard language changes over time as well, because the language is a living creation, which is changing as human society is changing. For example, with the development of technology, there have been completely new words that are adjusted to grammar or the grammar itself adjusted to those words. Today everybody uses the word lift or a computer, simply because they are forced to use them; those words are subjects to all grammar rules. When they first appeared it was necessary to create new rules, or to adjust the existing ones, and they certainly sounded cumbersome for those who were yet to get used to them.

Finally, "except that we speak language, the language speaks us" (Lovrić-Jović, 2002), which means that the language we use and the way we speak is a reflection of our observation of the world around us. Changing the language indicates the change of attitudes and personal experience of some phenomenon. Of course, change of the language, if other changes do not follow it (changing behavior and changing of rights violations) will not lead to the elimination of discrimination, but it is one of the steps that are inevitable if we want to combat unequal treatment.

1.2.3.2 Discrimination by behavior

The way we treat other people, how we behave to them, indicates what our attitude about them is, the degree of respect and personal liking. For example, we can avoid a certain person, or avoid to address to him/her, or to address to him/her with insulting tone, we can say something bad about that person to someone else. However, if we with our behavior highlight a certain group of people

that is different from the majority on some ground, or we highlight a person who belongs to a minority group, it is a discriminatory behavior. It is a common opinion that the behavior is not discrimination because it is not a direct deprivation of rights. Why is then important to be aware of it and change it?

Discriminatory behavior leads to the strengthening of stereotypes and prejudice. The discriminatory behavior includes a great deal of actions so-called "unwritten rules", "defaults" or "customs". It could be custom that someone of another skin color or another religion will not be invited to certain social events, it could be an unwritten rule that such person will be differently addressed on the street, in shops, in institutions, it could be a default that such a person will be avoided for company in public places and so on. Regarding that "unwritten rules, customs, and defaults" are rarely discussed or reviewed, this behavior repeats over and over again, and that is why it strengthens stereotypes and prejudices again and again. Plus, unwritten rules and customs are very difficult to be regulated by law and that is why it is harder to sanction them legally, therefore they are the most difficult to be changed.

Discriminatory behavior leads to social exclusion. Behavior by which those who are majority or have more power treat worse those who are minority, or have less power, threatens the entire minority group because it leads to potential exclusion from a large part of social life and to stigmatization and marginalization.

Stigmatization is negative "marking" of a person (or group of persons) based on the characteristics that distinguish them from other society members. Stigmatization leads to *marginalization*, or to the process by which a person or group of persons are excluded from participation in the political, educational, health, social and other social processes and in that way "pushes" them to the margins of society. In this way, something that at first glance may seem harmless, or as it has nothing to do with social relations actually, in general it becomes powerful tool in undermining rights to all to equal treatment and opportunities.

Examples of discriminating behaviors are well known to all: some restaurants, clubs and shops do not accept people who belong to certain groups (in this country these are often Roma), when seeing in the street a person with obvious physical disability, parents will often rapidly move their children away so as not to see that person; some individuals will avoid to hire or choose for certain positions people of different ethnicity or will refuse to provide them the same quality of services to etc. These are just some of the examples that lead to social exclusion.

1.3 DISCRIMINATION OF CERTAIN GROUPS - TERMS AND DEFINITIONS

1.3.1 Sexism

To define sexism, it is necessary to understand the terms of sex, gender and gender roles: *Sex* refers to the biological differences between women and men.

They are mostly permanent and universal. Women have breasts and men do not - it's a feature of the sex. Women bare children and men do not - it is also a sex distinction.

Gender refers to the psychological, cultural and social differences between women and men, which are considered to have been learned or imposed by society. How does a society see the role of women and men and what does it expect from each of them (social expectations related to gender roles) depends on numerous factors: cultural, political, economic, social and religious. *Attitudes and behaviors toward gender are learned and can be changed*. The usual division of jobs - women take care of children and home while men earn for living - *are gender roles*, that is what society expects from us. Imposing firm, socially accepted roles of men and women is what encourages and creates *sexism*.

Sexism is an attitude / opinion / behavior that one sex (usually female) is considered / treated as inferior to others. Such an attitude may include offensive language, humiliation and various forms of unfair treatment of one sex over the other, all the way to the obvious expression of hatred and physical violence. When we talk about unfair treatment, we think mostly about harmful injustice done to women. Although the unequal treatment of men can be discussed, the data show that mostly women are those who suffer from unequal treatment.

1.3.2 Ethnic discrimination, racism and racial segregation

Ethnic - derived from the Greek word 'ethno', meaning tribe. Classification of people can be made according to racial, ethnic, tribal, linguistic, religious and cultural determination and origins.

Ethnic discrimination - unfair treatment of people based on their ethnic origin, that is on the attitude / opinion that ethnicity is the carrier of superiority or inferiority, or certain characteristics. The view that the various nationalities / ethnic groups are inferior or less capable, less intelligent or have negative characteristics is often presented.

Race - the term used to indicate the division of the human race according to the characteristics that are inherited and specific enough to be characterized as different 'types', so it refers to a group of people who have specific characteristics that are clearly identifiable. It is common to indicate it by the skin color and so we encounter a white, yellow, black and red race.

Racism - opinion/attitude that some of the races have superior characteristics compared to other races (that they are smarter, more capable, worthier). The attitude is that the white race is superior to others is encountered most often.
Racial discrimination - unfair treatment of people who have a different skin color, which is based on racism.

Roma - the name for people whose origins are from India. The word Roma derives from the word "roaman" (Shib) means man/people who speak Romany.
Gypsies - a term derives from the Greek word "athigganien", meaning, "do not touch it", and it is offensive term for the Roma ethnic group.
Discrimination of Roma - there is no special name for this type of discrimination, but the used term is racism. This discrimination is the unfair treatment of persons belonging to the Roma ethnic group based on the opinion that the Roma are less worthy human beings.
Racial segregation is defined as an act by which a person is distinguished from the others based on his/her belonging to the particular race. Distinguishing refers to everyday activities such as: access to restaurants, public toilets, public fountains, transportation, theaters, schools and universities, health and social welfare organizations and / or institutions of the system.

Racial segregation could be outlawed, but still used in practice. For example, in Serbia, where it is illegal to deny someone education on racial basis, a common practice, which is changing now very slowly and with lots of difficulties, was that Roma children were situated in special schools although they had a normal level of intelligence. A classic example of segregation on the everyday level is when Roma are not allowed to access the pool, the restaurants, clubs, sport centers. Despite laws and efforts to increase awareness of discrimination and racial segregation, in July 2012 the Roma were not allowed into the McDonalds restaurant in Novi Sad.

1.3.3 Anti-Semitism

Anti-Semitism - Anti-Semitism is a certain perception of the Jews, which may be expressed as hatred toward that people. Rhetorical and physical manifestations of anti-Semitism directed against the Jews, or people who are not Jewish and / or their property, toward Jewish community institutions and religious facilities.[3] Since it is often not clear what anti-Semitism is, we are listing some examples:

- *Rhetorical manifestations*: call for violence against the Jews, Jewish communities, denial of Holocaust or blaming the Jews that they imagined or exaggerated it, or strengthening of the idea about existence of Jewish world conspiracy;
- *Behavior*: when the opportunities or services available to others are denied to Jews whether concerning access to certain places, or exclusion from certain occupations
- *Direct violation of rights*: the denial and / or unequal treatment related to access to health, education and / or institutions of the system, employment, and physical violence - life threats because they belong to the Jewish community and / or violating properties (buildings, schools, synagogues, cemeteries, etc.) because they are (or are considered) Jewish or related to Jews.

1.3.4 Homophobia and related terms

Sexual orientation - a choice that a person makes in relation to the sex of the sexual and emotional partner.

Lesbian: a woman who chooses women for her emotional, sexual and life companions and partners.

A gay man: a man who chooses men for his emotional and sexual and life partners and companions.

Gay is a term for homosexually oriented persons and can be used for both sexes (that is, for men and women who have a preference towards same sex), although in our language it is used mainly for men. The word 'gay' is an English word and means cheerful.

3 European Union Agency for Fundamental Rights.

Bisexual: women or men who choose both women and men for their emotional and sexual partners.

Transsexual: Men or women who choose by dressing or sex-change operations to change sex from the original, biological one. LGBT: lesbian, gay, bisexual, transgender - population that chooses to live differently from heterosexuals.

Homophobia: hatred, fear, hostility and aversion toward persons who are choosing persons of the same sex for partners. Homophobia results in unequal and unjust treatment of people with different sexual orientation from heterosexuals.

1.3.5 Xenophobia

Xenophobia is an intense and irrational expression of hatred toward aliens and a deep fear or hatred toward foreign. The word xenophobia is derived from the Greek words "xenos" (foreigner) and "phobos" (fear).

Xenophobia can occur in the form of cultural xenophobia, when expressing hostility, fear or hatred toward the elements and / or impacts of other cultures, such as customs and / or language. In the other, more aggressive form, xenophobia is directed towards members of other ethnic and national groups - for example, toward immigrants, but also toward members of groups that are present in society for many years.

The difference between racism and xenophobia is reflected in the fact that racism is based exclusively on race and xenophobia can be based on a series of aspects (e.g. customs) which for some reason cannot be considered "foreign" in particular culture.

1.3.6 Islamophobia

Islamophobia means prejudice, irrational and deep hatred and fear and aversion towards Islam and Muslims.

Islamophobia can be expressed as: prejudice against Islam as religion which is considered as a violent political ideology rather than a religion; discrimination in employment and / or the providing services (such as health and education); exclusion from leadership positions, political participation, regular employment, violence, verbal and / or physical directed towards property or persons. (The Runnymede Trust, 1997)

1.4
PUBLIC OPINION

Public opinion polls show that citizens understand very well the terms of discrimination and its effects. So the survey "Public opinion on discrimination and inequality in Serbia" (the Ministry of Labor and Social Policy, UNDP, 2010) produced the following results:

- Most often citizens define discrimination as: rejection, exclusion from the community, degrading, humiliating, violation/ denial of rights, diversity / threat because of the differences, inequality, imparity.

Over 90% of citizens expressed their agreement with the statement that discrimination hurts others.

The most important factors that cause discrimination, according to citizens, are: ignorance, religious beliefs and family attitudes, fears and attitudes in a certain culture.

The same survey was conducted a year earlier; the comparison between two of them suggests that discrimination and intolerance are increasing and researchers attributed the causes to the economic crisis. The following results are therefore worrying:

- While most people agree with the statement that harassment and degrading treatment or unpleasant behavior itself can be considered as discriminatory, percentage of those who think this way depends on the group to which such behavior is directed to. In other words, whether something is discrimination or not depends on who it is directed against.
- In a year, the number of those who believe that discrimination is often justified increased from 8% (2009) to 15% (2010).
- Percentage of people who agree with the opinion that it is not justified- without exception - to deny someone's right only on the basis of personal characteristics, is reduced from 86% (2009) to 76% (2010).
- Percentage of people who agree with the opinion that membership in a minority group should not be considered in the court trial decreased from 80% (2009) to 76% (2010). The numbers of those who think that it depends on minority groups the victims belong to, have increased from 4% to 9%.

Research on prejudice shows that Albanians and sexual minorities are continuously at the top of the list of minority groups stricken by prejudices, followed by Roma, Muslims / Bosnians, Croats, Hungarians. So, for example, only 36% of respondents believe that Albanians could perform the job of their director, 30% that they are able to practice the job of the mayor, and 32% to do the job of the

teacher. At the same time, over 70% of citizens believe that Serbs would successfully perform all of these tasks. Preference is given to citizens of Roma only when it comes to job of a sanitation worker.

INTOLERANCE EXPRESSED IN THE YEAR 2010:

WOULD YOU HAVE SOMETHING AGAINST
A MEMBER OF FOLLOWING GROUPS TO BE:

% of responses YES	your neighbor	friend of your children	married from your to someone close family
HIV-positive	35	55	82
Sexual minorities	40	55	82
Albanians	31	36	64
Roma	12	15	52
Muslims / Bosnians	16	18	48
Croats	17	19	39
Hungarians	7	8	28
People with physical disabilities	2	4	30
Refugees and displaced	3	3	7

Research on the attitudes of high school students about minority groups, violence and discrimination (YUCOM, Belgrade Center for Human Rights, 2012) showed the following:

- Even 84% of high school students believe that they were present in a situation when someone was discriminated
- 96% are aware that there is a link between discrimination and violence.
- Despite the awareness of the link between discrimination (intolerance) and violence, even 21% does not want to be friends with members of sexual minorities, 19% with Albanians, 10% with Muslims, 9% with Roma, 9% with Croats, while only 2% would not be friends with those they consider bad people.
- Only 16% of examinees believe that sexual minorities should have the same rights as everyone else.

Although the awareness of citizens and young people has certainly increased over the last few years regarding the understanding of discrimination and its consequences, both studies indicate that there is still a significant level of prejudice and intolerance towards minority groups.

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2

Legal and essential equality - Conceptual delineation*

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2.1.
THE PRINCIPLE OF NON-DISCRIMINATION AND THE PRINCIPLE OF EQUALITY

Resulting from the general postulate of the equal dignity of all people, the principle of non-discrimination is deeply rooted in Western culture. So in the United States, at a time when slavery existed and no women rights were granted, the Declaration of Independence proclaimed an obvious truth - that "all men are created equal" (Lochak, 2009: 19), and these values were incorporated into the slogan of the French Revolution - Liberty, Equality, Fraternity. According to Tocqueville, equality is "a general and dominant passion" of modern societies, where public pressure is continuously growing, "to act toward each person as if he/she was equal in dignity to all others, and, according to that, as if he/she was entitled to enjoy the same rights and freedoms "(Boudon, 2007:39). In fact, while in holistic societies, where everyone's place was determined by unchanged order, justice was reflected in the fact that everyone was at his/her rightful place, modern societies relate justice to equality, inseparable from realization of human rights (Lochak, 2009: 80).

The reason for such a high valuation of non-discrimination is in the unbreakable bonds between equality and the very idea of justice. Since the Ancient Greek times justice is explained by equality - what is right is just, what is unjust is unequal (Aristotle, 2004: 237). Many centuries later, justice as "the first virtue of social institutions" would continue to be determined by the concept of equality, so, although the apprehension of a just and unjust is different, "there was agreement that the institutions are just when random differences in assigning basic rights and obligations are not made and when the rules govern the proper balance between the opposed requirements regarding the welfare of social life "(Rawls, 1999: 5).

Justice, therefore, always implies some kind of equality, which in the legal system is expressed primarily through the homonymous principles. In this sense, equality is a human right, and the condition to perform other rights, occurring as "Supporting right" - droit-support, droit - tuteur (but Favoreu et, 2002: 296-297). In this second sense, the principle of equality is the best guarantee against arbitrary acts of government and (the best guarantee) for respecting other fundamental rights. As noted by Robert Jackson, a judge of the Supreme Court of the United States, "there is no more effective practical protection against arbitrary and unreasonable government than a requirement to apply to all the principles of law which power-holders impose on minority"(Chemerinsky, 1999:264). On the other hand, the principle of equality as a human right, is expressed in terms of requirements for non-discrimination, prohibiting resorting to certain criteria for evaluation of individual situations (Hernu, 2008: 357).

2.2.
RATIO BETWEEN PRINCIPLES OF NON-DISCRIMINATION AND EQUALITY

Constitutional and legal texts sometimes simultaneously, sometimes alternately guarantee the principle of equality and prohibit discrimination, therefore it is reasonable to pose a question about the ratio between these categories. It can be clamed that they coincide completely or partly, as it is reasonable to say that they are complement, and some people defend the thesis that these are two different concepts (Bioy, 2008: 64). This conceptual complicacy is by no means accidental, because neither the principle of equality, nor prohibition of discrimination are unambiguous terms, so both in everyday language and in the law one or the other of their aspects can become prominent, depending on the specific situation. However, in the context of the European protection of human rights, to which we belong too, it is not arguable that the prohibition of discrimination is an aspect of operating the principle of equality in a double sense. While the prohibition of discrimination occurs as the first and fundamental barrage of the principle of equality, since it is more efficient and more functional than the general and abstract principle of equality it, on the other hand, expresses with the legal language and embodies what philosophical principle of equality means - equal treatment of equals, and unequal treatment of unequal, that is, not every distinction is discrimination. The principle of equality and prohibition of discrimination are "the two sides of the same coin" and it is "the essence of the whole concept of human rights "(Paunović, Krivokapić, Krstić, 2007: 137).

First of all, while conducting the principle of equality enforcing state to treat everyone equally, the prohibition of discrimination excludes unjustified distinction on any ground, especially on the one that is specifically stated in appropriate normative acts (Constitution, international treaty or law). Specified in this way, the prohibition of discrimination appears as a negative formulation of the principle of equality, with a much higher level of efficiency and operability compared to it, in identifying and punishing inequality (Hernu, 2008: 357). Specifically, what is first noted related to the prohibition is that the grounds on which it is not possible to discriminate individuals are exemplary stated, such as, considering the European Convention for the Protection of Human Rights: sex, race, color, language, religion, political or other opinion, national or social origin, association with a social minority, property, birth or other status. Since this is exemplary specifying of the grounds of unallowed distinction, which occur most frequently in practice, the other distinguishing criteria, which are not justified are also considered as discrimination, and in this sense, are prohibited. So, the the European Court of Human Rights recognized other grounds for arbitrary distinction of individuals, in regard to those that are explicitly stated by the European Convention, and these are: disability, age and sexual orientation (Handbook, 2010: 89).

Besides being the first and fundamental barrage of the principle of equality, the prohibition of discrimination contributes to a more sophisticated application of this principle expressing in itself that not every distinction is unallowed (Bioy, 2008: 64-65). The term "discrimination" has a completely determined juristic meaning that implies biased or unreasonable distinction of subjects that are in the same or similar position. This is exactly equivalent to the concept of equality, according to which, equal is what is the same regarding quality, quantity, nature and value (Hernu, 2008: 357). In fact, even Aristotle pointed to the difference between the arithmetic and geometric equality between the numerical and proportional equality, between equity and equality in the number of merits, which is all more or less bringing us to the *summa divisio* between formal and real equality (Melin - Soucramanien,1997: 27). This difference is maybe the most precisely expressed in Pliny's idea that "nothing is so unequal as the equality itself "(Nihil est tam inaequale quam equitas ipsa), which results in an obligation of the state, primarily in the form of a judge, to objectively compare analogous situations and to examine whether there is a requirement of equal treatment. The European Court itself, in 1968, in the "Belgian linguistic case " noted that would be faced with the absurd consequences if prohibition of discrimination included the prohibition of any legal distinction: "We would be forced to judge, as contrary to the Convention, many legal or lawful statutes that do not provide full equality treatment for all in obtaining stated rights and freedoms. The competent authorities of the state members are often faced with situations and problems whose diversities require different legal solutions, besides, even certain legal inequalities contribute to correct factual inequalities "[1].

Relativizing the principle of legal equality, the European Court has defined the criteria to determine whether the allowed differentiation or discrimination takes place. So, "equal treatment is violated if there is no objective and reasonable justification of distinction. The existence of such a justification must be appreciated regarding the goal and consequences of deliberated measures, considering the overcoming principles in the democratic societies."[2]However, discrimination can occur when the goal is justified because "difference in treatment in realizing the rights guaranteed by the Convention should not only aim to achieve a legitimate goal: Article 14 .. is violated when it is clearly determined that there is no reasonable proportion between the used means and the goal it was aimed at".[3] It turns out that it is not only that the principle of equality does not entail prohibition of

1 Affaire„ relative à certains aspects du régime linguistique de l'enseignement en Belgique " c. Belgique, n. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 juillet 1968, § 10..
2 Ibid .
3 Ibid

any legal distinction, because it would produce absurd consequences, but also that certain legal inequalities contribute to the correction of factual inequality. Therefore the dominant passion of contemporary societies is reflected in, adding to Tocqueville, treating everyone as essentially equal in dignity to all others, and, according to that, and as he/she is not only entitled to benefit the same rights and freedoms, but also to achieve them in practice. In fact, while liberalism as an ideology implies that the state should guarantee equality of opportunities, a state of prosperity pays attention not only to opportunities, but also to the outcome (equality of results) as well in order to provide to each individual a decent minimum of living conditions (Fleiner , Basta Fleiner, 2009: 171).

In order to overcome formal and to achieve essential equality, contemporary legislations use various types of amendments and adjustments of the principles of equality and prohibition of discrimination. As first, it is more and more frequent to consider, under the term prohibition of discrimination, not only direct but also indirect discrimination. While direct discrimination is open by nature, meaning that one of the arbitrary criteria is figuring as a basis for distinction between individuals, the indirect is hidden and therefore more difficult to be detected. The indirect discrimination occurs in the form of measurement which by using a priori neutral criteria anticipates elements which, abstractly speaking, concern everyone, but which specifically disadvantage a particular group determined by one of the unallowed grounds distinction, such as women, foreigners, etc.. Prohibition of direct discrimination is therefore a way to achieve essential equality between social groups that the legal system recognizes as specific categories (Hernu, 2008: 359).

2.3.
SPECIAL MEASURES

A special form of recognition of group differences and fight for their fundamental equalization are special measures. They should contribute to a greater factual equality between groups, or, at least, to allow members of a group in disfavor a true equality of opportunity. Their purpose is to bridge the gap in economic and social development of various social groups, by establishing a real preferential treatment for a certain period, until these groups do not reach the level of development of entire society. That is why, in the normative texts they are marked as "temporary special measures", "special and concrete measures "," positive action "," affirmative action "," politics of equal opportunities " and the like, because of the negative connotations that" discrimination " has, as such, although this issue is about discrimination with a positive goal - to promote full and effective equality. It follows that the special measures accept the logic of discrimination, but to a certain deadline, and not to the benefit of individuals, but of groups subjected to some kind of oppression in the past- women, colonized nations, certain castes and tribes in India, African-American, Hispano-American and Asian population in the United States and others - or are today, on various grounds, in the minority - natives, ethnic and religious minorities, immigrants and others (Calves, 2008: 7-25).

2.4.
COLLECTIVE RIGHTS

The concept of collective rights should be distinguished from special measures, because, according to the beneficiaries criterion, which separates positive discrimination from prohibited discrimination, they seem identical. That is, by the collective rights and special measures a particular group is "marked as the beneficiary of some benefits not enjoyed by other members of society, "and in Nomo technical sense they assume an almost identical normative expression. However, what makes them separate concepts is that in the case of special measures it is about exceptional and temporarily expedient measures that seek to overcome differences between groups in a particular aspect of social life, while the collective rights are understood as inherent and permanent, focused on preservation of identity differences between groups (Jovanovic, 2009: 18-20). Collective rights, therefore, assume existence of a group, as a single corporate entity with appropriate moral status that is "logical precondition" and precedes the interests and rights of the group, unlike a set of interest-related individuals or inner class of subjects - students, retirees, lawyers, etc. (Jovanović, 2008: 101).

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3

International standards for prohibition of discrimination*

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3.1. POSITION OF INTERNATIONAL LAW IN THE LEGAL ORDER OF THE REPUBLIC OF SERBIA

Although international law is determined in various ways, it could be most simply defined as a specific normative order governing relations between subjects of international law, as well as processes in international community. The procedure of enacting international standards is a complicated and a long-term process, and the main sources of international law are treaties and international customary law rules.

The Constitution of the Republic of Serbia[1] includes several regulations related to international law. The highest legal act, according to Art. 16, accepts as relevant sources the ratified international treaties and generally accepted rules of international law. The first source are considered to be the agreements ratified through an established procedure, while the second source is actually international customary law. This source of rights is accepted in Art. 38, para.2 of the Statute of the International Court of Justice as evidence of a general practice accepted as law.

Art. 16, para. 2 of the Constitution established a hierarchy of legal norms as the ratified international treaties must be in accordance with the Constitution, which means that they are subjected to evaluation of constitutionality. In other words, the Constitution is the supreme legal document, followed by international treaties, laws and by-laws. However, it is unclear whether international customs have the same status. While Art. 194 of the Constitution confirms this hierarchy because it anticipates that the laws and other acts must not be contrary to the generally accepted rules of international law and ratified international treaties, Art. 167, Para. 1, clause 2 of the Constitution anticipates that the Constitutional Court decides on accordance of ratified international treaties with the Constitution, as well as the accordance of laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties.

It follows that the Constitution and international customs are even, which probably was not the intention of the writers of the Constitution and this dilemma should be resolved. The Constitution guarantees the immediate application of human and minority rights "guaranteed by generally accepted rules of international law, ratified by international treaties and laws "(Article 18, para. 2). Regulations on human and minority rights are interpreted on behalf of promoting the values of a democratic society, according to valid international standards of human and minority rights, as well as the practice of international institutions supervising their implementation. This is a unique solution in the region that requires the authorities to know and apply the practice of the relevant supervisory

1 "Fig. Gazette" no. 98/2006.

authorities that deal with human rights (such as the UN treaty bodies and the European Court for Human Rights).

The Constitution further anticipates that the law can only regulate the way of achieving human rights, and only if the conditions regulated by the Constitution are fulfilled, respecting the legislator's acting limits set by the Constitution. Despite the evident constitutional determination of the position of international law in the interior order of the Republic of Serbia, the state authorities and institutions have still poor knowledge and weak application of international norms and standards. The reasons for this should be searched in the non-recognition and misunderstanding of the international law status in the interior legal order, as well as in the lack of knowledge and lack of understanding of the obligations resulting from it. The presence of inconsistent and unsystematic monitoring of treaty bodies' decisions and judgments of the European Court of Human Rights by the national courts, which should arbitrate in accordance with this practice, is evident too. The courts still refer too little to international jurisprudence, and when they do, they often do not specify the exact number and the name of the decision corroborating their opinion in the decision made by a domestic court.

The above-mentioned reasons lead to reluctance by the authorities to directly apply the international standards in the case of a legal gap.[2] However, there are verdicts where international standards are properly interpreted and international standards applied directly in the case of the legal gap. These examples should serve as examples of good practices that should be followed by other judges when deciding on issues of discrimination. Thus, the first domestic judgment in which the norms of international law were interpreted and applied directly was a verdict in which discrimination was found.

Example

In the Krsmanovača case, Sports and Recreation Center worker from Šabac prevented three Roma from entering the pool only because they were Roma.[3] [9] With this verdict the Supreme Court in 2004 highlighted the obligation and direct applicability of international conventions, clearly defined the concept of individual rights and, finally, accepted the "testing" as an authoritative way of proving discrimination in court, at the time when no anti-discrimination law was adopted in Serbia. In this case, the court found that the ratified international conventions form an integral part of the interior legal order and that the SFRY in 1967 signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination.

2 See, for example, judgment of the Administrative Court no. 8th, In 3815/11 of July 11, 2011.
3 The judgment of the Supreme Court of Serbia, rev. 229/2004/1 of April 21, 2004.

Court applied the definition of racial discrimination from Article 5, by which the states committed themselves to prohibit and eliminate racial discrimination in all its forms and guarantee to everyone equality before the law regardless of race, color, national or ethnic origin, and particular right to access to all places and services intended for public use, such as transportation, hotels, restaurants, cafes, theaters and parks. The court also relied on Article 26 of the Covenant on Civil and Political Rights that the SFRY ratified in 1971, which prohibits discrimination, among other things, on racial grounds.

In order to reach a decision in the Krsmanovača case it was necessary to have a good knowledge of international standards and adequately apply the definitions contained in the relevant international instruments, so they could be directly applied in case there is no domestic definition of discrimination. In another example, not only international norms were applied in the case of legal gap, but also the standards determined in the practice of international supervisory authorities, mostly of the European Court for Human Rights.

Example

The Commissioner for Protection of Equality sent a recommendation to one of the faculties of the University of Belgrade not to reject the request of a transgender person for issuance of a new certificate denominated to the new name because of gender and name change, although faculty regulations do not specifically prescribe the way of handling such a situation. The legislation allows the issuance of new certificate only after advertising the original public document as invalid in the "Official Gazette of the Republic of Serbia", and on the basis of the data from the records kept by the institution of higher education.[4] However, the recommendation emphasizes the necessity of a wide interpretation of this regulation which would include the described situation as well, because this is necessary for full integration of the person who changed sex in his/her personal and professional life. The Commissioner began from a point that none of the relevant national regulations prohibits the issuance of new certificate. She also referred to several relevant international sources that demand the equality of transgender persons and the right to protection of their privacy and integrity. Finally, the Commissioner relied on several decisions of the European Court for Human Rights which highlight the need for better understanding of the problems transgender persons are faced with, and obliges states to adequately regulate the change of the legal status of these persons. Based on these sources, the Commissioner submitted to the Faculty the opinion that in this case discrimination occurred and she recommended the issuance of new certificate on a new name.

4 Art 102, Law on Higher Education, "Official Gazette of RS", no. 76/2005, 100/2007 - Authentic Interpretation, 97/2008 and 44/2010.

3.2. CUSTOMARY INTERNATIONAL LAW

Customary legal rules are unwritten sources of law. Although, at present, the role of international agreements is more and more expressed, a certain part of the relations in the international community is still regulated by customary law. It results from the definition contained in Art. 38 of the Statute of the International Court that the international customs are "evidence of general practice accepted as law". This means that customs are represented only by those rules which have been respected for long enough by everyone, or by most subjects of international law (general practice) who are at the same time aware of the legal obligatoriness of these rules of (acceptance as a right). In other words, the custom has two elements: (1) the material or objective, which is reduced to the existence of general practice, and (2) mental or subjective, which is reflected in the claim that there is an awareness of the legal obligation to respect the given rule.

These rules are valid for the state which has not participated in their creation, that is, for the newly established state in the international community, such as the Republic of Serbia. In practice it is not easy to prove whether a rule is accepted in the form of customary legal rule, and the elements that constitute evidence that an international customary law exists are the following: the texts of international instruments, international courts decisions, national courts decisions, national legislation, diplomatic correspondence between the states, opinions of distinguished international law experts, practice of international organizations.

The judge is obliged by the Constitution to apply the customary law, and has no capacity to explore all these resources to determine whether a rule is customary or not. Because of that he is going to apply only those rules that undoubtedly have this status.

In the area of human rights, the Universal Declaration of Human Rights from 1948, legislated in the form of a UN General Assembly resolution[5] [11], has gained the status of international customary law. The first instrument for the protection of human rights, legislated shortly after the Second World War, in its Preamble emphasizes that "recognition of the congenital dignity and of the equal inalienable rights of all mankind is the foundation of freedom, justice and peace in the world." The Universal Declaration in Art.1 proclaims the following: "All human beings are born free and equal in dignity and in rights." Art.2, para. 1, further guarantees to every person the equality in rights and freedoms guaranteed by this instrument, without any distinction based on "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The abovementioned regulation introduces a modern approach to the prohibition of discrimination, by listing personal characteristics on the basis of

5 Resolution A/RES/217, Decembar 10, 1948.

which discrimination is prohibited, specifically quotes most frequent grounds of discrimination, but does not close the list of the protected grounds. Also, Art. 7, of the Universal Declaration guarantees the equality of all in front of the law, and the right for any person to the equal legal protection, not only in the case of discrimination, but when there is encouraging to discrimination.

The Universal Declaration guarantees a series of civil, political, economic, social and cultural rights, and all rights granted have to be used in accordance with the prohibition of discrimination. These are: the right to life, to liberty and security, to the prohibition of slavery and torture and other forms of abuse, to the prohibition of discrimination, to the prohibition of arbitrary arrest, detention and deportation, the right to a fair trial, the right to private and family life, to the freedom of movement, the right to a nationality, the right to marry and found a family, the right to property, to freedom of religion, expression and of assembly and association, as well as political rights. The Universal Declaration guarantees the right to social security, the right to work and rights related to work, the right to education and the right to participate freely in cultural community life.

Besides the Universal Declaration, which guarantees equality to all without distinction, in this area, it is important to mention the Declaration on the Rights of Members of National or Ethnic, Religious and Linguistic Minorities[6] from 1992. This declaration was also enacted in the early nineties in the form of a UN General Assembly resolution, and today has the status of international customary law. This Declaration guarantees a series of rights to the members of national, ethnic, linguistic and religious minorities, and demands from states to develop and expand the realization of these rights. Therefore, the Declaration introduces positive obligation of the state to achieve equality of minority towards majority population, and points that mere refraining from violence and prohibition of discrimination are not sufficient to achieve substantive equality in society. Art. 2, para. 1, of the Declaration guarantees to minorities the right to enjoy their own culture, to manifest and practice their own religion, and to use their language freely in the private and public life without any interference or discrimination. Art 2, para. 2 of the Declaration further guarantees to minorities the effective participation in the "cultural, religious, social, economic and public life " where discrimination is prohibited.

At the international level there is a large number of declarations that preceded adoption of international conventions on human rights, which will not be mentioned because the Republic of Serbia ratified them in the form of international treaties. They will be discussed in the next section.

6 Resolution 47/135, December 18, 1992.

3.3 INTERNATIONAL TREATIES

International agreement is the consent of the will of the two or more international law subjects, regulated by international law, which produces certain rights andobligations among them. In fact, international agreements are binding only to signatory states, i.e. the stateswhich explicitly accepted them, and in practice these are never all countries of the world. However, even thestate that has not completed the process of ratification, but only signs an internationalconvention, is obligated by this act to a particular behavior. Firstly, by this act thestate is obligated to complete the ratification process in a foreseeable future, and by Article 18 of the Vienna Convention on the Law of Treaties[7] from 1969, to refrain from acts which would deprive the treaty of its object and goal.

3.3.1. International treaties adopted under the UN auspices

After the Second World War, in the area of human rights, a large number of international conventions was adopted. Today, a total of nine conventions are the skeleton of the universal protection of human rights within the United Nations.

These are the following conventions:

- Civil and Political Rights Covenant (1966)
- International Economic, Social and Cultural Rights Covenant (1966)
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Punishment and Actions (1984)
- Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members (1990)
- Convention on the Rights of Persons with Disabilities (2006)
- The International Convention on the Protection of All Persons from Enforced Disappearances (2006)

All of these conventions contain regulations prohibiting discrimination, and two conventions are particularly specialized in the area of discrimination: race and the sex. The provisions of all these conventions are legally binding for the Republic of Serbia, except the International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members, which the Republic of Serbia has signed but not ratified.

7 "The Official Gazette SFRY" - International Treaties and Agreements, no. 30/72.

3.3.1.1. General international treaties on human rights

Covenants are the first international treaties on human rights explicitly anticipating discrimination of entitled rights guaranteed by them.

The Civil and Political Rights Covenant[8] [14] in Article 20, para. 2, proclaims that the law "will prohibit any advocacy of national, racial or religious hatred that represents encouragement to discrimination, hostility or violence." Article 26 of the Covenant established the equality of all before the law and the right to equal protection without any distinction. Further it prohibits any discrimination and guarantees to all persons "equal and effective protection against any discrimination on the basis on race, color, sex, language, religion, political and any other opinion, and national and social origin, property, birth or other status." This regulation applies the same legal technique as the Universal Declaration, because it does not close the field of grounds for discrimination with the words "any discrimination and especially by explicitly mentioned personal characteristics". On the basis of the Covenant, discrimination of entitled rights guaranteed by this instrument is prohibited, and these are: right to life (Article 6), the prohibition of torture, inhuman or degrading treatment or punishment (Article 7), prohibition of slavery and forced labor (Article 8), the right to liberty and security of a person (Article 9), the right of a prisoner to humane treatment (Article 10), the prohibition of detention due to unfulfilled contractual obligations (Article 11), the right to freedom of movement (Article 12), the right of movement of foreigners 13), the right to a fair trial (Article 14), the right to non bis in idem (Article 15), the right to the recognition of legal personality (Article 16), the right to protection of private life, family, home and correspondence (Article 17), the right to freedom of thought, conscience and religion (Article 18), freedom of speech (Article 19), the prohibition of war propaganda and to the inciting of national, racial or religious hatred (Article 20), the right to freedom of peaceful assembly (Article 21), freedom of association (Article 22), the right to protection of family (Article 23), protection of the child (Article 24), the right to participate in public affairs (Article 25), and the protection of national minorities (Article 27).

8 "The Official Gazette SFRY" - International Treaties and Agreements, no. 7/71. After giving up continuity with the SFRY and giving successor statement, the Republic of Serbia accepted the validity of the Pact on March 12, 2001.

Examples

On the basis of the Civil and Political Rights Covenant, the Committee on Human Rights was established to monitor the extent of the fulfillment of obligations which the countries assumed. In one of the first cases, the Committee looked at the very question of discrimination. So, in the case of Aumeerudy Cziffra against Mauritius,[9] the Committee on Human Rights reviewed the application of twenty Mauritius women who claimed to be victims of discrimination. They considered that the immigration and deportation law from 1977, led to unequal treatment of husbands and wives of foreign citizens married to citizens of Mauritius, in terms of staying in this country. According to this law, men foreigners married to the women from Mauritius lost the right to stay in Mauritius, and they had to require "sojourn permission" which the Minister of Internal Affaires was able to deny or deprive at any time. Also, husbands foreigners could have been deported by the Minister's order, which is not subject to judicial review. On the other hand, women foreigners married to husbands from Mauritius, retain their legal right to stay in this country.

The Human Rights Committee considered that states are obliged to respect and guarantee the Covenant rights "without any distinction ... (among other things) by sex", especially according to Article 3, "To ensure the equal right of men and women to the use of" all these rights, as well as according to Article 26, to provide "without any distinction" - "equal legal protection. " In this case, an unfavorable distinction by sex is made that affects the alleged victim in one of their entitled rights. At the same time, the Committee considers that the legislation which subjects to the restrictions only the spouses of women from Mauritius, and not the spouses of men from Mauritius, is discriminatory toward women from Mauritius and cannot be justified by safety-related reasons.

The case of Zvan De Fris v. Netherlands,[10] is about the failure to provide social help because of discrimination against married women. In this case, the applicant's request for assistance after job loss was denied on the basis of Social Assistance Law for Unemployed. This Law had a condition, not valid for men, that a woman had to prove that she is family's breadwinner to get help. Therefore the applicant had claimed that the only reasons for denial of assistance in her case, are gender and marital status, and that a violation of Article 26 of the Covenant occurred in the form of discrimination on these grounds. The Netherlands defended itself by claiming that the difference between married women and married men was made because

9 Aumeeruddy c. Cziffra, the Human Rights Committee, Appl. 35/1978, 1981.

10 Zvan-de- Fris v. the Netherlands, the Committee for Human Rights, Appl. 182/1984, 1987.

of the prevailing attitude in society about the role of men as the breadwinner. The Human Rights Committee found discrimination in this case, and pointed out that the distinction is not justified.

The Economic, Social and Cultural Rights Covenant [11] in Article 2, para. 2, obliges signatory countries to ensure the entitlement to the rights guaranteed "without discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other characteristics." States are obligated to provide to individuals favorable working conditions, fair compensation for their work, social security, basic education or the accomplishment of the cultural needs of individuals. These rights, regardless of the laws of the State, are not easy to provide, as they depend on economic power of the state, but the states must do their best to achieve these rights to the maximum of their available resources. These are: the right to work (Article 6), the right to just and favorable conditions of work (Article 7), the right to union organization (Article 8), the right to social security (Article 9), the right to protection of the mother, child and family (Article 10), the right to an adequate living standard (Article 11), the right to health (Article 12), the right to education (Article 13), right to participation in cultural life and entitlement to the benefits of scientific progress (Article 15).

3.3.1.2. International treaties prohibiting the particular act execution

This group of international conventions adopted under the auspices of the UN includes two conventions that prohibit acts that are directed against the physical and psychological integrity, dignity and survival of a person.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12]defines and prohibits three forms of abuse: torture, inhuman and degrading treatment and punishment. It anticipates a series of legislative, administrative, legal and other measures concerning prevention, investigation, the bringing to justice of those who disregard the regulations on prohibition of abuse, and also providing compensation to victims. The Convention specifically excludes the possibility of invoking exceptional circumstances, because in that way the torture would be allowed. All signatory states are obliged to criminal-

11 Zvan-de- Fris v. the Netherlands, the Committee for Human Rights, Appl. 182/1984, 1987.

12 "Official Gazette of the SFRY-International Treaties ", no. 9/1991. Following the denial of continuity with the SFRY and giving successor statements, the Republic of Serbia accepted the validity of the Pact on March 12, 2001.

ize torture and to punish the perpetrators properly, depending on the severity of the act. Article 12 specifically requires states to make prompt and impartial investigations whenever there are reasonable doubts that torture occurred, and practice shows that such an investigation is often missing when the victim is a member of a marginalized group.

Example

On the basis of this Convention, the Committee Against Torture was established, with the task to examine the extent to which countries fulfill their obligations assumed by this international instrument. In the case of Besim Osmani against Serbia,[13]the applicant is a Serbian citizen of Roma origin, who was one of 107 inhabitants of the Antenna colony in New Belgrade that existed since 1962. Most of the residents were Roma displaced from Kosovo in 1999, and only four families were permanently settled here.

In 2000, the municipality informed the residents in writing about the destruction of the colony and gave them one day as the deadline to move out. A few days later, a group of a dozen uniformed police officers arrived in the colony to enforce the eviction order . Along with them arriveda cargo van with police license plates in which there were 5-6 police officers dressed as civilians, who, during the dislodging of Roma were beating a large number of the Roma present and were insulting them on ethnic grounds. The applicant held in the arms his four year old son. However, a policeman dressed as civilian, during this operation slapped him twice and punched with fists in the head and kidneys, and struck the child as well. On this occasion, the Roma's home and personal belongings were completely destroyed, including a mini-van, and he, his wife and three minor children became homeless. After this event, they lived for 6 months in a tent on the ground of destroyed colony, and since 2002 they have lived in the basement of the building where Osmani is working on the maintenance of the heating system.

The Committee against Torture established that in this case, the causing of physical and mental suffering deepened the vulnerability of Besim Osmani, caused by his Roma ethnic origin, and the inevitable connection with a minority which during history has been exposed to discrimination and prejudice. The Committee considered that in this case, civil servants witnessed the event and did not intervene to prevent abuse, and that it was at least "an explicit or tacit consent or the approval" of such abuse. The Committee expressed concern about the "failure of police officers or of-

13 Mr Osmani v. Serbia, the Committee against Torture, Appl. 261/2005, 2009

ficers responsible for maintaining order who do not provide adequate protection against racial motivated attacks when such groups are threatened."[14]

The International Convention for the Protection of All Persons from Enforced Disappearances[15] prohibits enforced disappearances, which are defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." The Convention requires states to take appropriate measures to investigate the existence of this act, and to detect offenders and to punish them properly. Article 7, para.1, point B, specifically anticipates that the death of a missing person or forced disappearance of pregnant women, minors, persons with disabilities and other particularly threatened people will be considered as the aggravating circumstance.

3.3.1.3. International treaties that protect the position of certain categories of persons

The Convention on the Rights of the Child[16] provides a catalog of human rights that are granted to persons under the age of 18. The Convention is based on four basic principles: non-discrimination, respect for the best interests of the child, its right to life, survival and development, and respect for the child's attitudes. The Convention obliges states to respect and ensure the rights of every child within their jurisdiction without any discrimination and without regard to race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, or other basics. States are obligated to ensure to the child such protection and necessary care for its well-being. The Convention anticipates the following rights: achieving the highest possible degree of health, and health and medical preventive care, the right to gratuitous primary education, the right to rest, free time, playing and participation in cultural and artistic events, the right to information, to freely express their opinion and to be heard, the right of children to live with their parents and to have contact with both parents if they live separately, while children with disabilities are entitled to special support and

14 Mr Osmani v. Serbia, the Committee against Torture, Appl. 261/2005, 2009

15 "Official Gazette of RS - International Treaties", no. 1/11.

16 "The Official Gazette SFRY" - International Treaties, no. 15/90 and the "Official Gazette of FRY - International ", no. 4/96 and 2/97. After giving up the continuity of the SFRY successor and giving statements, Serbia has accepted the Covenant October 4th, 2001.

improvement and to actively participate in social life. States Parties must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injuries or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

The Convention on the Rights of Persons with Disabilities[17] guarantees to the persons with disabilities the full and equal entitlement to all human rights and promotes respect of their inherent dignity. The basic principles of the Convention are: respect for the inherent dignity, individual autonomy including the freedom of personal choice and independence of persons, prohibition of discrimination, full and effective participation and inclusion in society, respect of the difference and acceptance of persons with disabilities as part of human diversity and humanity, equality of opportunities, accessibility, equality between women and men, respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identity. States Parties commit themselves to adopt necessary legislative, administrative and other measures to ensure equality and non-discrimination of persons with disabilities and to ensure the rights recognized by this international instrument. States must take all necessary measures to abolish or modify regulations, customs and practice representing discrimination of people with disabilities. The Convention provides a catalog of specific rights for persons with disabilities, including a particularly important accessibility, representing one of the essential preconditions for their equal participation in all spheres of social life. The Convention regulates issues such as freedom and personal integrity and guarantees protection from torture and inhuman treatment, protection from violence, abuse and exploitation, protection of physical and mental integrity, and the right to education, right to work and establishing the necessary support services.

On the international level, the adoption of *the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families* was long awaited. The Convention in Article 2, provides a general definition of migrant workers, as well as definitions of special categories of these workers. According the Convention, the migrant worker means a "person that should be engaged, is engaged or has been engaged in paid work in the state where he/she is not a citizen." Migrant workers and members of their families have a right not to be discriminated regarding their fundamental rights. Besides the rights in the area of work and social security, theyare entitled to a series of special rights, among

17 "Official Gazette - International Treaties", no. 42/2009.

which the most prominent are freedom of movement and freedom of choosing the residence on the territory of the state of employment, participation in public affairs of the state of origin, equal treatment with citizens of the state of employment regarding access to educational institutions and services, access to facilities and institutions for professional improvement and re-qualification, access to housing,access to health services, and access to and participation in cultural life.

Serbia signed this Convention on November 11, 2004, but has still not ratified it, which means that it is not bound by its regulations. However, because of the importance of the Convention and the increasing influx of migrant workers, it is necessary to ratify the Convention as soon as possible.

3.3.1.4. Specialized treaties in the field of discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination[18] is the main document of the Un in the fight against racism and discrimination. This convention is based on the fact that the existence of theories based on racial superiority or hatred, such as policies of apartheid, segregation or separation, are very dangerous. This is the reason why the Convention requires States Parties to condemn "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin or which attempt to justify or promote racial hatred and discrimination "(Art. 4). States are obliged to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination. States are especially obliged to incriminate all dissemination of such ideas, encouragement to discrimination and acts of violence, to declare them illegal and to prohibit organizations and activities of organized propaganda that encourages discrimination, and not to permit public authorities to encourage or help racial discrimination. The Convention requires states to take necessary measures for prompt elimination of all forms of racial discrimination and to repress racist doctrines and practices.

Although numerous international conventions contain regulations about prohibiting discrimination, in most of these instruments the definition of discrimination is missing. This very Convention is an exception which in Art. 1 defines discrimination as "any distinction, exclusion, restriction or preference based on

18 "The Official Gazette SFRY" - International Treaties, no. 31/67. After giving up continuity with the SFRY and giving successor statements, Republic of Serbia accepted the validity of the 12th Pact March 2001.

race, color, ancestors, national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." So, in the same time, discrimination means unallowed exclusion, and giving priority to certain group that threaten equal rights.

Example

On the basis of this Convention, the Committee on the Elimination of Racial Discrimination was established which has a role to supervise the obligations undertook by states regarding this international instrument. In the case of L.K. v. the Netherlands[19] a Moroccan citizen visited, together with a friend, a house for rent in the street where buildings of social housing in Utrecht were located. During the visit, they heard several people shouting: "No more foreigners!" After that, he was warned that if he rents the house, it will be destroyed and his car damaged. The applicant returned to the local rental agency and asked the clerk to provide them an escort. Several local residents told the clerk that they will not accept him (the Moroccan) as a neighbor, based on the tacit rule that the foreigners will not constitute more than 5% population in the street. After the incident, the clerk refused to rent this apartment to this family.

The Committee in this particular case found that such exclamations and comments could be characterized as encouraging to racial discrimination and acts of violence against L.K. The State Party was declared responsible because it did not investigate the case With the necessary care and efficiency. The Committee emphasized that it is necessary to carry out an investigation in case of racially motivated violence, especially when it is expressed in public and within a group.

The Convention on the Elimination of All Forms of Discrimination against Women[20] is the first international legal instrument which entirely guarantees the protection of rights of women and protection of their civil, political, economic, social and cultural rights. According to this convention, the main task of the states is to recognize, and to protect women's human rights in all cases, by national consti-

19 LK v. the Netherlands, the Committee on the Elimination of Racial Discrimination, the application No. 4/1991, 1993

20 "The Official Gazette SFRY" - International Treaties. 11/1981. Following denial of continuity with the SFRY and giving successor statements, the Republic of Serbia accepted the validity of the Pact on March 12, 2001.

tutions, laws and by-laws. In the Preamble of the Convention it is stated "discrimination against women violates the principles of equality and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family, and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity." Art .1 of the Convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms, in the political, economic, social, cultural, civil or any other field.". In Art. 2 it is stated that States Parties must eliminate discrimination against women in all its forms and support the development and emancipation of women, by all appropriate means (Article 3). Art.15 of the Convention guarantees the equality of women and men before the law. Besides these measures, the government should undertake the so-called positive measures that will help prompt achieving oequality among sexes and the protection of maternity. The states are also required to abolish the penalty provisions and customs, and abandon any practice of establishing and maintaining discrimination against women (Article 5). Art. 6 is particularly significant because it prohibits all forms of discrimination against women and requires the elimination of all forms of women trafficking and exploitation of women prostitution. The Convention particularly pledges for improving the status of women living in rural areas and guarantees equal rights regarding acquisition, citizenship change and retention, especially in a marriage with a foreigner. The Convention further requires elimination of discrimination in political and public life (Article 7), international affaires (Article 8), education (Article 10), employment (Article 11), health protection (Article 12), the economic and social life (Article 13), and marriage and family relations (Article 16).

Example

On the basis of the Convention, the Committee on the Elimination of Discrimination against Women was established, which has repeatedly declared a violation of the Convention on various issues. In case of A. S. against Hungary[21], a Roma nationality female applicant claimed that she was a victim of forced sterilization in a Hungarian hospital. She is the mother of three children, and had a normal fourth pregnancy until the 9th month when the death of the fetus in her stomach occurred. On the operating table, she was asked to sign a consent to Caesarean section. She was also asked to sign a paper handwritten by the doctor: "Having the knowledge of the death of the fetus I demand sterilization because I do not want to give birth or to be pregnant again." The letter was signed by the doctor and the nurse. Besides that, she also signed the statement with the consent to a blood transfusion and the anesthesia. In her complaint, A.S. clamed that the concept of sterilization was not known to her, which, in her case was performed in an emergency, without the full and informed consent of the patient. She received no specific nformation on the nature of the sterilization operation effects (risks and consequences) and her ability to give birth in the way understandable to her, nor she was advised on family planning and contraceptives.

The Committee found a violation of the Convention on failing to provide the information and advice on family planning, as well as the violation of General Recommendation no. 21 on equality in marriage and family relations, where it is stated that along with "enforcement measures that have serious consequences on the women, as the forced sterilization is, the woman must be provided the information about contraceptive means and their use, and be guaranteed access to sex education and services for family planning." The Committee especially paid attention to her condition at the time, and particularly that it has passed only 17 minutes from her arrival to the hospital until the surgery. The Committee referred to General Recommendation number 19, that the forced sterilization is a significant impact on the physical and the mental health of woman and violates her right to decide on the number of children, and demanded the State Party to abort this practice.

In Cristina Muñoz v. Spain[22] the Committee was deciding on a completely different violation. The applicant is the first-born child in a family that has the title of Comte, a title which was inherited in her family by her younger brother. According the Law

21 AS. V. Hungary, the Committee on the Elimination of Discrimination against Women, Appl. No. 4/2004, 2008.

22 Cristina c. Muñoz-Vargas y Sainz de Vicuña c. Spain, the Committee on Elimination of Discrimination against Women, Appl. No. 7/2005, 2007.

of succession of noble titles from 1948, the first-born child inherits the title, but the female child only if it does not have younger brothers. She sued her brother on December 30, 1988, and demanded to be given back the title, on the basis of the principle of equality between the sexes, and on the basis of the Constitution of 1978 and the Convention of 1979. The court rejected her claim considering that her brother received the title in accordance with the valid regulations at the time.

The Committee rejected the complaint on procedural grounds, but eight Committee members considered that the application should be dismissed on other grounds. According to them, the titles have only symbolic character, and the Convention is focused on protecting women against discrimination that is intended to correct or nullify the recognition, enjoyment or exercise of women's human rights , under the principle of equality. However, in her dissenting opinion, one member of the Committee pointed out that the title does not represent a fundamental right, but that the law and practice of the States Parties must not allow a different treatment establishing the superiority of men over women. She recalled General Comment No. 28 where it is stated that inequality of women in enjoying rights in the world is deeply rooted in traditions, history, and culture, including religious attitudes, and that it must be eliminated.

3.3.2. European anti-discrimination legislation

In addition to universal standards of human rights, the international instruments adopted under the auspices of two regional organizations: the Council of Europe and the European Union are of special significance for the Republic of Serbia.

3.3.2.1. The Council of Europe

The Council of Europe is a European organization created after the Second World War in order to protect and promote freedoms and democratic values in its member states. The respect for human rights was set as one of the most important tasks and requirements for membership (Articles 3 and 4 of the Statute). The Republic of Serbia has been a member of the Council of Europe since 2003. Today all European countries, except for Belarus, are its members.

3.3.2.1.1. The European Convention on Human Rights

Shortly after the establishment of the Council of Europe, the first Convention in the field of Human Rights - European Convention for the Protection of Human

Rights and Fundamental Freedoms was adopted, which was signed in Rome in 1950 by thirteen member states of the Council of Europe[23]. The Republic of Serbia ratified the European Convention on March 3, 2004.[24]

The European Convention contains two regulations on prohibition of discrimination, Article 14 of the European Convention and Art. 1 of the First Protocol to the European Convention.

3.3.2.1.1.1. Prohibition of discrimination - Article 14 of the European Convention

Article 14 of the European Convention contains the basic regulation on the prohibition of discrimination to protect individuals from discrimination in the enjoyment of rights guaranteed by this international instrument. In Art 14 it is stated: «the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.» The term ‹shall be secured› indicates that the state has not only a negative but also a positive obligation, that is, an obligation of ensuring the effective enjoyment of protection agains-discrimination[25].

23 Fundamental rights and freedoms of the European Convention, which apply to all persons the right to life (Article 2), prohibition of torture, inhuman and degrading treatment (Article 3), the prohibition of slavery and forced labor (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), punishment only according to law (Art. 7), the right to respecting private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), the right to marry (Article 12), the right to an effective remedy (Article 13) and prohibition of discrimination (Article 14). In addition to the European Convention, fourteen protocols have been legislated to date, some of them are dealing with procedural issues, while others are increasing the catalog of human rights guaranteed by the applying of new, substantive regulations, as following: The First Protocol (right to peaceful entitlement to property (Article1), the right to education (Article 2) and the right to free choices (Article 3), Fourth protocol (no debt slavery (Art .1), freedom of movement (Article 2), the Sixth protocol (no reaching the verdict and execution of death penalty (Article 1), the Seventh Protocol (the right of appeal in criminal matters (Article 2), the right to recompense for wrongful conviction (Article 3), the right not to be tried or punished twice in the same legal matters (Article 4) and equality of spouses (Article 5), the Twelfth Protocol (general prohibition of discrimination (Article 1), and the Thirteenth Protocol (absolute prohibition of the death penalty (Article 1). Individual rights guaranteed by the protocols refer exclusively to foreigners: the Fourth Protocol (Prohibition of expatriation of own citizens(Article 3) and the prohibition of collective deportation of aliens (Article 4) and the Seventh Protocol (protection in the deportation aliens (Art. 1).

24 "Official Gazette of Montenegro", no. 9/2003, 5/2005 and 7/2005 - corr.

25 Beard v. UK, ECtHR, Appl. 24882/94, 2001; Thlimmenos. V. Greece, ECtHR, Appl. 34369/97, 2000.

The first characteristic of this article is that it is does not represent a self-contained law, but its field of application is limited to the rights legitimated by the European Convention and its protocols. Because the Convention guarantees mostly civil and political rights, a large number of rights and privileges related to economic, social and cultural rights remain beyond its protection. This nature of Art. 14 was confirmed in the practice of the European Court, which supervises whether and to what extent the states parties respect their obligations assumed from the European Convention. So in case of Marks v. Belgium, the European Court found that Article 14 is not self-contained because it "acts exclusively in relation to" the entitlement to rights and obligations", which is guaranteed by other basic regulations."[26]

However, it should be noted that the European Court considers that for the application of Art. 14 even a very weak link between the prohibition of discrimination and some other regulation is sometimes sufficient, as it is concluded in the case of Schmidt and Dalstrem.[27] In fact, in this case several repressive measures applied to members of the union were examined, such as wage cuts, which were supposed to be a punishment for the strike. The European Court found that these measures are related to Art. 11 of the European convention which guarantees the right to establish unions and to protect the interests of its members[28], although specific repressive measures by themselves were not representing a violation of any guaranteed right. Also, in another case, the European Court found that social benefits for child allowance fall within the sphere of Art. 8 of the European Convention[29].

It is important to know that the European Court does not have to determine a violation of the guaranteed right, in order to establish violation of Art. 14. So, the measure which is in accordance with some article of the European Convention may represent a violation of this article when observed related to Art. 14th.[30] However, this authority first examines whether some fundamental right from the European Convention is violated, before proceeding to examine the violations of Article 14, regarding this article. When it determines that there has been a violation of this Article, the European Court may but doesn't have to examine separately the allegations concerning violations of Art. 14. For example, in the

26 Marckx v. Belgium, ECtHR, Series A no. 31, 1979, par.32, Backowski and Others. Poland, ECtHR, Appl. 1543/06, 2007, para. 93

27 Schmidt and Dahlström v.. Sweden, ECtHR, Appl. 5589/72, 1976.

28 Ibid, para. 39

29 Okpisz v. Germany, ECtHR, Appl. 59140/00, 2005.

30 Inze v. Austria, ECtHR, Appl. 865/79, 1987, para. 36

case Dajohn against the United Kingdom, the Court found that the prosecution for the adult men's private homosexual acts is a violation of Art. 8 of the European Convention which guarantees the right to privacy, and so there is no need to separately examine the applicant's statements in relation to Art. 14.[31]However, the Court will always examine separately the violation of Art. 14, when "apparent disparity in treating the entitlement to the fundamental right is a fundamental aspect of a particular case".[32]

Another characteristic of Art. 14 is that although it states the explicitly prohibited grounds of discrimination, this article does not close the list of prohibited grounds by the term "or other grounds". This highlights that the explicitly specified grounds are not the only grounds of discrimination. Therefore, the European Court in its previous practice accepted that, among the prohibited grounds for discrimination, are also sexual orientation, marital status[33], professional status, legality / illegality at birth[34], as well as the military or professional status[35]. As Art. 14 of the European Convention does not contain a definition of discrimination, it is the task of the European Court to develop in its practice an obvious guideline on what is considered to be discrimination. The Court discussed on this issue for the first time in the case of Belgium Linguistics in 1968, where it found that not every distinction is unallowed, because it (distinction) is sometimes necessary to correct existing inequalities in society. By that, this Court concluded that positive measures to correct the effects of discrimination and the full entitlement to the rights of the European Convention do not represent a violation of Art. 14, if such measures have objective and reasonable justification. The European Court's practice is very rich when it comes to direct discrimination. On the other hand, it took some time for European Court to recognize the different treatment in the case of indirect discrimination. In one case, authorities in the United Kingdom were accused of arbitrary deprivation of life of the Catholic community members[36]. The applicant claimed that the Security Forces in Northern Ireland in the period from 1969 to 1994 killed 357 persons in total, mostly Roman Catholics, while the number of Protestants was negligible. It was particularly highlighted

31 Dudgeon v. UK, ECtHR, Appl. 7525/76, 1981.
32 Airey v.. Ireland, ECtHR, Appl. 6289/73, 1979, para. 30 See 30 and v Timishev. Russia, ECtHR, Appl. 55 762/00, 55974/00, 2005.
33 Elsholz c. Germany, ECtHR, Appl. 25735/94 2000, Sahin v. Germany, Appl. 30943/96, 2001; v. PM. UK, ECtHR, Appl. 6638/03, 2005.
34 Vermeire v.. Belgium, ECtHR, Appl. 12849/87, 1991; Mazurek v. France, ECtHR, Appl. 34406/97, 2000; Pla and Puncernau c. Andorra, ECtHR, Appl. 69 498/01, 2004.
35 Van der Mussele c. Belgium, ECtHR, Appl. 8919/80, 1983; Rekvényi c. Hungary, ECtHR, Appl. 25390/94, 1999th
36 Hugh Jordan v.. UK, ECtHR, Appl. 24746/94, 2001t,

that in only about thirty cases, the court proceedings on the use of this kind of deadly force had been launched, and that only four verdicts were passed, which points to the existence of discrimination based on national origin. The European Court underlined that in situations where the "general policy or a measure has disproportionately harmful effects on a particular group, it is not excluded that it could be considered discriminatory, even though these policies or measures are not focused specifically against that group. "[37] However, the problem with indirect discrimination is in proving it, particularly in the disproportionate impact that a seemingly neutral measure generates on the members of certain groups. Therefore, the Court considers that it is not enough just to present only statistical data to prove the existence of discriminatory practices in some country[38]. In this case, the applicant must prove that a difference is made in the treatment by pointing to the differently treated group and compare it with another group who has a favorable treatment and which, at the same time, is in the same or a similar situation. So the applicant is required to identify a group that is treated differently and to prove that it is in an analogous situation to the one in which the victim of the specific treatment is[39]. So in the famous case Van der Musella against Belgium, the applicant claimed that, unlike some of other professions, he, as a law clerk is at a disadvantage because he is obliged to work for free to help people achieve the so-called right of the poor. The European Court found that it is difficult to compare the different professions with the profession of the lawyer, as well as that the entering into this profession implies some obligations and that every individual agrees to them in advance. In return, lawyers enjoy some significant privileges, including the exclusive right of representation in court.

On the other hand, discrimination can occur when the government applies the same treatment to individuals or groups that are in a significantly different situation. In Thlimmenos famous case, the applicant was convicted for refusing military service due to conscientious objection, and thus he was disabled from working asaccountant because he was convicted. He considered that the violation of his rights, that is of Art. 14, related to Art. 9, of the European Convention, which guarantees freedom of thought, conscience and religion, because no distinction is made between persons convicted because of their religious beliefs and persons who have committed other crimes. The European Court agreed with this stand and pointed out that the state with no objective and reasonable justification treated two completely different groups analogically.

37 Ibid, para. 154

38 DH and Others. Czech Republic, ECtHR, Appl. 57325/00, 2006.

39 V Lithgow. UK, ECtHR, Appl. 9006/80, 9262/81, 9263/81 (1986), para.177

When any difference in treatment between the two analogous groups is detected, the burden of proof is on the state to prove that the different treatment is objectively and reasonably justified. Different treatment could be objectively and reasonably justified when it seeks a legitimate aim and if there is proportionality between the means used and the desired aim[40]. The jurisprudence analysis of the European Court shows that it is not difficult for the states to prove a legitimate aim because almost any rational reason is considered legitimate, regardless of the consequences that a certain treatment causes to the discriminated group. In assessing the proportionality test, the state is recognized a certain "sphere of free estimation", which depends on the circumstances of the case and the the case itself. Thus, the discretionary powers are smaller when it comes to some specially sensitive grounds (e.g. race, gender, sexual orientation, religious and ethnic origin), which are a common and serious grounds of discrimination, and then for the state it is difficult to prove the existence of a legitimate aim justifying discriminatory treatment. On the other hand, the discretionary powers are broader on those grounds which are not a common and serious cause for discrimination, and where is no consensus among European states regarding particular issue (e.g. adoption of children by members of sexual minorities), or when it comes to general measures of economic and social strategies[41]. However, it is evident that the burden of proof of the applicant is much more difficult when it comes to indirect discrimination, because it is necessary to offer evidence which leave no doubt to the disproportionate effect produced by one discriminatory treatment.

Example

In the first verdict against Serbia on the basis of discrimination, the applicant is Života Milanović, a Serbian citizen who lives in a village Belica, near Jagodina[42]. Since 1984 he has been a prominent member of the community Hari Krishna in Serbia, and because of that, since 2000 has received anonymous threats. Milanović was repeatedly attacked by unidentified men in the period from 2001 to 2007, who stabbed him and cut him with knives, which is why he ended up in hospital four times. Each of the cases occurred in the evening or late at night in the neighborhood of Milanović›s relatives apartment in Jagodina and every time the attacks were

40 See, among others, Markx c. Belgium, ECtHR, verdict quoted a few. 33; Hoffman v.. Austria, ECtHR, Appl. 12875/87, 1993, para. 31, 33; Thlimmenos v. Greece, ECtHR, verdict quoted, para. 46

41 See James and Others. UK, ECHR, Series A no. 98, (1986), para. 46. The Court considers that states have a better knowledge of their own society and their needs, so they can judge better than international judges what the public interest is, so that the Court respects the principle of their policy, unless it is not without reasonable foundation.

42 Milanovic c. Serbia, ECtHR, Appl. 44 614/07, 2010.

reported to the police. Milanović claimed that the attackers were members of local right-wing organizations. The police have repeatedly questioned Milanović and potential witnesses and took some investigative actions, but failed to identify the attackers. In police records it was noted several times that Milanović is a member of a religious sect, that he has «strange looks» and the police expressed unfounded suspicion that he was injuring himself. The European Court noted that the state has an obligation to undertake activities directed to preventing acts of abuse undertaken by private individuals. However, this obligation is not absolute and does not impose to the authorities an impossible or disproportionate burden. «Standard test» applied in this case is whether the state took reasonable steps to protect the individual from being harmed, or from the risk of abuse the state knew or should have known about.

The European Court pointed out that in this case it was necessary to conduct an effective investigation, i.e. there was an obligation to undertake all available and operational measures which could be reasonably expected in order to find the perpetrators of these attacks. However, in this case, the police did not consider the religious motivation of the attacks and treated the exactly the same as other attacks, for example, pub fights. So, all measures to protect Milanović from systemic and religiously motivated attacks had not been taken, partly due to the unfounded suspicion that he was indeed the victim of the attack. The European Court found a violation of Art. 14, related to Art. 9, which guarantees freedom of religion.

3.3.2.1.1.2 Prohibition of discrimination – Article 1 of Protocol 12 to the European Convention

Article 1 of Protocol 12 is the result of a need to introduce larger protection from discrimination in relation to Art. 14 of the European Convention by one independent right and enable applications which will not contain only a violation of guaranteed rights. As the linguistic formulation of Art. 1 is completely the same as the one used in Art. 14, the purpose of this article is not to abolish Art. 14, but to supplement it. This evidently results from the Preamble of Protocol 12, which states as first the fundamental importance of the principle of equality, and then points out the need for taking further steps to achieve equality for all people. The first paragraph prohibits discrimination related to «any right prescribed by law,» that could refer to international law[43]. Therefore, the aim of this article is to pro-

43 See James and Others. UK, ECHR, Series A no. 98, (1986), para. 46. The Court considers that states have a better knowledge of their own society and their needs, so they can judge better than international judges what the public interest is, so that the Court respects the principle of their policy, unless it is not without reasonable foundation.

vide protection to individuals in the enjoyment of all rights or privileges which are explicitly or implicitly recognized by the national law, which evidently results from the Preamble of this protocol. The Report with explanations of Protocol 12 stipulates that protection from discrimination will be applied in the following situations:

1. in the enjoyment of any right which is specifically provided to the individual by domestic law;

2. in the enjoyment of any rights that may result from an evident obligation of public authority according to domestic law, i.e. where public authorities are obliged according to internal regulations to behave in a certain way;

3. in a situation where public authority performs some discretionary power; as

4. protection from any other act or omission by public authorities.

The explicitly listed prohibited grounds are identical to those existing in Art. 14, although the European Court found that there are some grounds, such as sexual orientation, which are often grounds of discrimination, but are not specifically listed in this article. However, this does not have a significant impact in practice because the clause of this article is an open issue, so not specifically listed grounds are also basically admitted.

Having in mind a wide application of Art. 1 of Protocol 12 in this area, the states are in no hurry to ratify it. Until today this instrument has been ratified by only 17 countries, and among the first ones to do so was the Republic of Serbia, at the time of ratification of the European Convention. The instrument itself came into effect on April 1, 2005, when it started to apply to the Republic of Serbia too.

Example

The first complaint which invoked Art. 1 of Protocol 12 was exactly the complaint against the Republic of Serbia. This was the case Stojanović, regarding the person who was serving a sentence for a criminal offense of fraud in a correctional facility in Nis[44]. He lost his last tooth in the prison therefore he could only eat pureed food, so he asked the prison dentist to make him free dentures. He referred to the fact

44 Stojanovic v. Serbia, ECHR, Appl. 34 425/04, 2009.

that he was a blood donor for 58 times and was exempt from paying for health care. However, he was told he would have to pay at least a part of the dentures in the amount of RSD 10,000 because he was not exempt from paying dentures by Article 4, of the Decision on the participation of the insured persons in the health care costs. The complainant considered that this constituted a violation of Art. 1 of Protocol 12 because he was put in the same situation with the general population, which is significantly different than the situation of the prisoners. However, the state claimed that he was already treated differently because the general population would have to pay the full cost for the dentures, while he was expected to pay a part of the amount. In other words, this price had already been reduced as in the case of other categories (e.g. pregnant women and pensioners). The European Court did not investigate this violation because before the decision in this case was made, the government decided to enable the prisoner free dentures.

The first case where the European Court found a violation of Art. 1 of Protocol 12 was the case of Sejdić and Finci against Bosnia and Herzegovina[45]. [51] In this case, two prominent public figures, Dervo Sejdic and Jakob Finci, applied for the elections in Bosnia and Herzegovina and for the House of Peoples of Bosnia and Herzegovina but in January 2007 they were rejected because they do not belong to the constituent peoples (Serbs, Croats and Bosniaks). On the basis of the Constitution of Bosnia and Herzegovina and the Election Law of 2001, only the constituent peoples of Bosnia and Herzegovina can participate in this election, and not the national minorities. The European Court found that in this particular case discrimination does exist because there is no reasonable and objective justification for eliminating the possibility of participation of minorities in this election. As the passive right to vote of Presidency members, i.e. a state authority as a non-legislative body is not included in Article 3 of the First Protocol which guarantees active and passive voting rights, the European Court treated this issue on the basis of Art. 1 of Protocol 12.

3.3.2.1.2. Other conventions adopted within the Council of Europe

In addition to the European Convention, which is the most important international instrument constituted under the auspices of the Council of Europe in the fight against discrimination, a large number of conventions stand out in its importance, in particular *the European Charter on Regional or Minority Languages* (1992) and *the Framework Convention for the Protection of National Minorities* (1995).

45 Sejdic and Finci v. BiH, ECHR, Appl. 27996/06 and 34836/06, 2009.

The European Charter on Regional or Minority Languages[46], has as a goal to promote historical regional and minority languages in Europe. The Charter establishes a number of concrete measures in different areas of life, in order to encourage the use of regional and minority languages in education, justice, administration, public services, state-run media, cultural, economic and social activities and international exchange. The Charter in Section II, Article 7, Item 2 (Goals and Principles) prohibits discrimination in a manner that it anticipates that "Member States undertake the obligation to eliminate, if they have not done so far, any unjustified violation, exclusion, restriction or unfavorable treatment relating to the use of regional or minority languages and that would have as a goal to discourage or endanger its preservation or development." The Charter allows for the adoption of special measures in favor of regional or minority languages "that have as a goal the promotion of equality between the users of these languages and the rest of the population or which take into account their specific conditions. '

The Framework Convention on the Protection of National Minorities[47] protects the rights of members of national minorities in members states of the Council of Europe. The Convention guarantees various rights of minorities, obliges states to ensure the enjoyment of these rights and recognizes a large number of the collective rights of minorities. The basic principle of the Convention is the principle of equality and prohibition of discrimination. So in Section II, Art. 4, para. 1, it is stated: "The States Parties are obligated to guarantee to members of national minorities equality before the law and equal legal protection. Under these terms any discrimination based on belonging to a national minority is prohibited." The Convention allows positive measures and undertaking the measures "where it is necessary" to achieve "full and effective equality between individuals belonging to a national minority and those belonging to the majority." Other essential regulations of the Convention cover a wide range of minority rights which states must respect: helping minorities to preserve and develop their culture and identity, encouraging tolerance, mutual respect and understanding between the majority population and the minorities, respecting freedom to assembly, associate, express, thought, conscience and religion of national minorities, ensuring minority access to state media, and assisting in establishing media in minority languages etc.

46 "The Official Gazette, International Treaties", No. 18/2005.
47 "Official Gazette of FRY - International Treaties", No. 6/98.

3.3.2.2 The European Union

The European Union is an international organization with over-stateselements, which now consists of 27 member states. The European Union, primarily, is an economic union that is based on four freedoms: freedom of goods, capital, people and services. However, it could not fail to protect some fundamental rights in its founding treaties, and until today it has significantly expanded its activities in the sphere of human rights. So today, in the EU there are significant sources in the sphere of anti-discrimination law, which are further developed in practice of the EU Court of Justice (ECJ).

The Republic of Serbia was granted a candidate status on March 1, 2012. and the standards established by these sources are still not legally binding for Serbia, but they represent an important guideline in the process of harmonization of regulations with the EU laws and for gaining full membership.

3.3.2.2.1. Primary Sources

The Original Treaty on establishing the European Economic Community from 1957 contains several provisions prohibiting any form of discrimination regarding nationality, indicates social and economic rights regarding protection of workers, free traffic of goods and services, as well as freedom of movement and residence. The treaty also contains regulation on the prohibition of discrimination based on sex in the context of employment. This regulation is aimed at preventing the realization of competitive advantage by offering lower wages to women and by less favorable terms of employment for women.

The Maastricht Treaty from 1992 also contains a provision on prohibition of discrimination on sex grounds in employment. This Art. 2 imposes an obligation on the states to promote equality between men and women in the field of equal opportunities in the labor market and equal conditions at work, and Art. 6, imposes an obligation to states to provide equal pay for equal work.

The Amsterdam Treaty from 1999, also in Art. 2, proclaims the equality of men and women in the labor market. However, this instrument goes a step further because Art. 13 gives very significant authorization to the European Council to take appropriate steps to combat discrimination grounded on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

A year after the Amsterdam Treaty, the *Charter of Fundamental Rights of the European Union* was adopted. The Charter is the first document that provides a catalog of human rights guaranteed in the EU. The third chapter of the Charter is devoted to equality (Articles 20 to 26). Art. 21, para. 1 prohibits discrimination "on any ground such as sex, race, color, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, affiliation to a national minority, property, birth, disability, age or sexual orientation." The significance of this article is not only that it does not close the list of grounds for discrimination, but that for the first time it explicitly introduces two grounds: the genetic characteristics and sexual orientation. Other articles proclaim equality before the law (Article 20), require states to respect the diversity of cultures, language and religion (Article 22), proclaim gender equality in all fields including employment, work and pay (Article 23), require from states a special care for children (Article 24), the elderly (Article 25) and the realization of inclusion of persons with disabilities (Article 26). Although the Charter is adopted as a non-obligatory legal act, it became binding on December 1, 2009 when *the Treaty of Lisbon* came into effect, in whose text it was incorporated.

3.3.2.2.2. Secondary Sources

So far, the EU has adopted a large number of directives primarily related to the prohibition of discrimination on the ground of sex in employment. However, by its significance in the sphere of anti-discrimination two directives stand out which were adopted in 2000, only a year after the Treaty of Amsterdam and Art. 13, which authorized the European Council to take more resolute steps in achieving equality on several grounds.

Directive on Racial Discrimination[48] prohibits discrimination on grounds of racial or ethnic origin in the context of employment, but also in the context of access to social security and protection, as well as goods and services.

Directive on equality in employment[49] prohibits discrimination in employment based on sex, religious belief, age or disability. The difference between these two directives is that the first one has a wider range of activity, but applies only to racial discrimination, while the second is restricted only to the sphere of employment, but covers as much as four grounds of discrimination.

48 Council Directive 2000/43 / EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

49 To this you publicly +1. Recall Council Directive 2000/78 / EC of November 27, 2000, establishing a general framework for equal treatment in employment and occupation.

Both directives anticipate and define in the same way the following forms of discrimination: direct discrimination, indirect discrimination, harassment and encouraging to discrimination (Article 2).

It is very important for directives to prescribe, in civil cases, the transfer of the burden of proof from the plaintiff to the defendant, so that the plaintiff only has to make the occurrence of discrimination probable, and then the defendant must prove that there is no discrimination, or that it is justified in the particular case. Both directives require states to take measures against victimization, i.e. that the plaintiff does not endure less favorable treatment for having instituted a suit in court. The directives require achievement of social dialogue between partners in order to achieve equality, especially of trade unions and workers, in accordance with national traditions and practice, as well as dialogue with non-governmental organizations. The states are required to make available more general information on the rights resulting from the directives. Also, both directives allow for undertaking positive measures in a way to prevent or compensate a disadvantage. The directives anticipate other grounds for justification of discrimination: the indirect discrimination can be allowed if it is objectively justified by achieving a legitimate goal, if the means for achieving that goal are appropriate and necessary, and in case of actual employment criterion, or when there is different treatment of individuals based on a legally protected ground and when this ground is closely linked to the ability of performing a particular job or to the qualifications for the particular job. The Directive on Employment Equality anticipates two more grounds: allowing discrimination on grounds of religion or religious beliefs, when it comes to employers running religious organizations, as well as "reasonable accommodation" to provide equal employment opportunities to people with disabilities. This term is defined as "appropriate measures taken if necessary and in certain cases, that make it possible to the people with disabilities to approach, participate, progress, or improve, if such measures do not burden the employer disproportionately "(Article 5). These measures may include placing elevators, ramps or toilets adapted for people with disabilities in the workplace, in order toenable a wheelchair access. Besides these obligations, the Directive on Racial Discrimination also anticipates enabling organizations, such as NGOs and unions, to assist victims of discrimination to institute a suit in court, and the obligation of the governments to establish specialized "authorities for improving equality" with the task to provide independent assistance to victims of discrimination regarding their claims, make independent researches on discrimination and publish independent reports and make recommendations on any issue relating to discrimination.

Extensive practice of the Court of Justice has significantly contributed to a clearer interpretation of the regulations of this Directive and set new standards in the protection against discrimination.

4

Monitoring of Fulfilment of Obligations Under International Agreements Regarding Prevention and Protection from Discrimination*

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The idea of the need for international protection of the individual and his/her human rights is quite new, because a classic international law is based on the doctrine that the relation between individuals and the state is entirely under internal jurisdiction of the states. So, the state supremely governs in its territory and executes dominion over individuals who reside in it, while international law regulates only relations between the states but not individual rights.[1]

However, with the development of international law on human rights, the relationship toward the individual is changing, because modern international law recognizes a different position of man since the norms of international law gradually incorporate in the idea that some rights related to all people are the subject of international law and that the protection must be provided to them, not only through international legal norms, but it is necessary to establish some kind of international control. The adoption of international treaties on human rights, which prescribe mechanisms for monitoring their fulfillment, limits the sovereign authority of the state and the individual is accepted as a subject of international law. When we know that the states disown the sovereign authority over individuals with difficulty, it is not surprising that it took long time to establish an international monitoring of the fulfillment of obligations which the states have towards persons under its jurisdiction.[2] [57]

1 Until the period between the two world wars, international law was defined as the right regulating exclusively the relations between states as subjects of international law, although it acknowledged the possibility of international legal protection of individuals but only when the government uses diplomatic protection of its citizens in relation to actions of other states. On the development of international law see more: Malanczuk, P. (1997) Modern Introduction to International Law,) London / New York, seventh revised edition, p. 1-34.

2 International monitoring mechanisms are not perfect and have many limitations but the fact that they are constantly improving and eventually establish new striving to encompass a wider range of countries encourages.

4.1. UNIVERSAL LEVEl

The universal international recognition of human rights was not achieved before the second half of the twentieth century, primarily when the United Nations (hereinafter: UN) began to adopt international treaties and treaties that protect human rights and this created a normative framework and defined the range and content of certain rights that belong to the corpus of human rights. That is why today the term – *universal protection of human rights* - is used for all international treaties adopted under the auspices of the UN, the universal international organization that gathers together the largest number of members, that is, almost all nations of the world.

However, just setting the norm has not ensured that human rights be really respected and truly protected at the national level. However, member states of the UN are able to ratify international treaties and in that way commit themselves to respect its regulations, but that does not mean that in practice they are really doing it. On the other hand, not a small number of countries have not ratified the universal international treaties on human rights and therefore the persons under the jurisdiction of these states cannot refer to the obligation of respecting human rights and use mechanisms of the control that are provided by them.

That is why, on the universal level, two parallel systems of monitoring the respect of human rights were developed. One, the adoption of international treaties on human rights, as these treaties anticipated that the treaty authorities regularly monitor their use, and the other in the UN political bodies.

Treaty Authorities (committees) - All universal international treaties have established treaty authorities (committees). Their role is to examine whether the States Parties respect the regulations of the ratified contract. The states that ratify an international convention participate in the election of members of treaty bodies, but they are, once they are elected, independent in their work. Committee members are mostly experts in the sphere of human rights and do not depend on attitudes of their governments but act in their personal capacity. Today, this system consists of nine committees and they are: the Committee on the Elimination of All Forms of Racial Discrimination, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Elimination of Discrimination of Women, the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, Committee on the Rights of Migrant Workers and the Committee for the Protection of Forced Disappearances. In order for the committees to fulfill their monitoring function, it was necessary to anticipate the appropriate control

mechanisms and establish procedures for their effective functioning. However, the nature of the international treaties is specific because they establish a special legal regime, since the state ratifying an international treaty on human rights enters into a treaty relation with other states that have accepted the particular treaty but the beneficiaries of those rights which are protected by these treaties are individuals living in the territory of States Parties. If the rules of contract law are applied on international conventions on human rights, that would mean that in the case of their violation the states should institute suits in courts against those countries (the parties) that violate the treaty. Although all universal international agreements anticipated the possibility for the states to start proceedings before the committees against another state for violations of rights from the treaty, it is unlikely that the states only due to the violation of human rights of the citizens of another state, will initiate proceedings against that state and risk spoiling good political, economic and diplomatic relations. Therefore it is not surprising that on the universal level no such proceedings has been initiated despite the fact that all international treaties anticipated the appropriate procedure in the suit of one state against the other state.[3]

Precisely because of this limitation, international conventions on human rights adopted by the United Nations anticipated another type of monitoring and established jurisdiction of the treaty authorities to consider individual complaints where the victim of the violation of the rights guaranteed by a convention may start the proceedingagainst the state. The possibility that an individual submit a complaint against his/her country before an international authority means departing from the view that the state is an absolute master of life of individuals who are within its territory and that it has unlimited power over them. On the contrary, the individual becomes an equal participant in proceedings before international authorities and the state is responsible for violations of some of guaranteed rights and bears the appropriate consequences.[4] The responsibil-

3 Because of this, in the further analysis of individual supervisory authorities work we will not deal with this procedure.

4 The first contract, which anticipated the individual complaints procedure was the Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Art.14, and Art. 21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides the same jurisdiction for the Committee Against Torture. The legal basis for the process of the individual's appeals to the Committee for Human Rights, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities results from Optional protocol of the proper convention . The Convention on the Rights of Migrants and the Convention on the Protection of Forced Disappearances gave also by appropriate Articles to the states the ability to make statements about the acceptance this jurisdiction. Only the Convention on the Rights of the Child does not provide this system of monitoring.

ity of the complainantis to, before addressing a competent committee, to fulfill eligibility conditions or to use up all internal legal remedies and to submit the complaint within 6 months from the adoption of a final judgment by a national court. The complaint must not be anonymous, must refer to the violation of the right guaranteed by the treaty, must not submitted to some other international authority that solves individual applications, or be used for personal promotion, or constitute an abuse of the right to start proceedings.

Although such monitoring mechanism provides direct protection of the victims, it has some weaknesses. The biggest defect of this control mechanism is that states can ratify the treaty, but are not obligated to agree to the start of individual complaints. Besides, the treaties limit the effect of the decisions of treaty authorities because they do not anticipate that the decisions of the monitoring authorities are binding. It does not mean, of course, that the state is able to ignore them completely, because it is aware that it joined an international treaty voluntarily, but it certainly reduces their power.

Treaty authorities are provided with one more kind of jurisdiction because they can exercise administrative control by periodically investigating the states reports on the treaty implementation on national level. Each state which as ratified a treaty is required to, within one year from the ratification, submit to the committee an initial report on its implementation After that, it is a state's obligation to submit periodic reports on the implementation of the treaty every four years. This type of monitoring enables independent authority to conduct regular control on how, and whether, the ratified international treaty is respected and whether its standards are incorporated in the positive legislation of the state that ratified the treaty. The session at which the report is examined should be attended by representatives of the state in question, who can point to the difficulties encountered in implementing the convention and receive useful advice and committee's recommendations on how to overcome them in order to improve the implementation of international standards in interior legislation and in practice of state authorities. On the other hand, committees may review the entire situation of the domain of human rights regulated by a relevant treaty after receiving information from many independent sources and not just from governments of member states.

Authorities established by the UN Charter (political bodies). –the very membership in the United Nations does not mean that the state is obliged to ratify international treaties on human rights adopted under the auspices of this organization,

as is the case with membership in some regional organizations, which will be discussed in the next chapter. Although there is a growing number of states that access to universal international treaties, there are still states that haven't accepted them so the situation of human rights in these states cannot be seen through the mechanisms of control by the treaty authorities. In order to realize the efforts to regularly monitor human rights in all member states, the UN developed simultaneously another monitoring mechanism, through political authorities founded by the Charter of the United Nations.

The UN Charter did not define what rights belong to the corpus of human rights, but only put the human rights among those values for which this international organizations is going to advocate. Although in the time of the establishment of the UN there were proposals to establish a system of control regarding the respect of human rights, such solution was not accepted and undertaken, so the Charter only stipulates that UN member states are obliged to "promote human rights and freedoms."[5] Since in the years after the founding of the United Nations there were frequent warnings that in some countries there were massive and systematic violations of human rights, the United Nation authorities had to respond in some way to this phenomenon, realizing that merely setting the norms of human rights and adoption of international treaties does not lead to their full respect.

According to the Charter, two authorities were entrusted with the responsibility to deal with human rights, i.e. the UN General Assembly and the Economic and Social Council.[6] They and their subsidiary authorities are, unlike the committees, political authorities,their jurisdiction is based on the UN Charter and the recommendations and the decisions they adopt must be respected by all UN member states, regardless of whether they are or not signatories of treaties on the human rights. Today, the most important role in the monitoring belongs to the Human Rights Council which will be discussed in the next section and the UN General

5 Art. 55 and 56 of the UN Charter.

6 The Economic and Social Council in 1947 established the Commission on Human rights, as its subsidiary authority, to which are transferred all powers regarding protection and promotion of human rights. The Commission, for the first several decades, has mostly dealt with a normative activity until the seventies of the last century, when it established control mechanisms adopting a decision that in the cases of mass and systematic violations of human rights special rapporteurs or working groups are going to be appointed to examine the human rights situation. In early eighties it introduced a new practice and began to appoint Special Rapporteurs for so-called thematic procedures that were not related to particular state but to some phenomenon of massive and systematic violations of human rights, for example torture, mass disappearances, human trafficking, restrictions on freedom association, expression and the like.

Assembly which adopts the texts of all universal international treaties, creating a legal framework of protection of human rights.

When evaluating the monitoring effectiveness of both systems, it is generally considered that the political authorities may be more effective in protecting human rights, as they have the political power to implement decisions they made, and their application does not depend on the will of the state, but on the majority in UN authorities where they vote. On the other hand, this monitoring system has weaknesses that are reflected primarily in the possibility that some countries, thanks to the growing influence of certain states in the very organization of the United Nations, will never be subject to consideration in front of the UN authorities or ensure by political influence that the majority of UN member states does not adopt a resolution that would condemn human rights situation in them.

When it comes to monitoring the prevention and protection from discrimination, both control systems have a very important role as it is non-discrimination principle in the base of all modern human rights treaties, from the Universal Declaration of 1948 to the latest instruments on human rights. Because of that, in the following sections we are going to deal with the work of the Human Rights Council and of those treaty authorities, which are dealing with discrimination to a great extent directly or indirectly.

4.1.1. The Human Rights Council

The Human Rights Council, a political authority established as a subsidiary authority of UN General Assembly, was founded in March 2006,[7] and although completely new authority,[8] it practically inherited the Commission on Human Rights which held its final session in March 2006 and ceased to exist.[9]

The Council has several monitoring mechanisms at its disposal: *special procedures, the universal periodic reviews and the procedures on individual applications.*

The special procedures were inherited by the Council from the Commission for Human Rights. They are initiated regarding the states where mass and system-

7 The Council was established in the UN General Assembly, UN Doc. A / RES. 60/251.

8 It is composed of 47 member states of the United Nations elected by the General UN General Assembly for a three-year term. It is a subsidiary authority of the General Assembly and it reports on its work. Since it's a political authority composed of representatives of the Council to vote in accordance with the recommendations of the state government Council members.

9 On the reasons for the abolition of the Commission sees more in Peter's C, V. (2008), Reform system of human rights at the United Nations - Human Rights Council, " Constitutional and international legal guarantees of human rights, the Faculty of Law in Nis Publications Center Nis.

atic violations of human rights occur, in such a way that the Council adopts a resolution at its session, in which the worrisome situation in the country is stated and a special rapporteur or working group are appointed with a mandate to monitor the situation in the concerned country and to report to the Council on that. The special procedure mandate holders are experts who deal with human rights in their regular job and activities, and are appointed by the Council from a list of experts composed by the Office of the High Commissioner for Human Rights. The main task of special procedure mandate holders is to collect information on violations of human rights and they, by rule, do so by organizing visits to the country and in direct contact with government and with anyone who can provide relevant information on cases about massive violations of human rights obtain the information necessary for evaluation of the situation in the country. They submit report to the Council on their findings and propose either to repeal the procedure as the situation in the country has changed or seek to extend their mandate because the state has not yet reached a satisfactory level of respect for human rights. The goal of initiating a special procedure is to force the government in the state through the UN political authorities to cease the practice of brutal and massive violations of human rights. In this way the cases of discrimination, if qualified as massive and systematical, are also examined and the UN points to the state to the unlawful violation of the principle of equality. Most special procedure mandate holders receive information about allegations of massive human rights violations and respond to them by submitting to the government urgent appeals with the request to stop the systematic violation of human rights. In this way, they can often provide immediate assistance to potential or direct victims.

Besides the special procedures regarding the states, in the eighties of the last century, the Human Rights Commission introduced the practice of starting special procedures to deal with specific issues - the so-called thematic procedures, when Special Rapporteurs are appointed with the task to deal with certain phenomena directly violating human rights or concerning them. Because of the advantage of the thematic mechanism and less resistance of the states towards it, thematic procedure were often initiated so in 2006 the Human Rights Council inherited as many as 28 thematic procedures. The resolution on establishing the Human Rights Council anticipated that it was going to inherit the duties of the Commission on Human Rights, so the Council initiated some new thematic procedures as well.

Within the thematic procedures several special rapporteurs were appointed dealing exclusively with issues relating to discrimination. Such is, for example, the special procedure for minority issues initiated with an explanation that the

minorities in almost all parts of the world are discriminated, often excluded from social life, and it is therefore necessary to make efforts to improve position of minorities (ethnic, religious, linguistic and other).[10] Discrimination is also in the essence of the mandate of the Special Rapporteur for contemporary forms of racism, racial discrimination, xenophobia and intolerance since it has the task to investigate contemporary forms of discrimination against people of African, Asian and Arab origin, asylum seekers, refugees, migrants, to examine the situation in which discrimination grows into forms of mass and systematic human rights violations, appearance of xenophobia, anti-Semitism, Islamophobia, the impact of measures to fight terrorism on the increase of racial discrimination, the role of education in the fight against these phenomena, and the like.[11] In 2010 the Human Rights Council adopted a resolution which established a working group for the issues of discrimination against women in legislation and in practice. The reason for initiation of this thematic procedure is the fact that, despite constitutional and legal reforms many countries haven't made enough progress to exterminate discrimination of women.[12]

Particular reference to these three special procedures does not mean that others special procedure mandate holders do not deal with cases of discrimination. In fact quite the opposite, almost in all reports, whatever the topic is, comments can be found dealing with the problems of discrimination which is often quoted as one of the most serious causes of negative trends in the phenomena Special Rapporteurs are dealing with within thematic procedures.

The Human Rights Council established a new monitoring mechanism - universal periodic review according to which the obligation of all UN member states is to deliver to the Council a report on the situation of human rights and on fulfilling international obligations once in every four years. The submission of the universal periodic review is intended to be a dialogue between the states and, which is particularly important, it ensures equal treatment of all UN member states since they are all obligated to respond to this obligation in the same way, so they cannot see it as a political pressure as it is often the case when a special procedure is initiated regarding some state.

10 This procedure was established by the Commission on Human Rights in 2005, and its mandate was renewed by the Human Rights Council twice, in 2008 and 2011. See Human Rights Council resolution 7/6 and Human Rights Council resolution 16/6.

11 Special procedure for this topic was initiated in 1993 in the Commission on Human Rights and the mandate of the Special Rapporteur was extended all the time. The Human Rights Council has taken over this procedure and is updating it constantly. By the last Council resolution, adopted in March 2011 the mandate was extended for another three years. See Human Rights Council Resolution 16/33.

12 See: Human Rights Council Resolution 15/23.

The Universal Periodic Review is composed of three parts. The first is submitted by the state, the second contains the data collected by the Office of the UN High Commissioner for Human Rights on how the state fulfills its treaty obligations and the third is reports which the Office of the High Commissioner receives from independent sources, national human rights institutions and non-governmental organizations. The Council adopts recommendations for the country on the issue that it should, in a period of four years (until the next report to the Council), accomplish or explain why it was not able to implement the obligations . In the first cycle, from 2008 to 2012, all UN member states submitted the universal periodic review.[13] The efficiency of the monitoring system through the universal periodic review can still not be properly evaluated because the second round of review started in May this year.

The Human Rights Council has available one more procedure that starts when from the individual complaints of alleged violations of human rights concludes that there is a mass and systematic violation. It then initiates a confidential procedure that aims to respond in time to stop massive violations of human rights and to help the victims as soon as possible. The procedure on individual complaints before the Human Rights Council has no character of quasi-judicial procedures (such as is the case of the procedures on individual applications in front the UN committees) or Council resolves a particular case. The purpose of this procedures is to, in cooperation with the State, stop situation of mass and systematic violations and to prevent further escalation of violence. That is why it is confidential because in the practice is shown that the States are more willing in confidential procedure to cooperate with international authorities. However, this monitoring system isn't shown as effective because procedures on complaints are very complex and demanding, it is slow as it develops through stages, with the negligible contribution and impact of the applicant. On the other hand, consequences of initiating proceedings for the issued country are very limited, so this procedure does not represent a mechanism that could strongly affect on the government of a particular state to change attitude toward human rights.[14]

4.1.2. The Human Rights Committee

By the Covenant on Civil and Political Rights (hereinafter ICCPR) the Human Rights Committee was established, consisting of 18 members elected by states

13 Serbia submitted a universal periodic review in the 2008, and in January 2013 it will be considered the second report where the Serbian government should show how they have met the recommendations of the Council. Report of the Human Rights in Serbia contains 22 recommendations, many of which related to the phenomena discrimination. All reports of the Human Rights Council, as well as state reports can be found at http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx

14 See more in: Godet, B. (2007), Complaint Procedures, in Muller, L. (eds.) The First 365 Days of the United Nations Human Rights Council, Switzerland, Ast & Jakob.

signatories of the Covenant for a four-year period.[15] The states ratifying ICCPR pledge to submit every four years a report to the Committee about its implementation. The report is considered at a meeting attended by the government representatives and their role is to explain and defend the state report and prepare answers to a list of questions that is submitted to them before the meeting.

The issue of discrimination has often been on the agenda of the Committee on Human Rights because Article 2 of the Covenant requires states to recognize the rights guaranteed by the Covenant without any distinction and in Article 26 to prohibit and provide effective protection against discrimination by law "... on the grounds of race, color, sex, language, religion, political or any other opinion, national or social origin, property, birth or other status. " After the Committee for Human Rights adopts, after examining reports, the document containing the conclusions and recommendations to the state, in these reports it also deals with discrimination cases (if any) and proposes solutions in order to have with full equality in the enjoyment of the rights stipulated by the Covenant.[16]

Along with the ICCPR the *First Optional Protocol* was adopted establishing the *quasi-judicial competence* of the Committee for Human Rights, according to which individuals whose rights stipulated by the Covenant have been violated may initiate proceedings against the state and require appropriate compensation.[17] On June 22, 2001, the SRY ratified the First Optional Protocol along with the ICCPR and thereby accepted the jurisdiction of the Human Rights Committee to examine individual applications of persons to whom some right under the Covenant was violated.[18] The Human Rights Committee resolved more than two thousand complaints and of all UN committees has the most comprehensive jurisprudence.[19] In terms of the range of validity of Article 26 of the Covenant, which prohibits discrimination, the Committee, deciding by individual applications, interpreted this article very widely. Namely, Article 2 of the Covenant anticipates that *the rights guaranteed by the Covenant must be acknowledged by the state to everyone without any difference*, but the Committee, interpreting this

15 Covenant on Civil and Political Rights and first Optional Protocol adopted the 1966 and put into effect in 1976 the Human rights Committee began with work in 1978, and has held over 100 sessions. Until August 2012 it was ratified by 167 countries.

16 Reports can be found at: http://tb.ohchr.org/default.aspx?ConvType=12&docType=36.

17 By August 2012 the Protocol has been ratified by 114 countries.

18 By the end of 2011 the Human Rights Committee has considered the three individual v. Serbia (Yugoslavia or Serbia and Montenegro) as follows: Zeljko Bodrožić against SaM, (CCPR/C/85/D/1180/2003), Maria and Dragan Novakovic against Serbia, (CCPR/C/100/D/1556/2007 (2010)) and X. against Serbia (CCPR/C/89/D/1355/2005 (2007)).

19 In the most recent report of the Committee of January 2012, 2076 individual complaints were registered, of which 116 have still not be solved by the Committee. See in A/66/40 (Vol. I).

regulation relating to Article 26, took a stand that it is not just a mere repetition of Article 2, but that *the principle of non-discrimination is a general requirement for the enjoyment of all rights and not just rights guaranteed by the Covenant.*

Example

In one case, when a Dutch citizen complained of discrimination because as a married woman she was not entitled to unemployment compensation even though that right is given to married men, and the Committee did not accept the argument of the state that the right to unemployment compensation is not guaranteed by the Covenant. On the contrary, the Committee for Human Rights took a stand that the state must, when making any law regulating any rights (and not only civil and political), pay attention that the text of the law is in accordance with Article 26 of the Covenant, and that it does not include any discriminatory regulations.[20]

In order to improve the interpretation of certain regulations of the treaty, all the UN Committees adopt general comments. The Human Rights Committee has adopted 34 general comments so far, and one relating to Article 26 of the Covenant. The Committee in its General Comment states that the principle of non-discrimination, as well as the principle of equality of all before the law and equal legal protection is contained, not only in the articles 2 and 26 of the Covenant, but in several other articles too (Articles 3, 4, 14 , 20 , 23, 24 and 25 of the Covenant). Even though it ascertains that the Covenant did not provide a definition of discrimination, the Committee referred to two conventions dealing directly with discrimination (Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women) and stated that the term discrimination used in the Covenant "*... should be understood as if it meant any distinction, exclusion, restriction or preference based on grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has as a purpose or effect violation or disabling of the recognition, entitlement or realization of all the rights and freedoms of all people on equal terms.*"[21]

4.1.3. The Committee on Economic, Social and Cultural Rights

Economic social and cultural rights at the universal level are protected by *the Covenant on Economic, Social and Cultural Rights* (hereinafter CESCR)[22], and the

20 The case Zwaan-de Vries v.. The Netherlands, CCPR/C/29/D/182/1984 (1987).

21 General Comment no. 18, paragraph 7. The text of the comments translated into Serbian can be found at: http://www.bgcentar.org.rs/images/stories/Datoteke/opsti%20komentari%20komiteta%20za%20ljudska%20prava.pdf.

22 Covenant took effect in January 1976 and by August 2012 it was ratified by 160 states.

supervisory authority that monitors the use of this international instrument is *the Committee on Economic, Social and Cultural Rights*, consisting from 18 independent experts selected for a four-year period. Due to specific social and economic rights, their program nature and gradual application, this Committee still cannot deal with individual applications, but it should be noted that, when it comes to these rights, discrimination in their full entitlement may always be the basis for initiating proceedings before other UN committees, which confirms the previously described stand of the Committee for Human Rights.[23] So, for now the monitoring function of this committee is reduced to examination of periodic reports of States Parties. Like all UN committees, this one, after examining reports, adopts concluding remarks and recommendations for the states.[24]

The Covenant on Economic and Social Rights does not contain an article of an absolute prohibition of discrimination, but many of its regulations require state-treaties to provide equality in the entitlement to the Covenant rights. The Committee on Economic, Social and Cultural Rights in its General Comment No. 20 dealt with the interpretation of Article 2, para. 2, CESCR, by which States Parties are obliged to accomplish all the rights guaranteed by the CESCR without any discrimination and concluded that the non-discrimination and equality are key to the entitlement and use of economic and social rights, gave definitions of formal and substantial, direct and indirect discrimination. All the prohibited grounds of discrimination are numbered and clearly defined , such as, for ex. race, color, sex, language, religion, political or other beliefs, origin by nationality or citizenship, financial status, age and the like. In the same comment, the Committee specifies what are the obligations of states in relation to the application of the non-discrimination principles in the entitlement to economic and social rights when adopting laws or defining strategies and policies in this area.[25]

23 For a long time the prevalent belief was that economic and social rights are not actionable but in 2008. was adopted the Facultative Protocol with CESCR, which provides competence of the Committee on Economic and Social Rights to consider individual applications but the Protocol has not yet been put into effect because it is not ratified by a sufficient number of states. More in: Scheinin, M. (2006) The proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A blueprint for the UN human rights treaty authority reform without amending the existing treaties, in: Human Rights Law Review, Volume 8th

24 All the reports can be found at http://tb.ohchr.org/default.aspx?ConvType=18&docType=36.

25 General Comment No. 20, E/C.12/GC/20. Committee General Comment on Economic, Social and Cultural Rights, translated into Serbian can be found

4.1.4. Committee on the Elimination of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination is the first international human rights instrument adopted by the UN.[26] It defines racial discrimination and obliges states to "... conduct without delay a policy seeking to eliminate all forms of racial discrimination, "particularly to protect racial groups, to criminalize all spreading of ideas based on racial hatred and to prohibit organizations that encourage racial discrimination. The monitoring authority which is set by this convention is the Committee on the Elimination of All Forms of Racial Discrimination (hereinafter the Committee Against Discrimination), is composed of 18 experts.[27] Since it deals with discrimination, the practice of this committee is particularly important for our consideration.

The Committee on the Elimination of All Forms of Racial Discrimination, as well as other UN committees, conducts monitoring primarily through administrative control, that is, by reviewing state reports. Committee's recommendations are generally referred to the States-members' legislation and to the obligations of states that discrimination is defined as a criminal act, the governments are warned to discriminatory laws or authorities' actions, with the aim of improving the position of minorities (racial, linguistic, religious, etc.). For this purpose, the Committee requests the states to perform regular consultations with members of minorities and to adopt policies and action plans to reinforce measures against racism and racial discrimination and ensure equal participation of minorities in public and political life.[28]

Realizing that discrimination is often an introduction to a very serious and brutal violations of human rights, the Committee on the Elimination of Discrimination in 1993 decided to establish a new, so-called pre-warning procedure, of preventive character initiated if it finds that long-term and systematic discrimination may easily degenerate into more serious conflict with more serious consequences. Pre-warning procedure is initiated when the Committee finds that "There is a conspicuous pattern of racial discrimination which can be seen by the social and economic indicators. "[29] Procedure for pre-warning has been initiated so far in re-

26 Convention on the Elimination of All Forms of Racial Discrimination was adopted in 1966 and came into force in March 1969, and by August 201. it was ratified by 174 countries.

27 More in: Partsch, KJ (1995) The Committee for Elimination of Racial Discrimination in Alston, P. (Ed.), The United Nations and Human Rights - A Critical Appraisal, Oxford, Clarendon Press.

28 Report of the Committee can be found at: http://tb.ohchr.org/default.aspx?ConvType=17&docType=36.

29 See United Nations, Official Records of the General Assembly, Forty-Eighth Session, Supplement No. 18 (UN Doc. A/48/18), Annex III (1993)

lation to more than 20 countries (e.g. Algeria, Bosnia and Herzegovina, Burundi, Croatia, Cyprus, Czech Republic, Israel, Mexico, Papua New Guinea, DR Congo, Liberia, Russia Federation, Rwanda, Macedonia, Nigeria, USA, Sudan, Kyrgyzstan, Australia and some more). In two cases, the Committee made a visit to the states and reported about the alarming condition to the UN Secretary General, the Security Council or other relevant UN authorities, requesting their intervention to prevent escalation of conflict. When initiating this procedure, the Committee may adopt the decisions, statements or resolutions and take measures to strengthen institutions whose activities contribute to pacification of tensions and strengthening a more tolerant atmosphere. Efficiency of pre-warning procedure is limited to some extent because there are no any anticipated activities until the next regular session of the Committee, so that every situation, no matter how troubling , cannot be evaluated until the first next session. On the other hand, its advantage is that it can prevent the escalation of violence and influence that other UN authorities, in particular the Security Council and the UN General Assembly, place on the agenda of their meetings certain situations and react using procedures available to them within their authorization.

In addition to the *pre-warning procedure*, the same year, in 1993, the Committee on the Elimination of Discrimination decided to initiate the organizing of *thematic debates*, in which, besides government representatives, participate representatives of specialized authorities and agencies, inter-governmental and non-governmental organizations. The meetings are public, and all participants are able to present their views and observations, to point to good or bad practice, and offer solutions to stamp out the occurrences of discrimination. So far, the Committee has been dealing with various issues such as, for example, the discrimination of Roma population, racial discrimination regarding persons of African origin, measures aiming to apply positive discrimination (affirmative action) and so on.[30]

Consideration of individual applications by the Committee on Elimination of Discrimination is regulated by Article 14 of the Convention on Elimination of all forms of Discrimination. As in all the other UN committees this jurisdiction has optional nature.[31] In June 2001 the SRY accepted this jurisdiction of the Committee.

30. All the reports can be found at: http://www2.ohchr.org/english/bodies/cerd/discussions.htm.
31 Although 174 countries have ratified the Convention, only 54 accepted this authority.

Since few states declared that they accept the possibility of initiating the procedure on individual applications, the practice of this Committee is limited.[32] Despite jurisprudence of this Committee being poor, the analysis of decisions brought out on individual applications shows that the Committee's attitude on elimination of discrimination is very consistent and it is reduced to an obligation of the states to announce the cases of discrimination as a criminal act, conduct efficient investigation and punish the offenders.

Example
In the case of Durmić against Serbia and Montenegro[33], launched because the complainant was not allowed to enter a disco club for being of Roma ethnicity , the Committee determined that Article 5 of the Convention on Elimination of all forms of Discrimination was violated, because no one answered for this and the state didn't conduct a wide and efficient investigation, and instructed the state to provide a just compensation to the victim and to take measures so that the police, prosecution and courts should in the future prosecute and punish all acts of discrimination. General Comments of the Committee for Elimination of All forms of Racial Discrimination are significant for a better understanding of international standards prohibiting discrimination, as they interpret regulations of the Convention dealing exclusively with racial discrimination. The Committee for Elimination of Discrimination has so far adopted 34 general comments and provided interpretation of almost all articles of the Convention.[34]

4.1.5. Committee for Elimination of Discrimination Against Women

Discrimination against women is a serious problem faced by many states, especially due to the fact that in many societies the traditional understanding of gender inequality is still dominant. So the discrimination against women is often not seen as a violation of the principle of equality, and even women themselves accept an uneven position in various spheres of social life because of education, tradition or prevailing religious views.

Because of the very common and widespread discrimination against women in international community is developed a conviction that it is necessary to reach

32 In its report of January 2012 the Committee on the Elimination of All FormsDiscrimination noted that since 1984. since this mechanism applies control, are received only 48 complaints, of which one was withdrawn and 17 declared inadmissible. Of the 27 cases in which the Committee decided on merits, only in 11 were found violations of the Convention, while for the other's decisions are not made.
33 Durmic v. Serbia and Montenegro, CERD/C/68/D/29/2003 (2006). text of the decision can be found at: http :/ / www. world courts. com / CERD / eng / decisions/ 2006.03.06_ Durmic _ v _ Serbia. htm.
34 The text of all comments can be found at: http :/ / www second OHCHR. org / english/ Bodies / CERD / comments. htm.

a convention that would prohibit every discrimination against women, and in 1979 the Convention on Elimination of All Forms of Discrimination against Women was adopted.[35] Although not the only legal instrument dealing with the status of women, the Convention is the first universal international agreement which provides the obligation of prohibiting any form of discrimination against women and requires full respect for gender equality.

The Convention established the Committee on the Elimination of Discrimination against Women, composed of twenty-three members elected by the state-signatories of the Convention to four-year period.[36]

Like all the other UN Committees this one has the main function to take care of the implementation of the Convention. State-treaties undertake obligation to, every four years, submit a report on the legislative, judicial, administrative and other measures taken to implement the Convention and to list all difficulties encountered during the application of Convention's regulations. The report is considered at a meeting of the Committee and it adopts the recommendations and concluding comments by which the issued state should proceed.[37]

In October 1999, the Optional Protocol to the Convention was adopted, establishing the competence of the Committee to consider individual applications.[38] The Federal Republic of Yugoslavia in 2002 ratified the Optional Protocol.

The Committee may request the issues state to take measures to protect the victim even before consideration of application acceptability, but it does not prejudge the decision of the Committee. The decision is provided to the conflicted parties and the state is required to submit within six months a written report and to inform about measures undertaken in accordance with the recommendations of the Committee.[39]

35 The convention, soon after the adoption was put into effect, already in 1981, and until now it has been ratified by even 187 states.

36 More on the committee see: Jacobson, R. (1995) The Committee on the Elimination of Discrimination against Women, in P. Alston, P. (ed.), The United Nations and Human Rights - A Critical Appraisal, Oxford, Clarendon Press.

37 Report of the Committee on the Elimination of Discrimination Against Women can be found at http://tb.ohchr.org/default.aspx?ConvType=15&docType=36.

38 Similar to the Convention, the Optional Protocol also came into effect very quickly, in December 2000. Up to now, 104 countries have ratified it.

39 According to this last report of the Committee from April 2012, the Committee has received over 40 complaints. The two have been declared inadmissible, in one case the Committee determined that there was no violation of the Convention, and in 12 it determined that the articles of the Convention have been violated and ordered the states to compensate the victims. Others have not yet been reviewed.

Besides the procedure on individual complaints, the Optional Protocol established one more monitoring mechanism - an investigative procedure initiated when there are indications that in some country there is a systematic and mass violation of the Convention.[40] The process is confidential in all stages and its goal is to, in cooperation with the government, investigate the situation and help potential victims. The Committee may organize a visit for the exact determination of the actual situation if the issued state agrees to that. After completing the procedure, the Committee adopts the report with comments and recommendations. If an agreement with the state where the investigation is conducted is reached, the Committee may enter a brief report on the investigated case in the regular annual report submitted to the UN General Assembly.[41]

Finally, like all other committees, this one adopts the general recommendations in which gives the interpretation of certain articles of the Convention. So far 28 general recommendations have been adopted. They refer to various spheres, such as to violence against women, equality in marriage and family relations, the situation of women migrants, of women with disabilities and the like. In its comments Committee also suggests measures the states should take for the full implementation of the Convention on the Elimination of Discrimination against Women.[42]

4.1.6. Committee on the Rights of Persons with Disabilities

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The most recent convention adopted under the auspices of the United Nations which protects the rights of particularly vulnerable groups, is the Convention on the Rights of Persons with Disabilities.[43] The monitoring of the implementation of this convention is entrusted to the Committee on Rights of Persons with Disabilities, composed of 18 independent experts who have specific experience in the protection of persons with disabilities.[44]

Its main function is to evaluate reports of state-signatories , however, compared with other treaty bodies we have discussed so far, this committee has the poorest practice since it started working only a few years ago and held only seven

40 Article 8 of the Optional Protocol.

41 Since the investigation is conducted under confidential procedure, from the reports of this Committee published so far is possible to see only that the procedure was carried out in relation to Mexico.

42 All of the recommendations can be found at http://www2.ohchr.org/english/bodies/cedaw/comments.htm.

43 Adopted in December 2006 , came into effect in May 2008 and by August 2012 118 states have ratified this Convention.

44 One of them is a citizen of Serbia, Damjan Tatić.

sessions so by now it has examined a relatively small number of state reports. Along with this convention the *Optional Protocol* was also adopted, which stipulates *the Committee's authority to decide on individual complaints*, but the states that ratify the convention are not obliged to ratify the Protocol as well.[45] Serbia ratified both the Protocol and the Convention on the Rights of Persons with Disabilities in 2009. This Committee has so far adopted only one decision.

Example

In the case of H. M. v. Sweden,[46] the Committee found that the state violated several articles of the Convention because it did not allow a person with a disability to build on its plot a hydrotherapy pool, by explaining that the municipal plan does not allow such construction. The Committee did not accept these arguments where the state was defending the decisions of its courts because it believes that states have an obligation to ensure to people with disabilities equal rights and referred to the provision of Article 19 of the Convention stating that states are going to take all measures necessary that "the people with disabilities have access to a range of support services in their homes, residential institutions and local community .... necessary to... support inclusion of persons with disabilities in their local communities and prevent isolation or exclusion from the community." Although the only one, this decision is significant because the Committee confirmed the view in accordance with the spirit of the Convention on Rights of Persons with Disabilities - the principle of non-discrimination is intended to provide equality of all, which includes obligation on states to treat differently persons who are, due to some of their characteristics, in a different situation than the majority of society. It is the Committee's stand that the state is required to, within securing the rights of people with disabilities, apply specific criteria which respect to their specific position.

It could be expected that, in the future, the reports and decisions of the Committee on the rights of the persons with disabilities are going to be useful, especially when having in mind that it deals with the protection of rights of an extremely vulnerable population category who is often discriminated.

45 By August 2012 the Protocol had been ratified by 71 states
46 HM v. Sweden, CRPD/C/7/D/3/2011.

4.2. THE REGIONAL LEVEL

Regarding the protection of human rights Europe was a leader compared to other continents because immediately after the Second World War, in 1949, the Council of Europe was founded (hereafter CoE), the first regional organization which has as one of the main goals the preservation and promotion of human rights and fundamental freedoms, and a year later *the European Convention on Human Rights and Fundamental Freedoms* was adopted (hereinafter ECHR), the first regional international treaty that created the obligation of states to respect and protect human rights.

On the American continent, almost two decades later, in 1969, *the Inter-American Convention on Human Rights* was adopted but a great importance for this part of the world had the *American Declaration on the Rights and Duties of Man*, adopted in 1948, a few months before the UN Universal Declaration of Human Rights.

For a long time the states of African and Asian continents did not share the interest in the adoption of regional international human rights treaties. It was only in 1981 that t*he African Charter on Human and Peoples' Rights* was adopted, under the auspices of the Organization of African Unity, while Asian countries have not yet created a similar contract.

4.2.1. The Council of Europe

Although on the European soil there are several organizations which, among other activities are dealing with human rights, the Council of Europe in this aspect is the most important regional organization established to accomplish, through its actions, a firmer connection of European countries, to achieve greater unity among -member states, to improve cooperation and preserve common heritage based on common tradition, history and nature of the political system of Western European countries, relying primarily on the principles of democracy and respect for human rights. The respect for human rights, individual liberties and political rights and the rule of law are listed in the statute of this organization «as principles which are the basis of true democracy «.[47] The Council of Europe has 47 state members.

By the adoption of the European Convention on Human Rights and Fundamental Freedoms the member states of the Council of Europe recognized some rights as inseparable rights of men and, what is very important, established a special mechanism of protection of the rights recognized by the Convention based on

47 Preamble to the Statute of the Council of Europe.

the court protection. In contrast to universal international treaties, member states of the Council of Europe are obliged to ratify within a year the European Convention and insert its regulations into their national legal system.

4.2.1.1. The European Court of Human Rights - Jurisdiction and procedure

Article 19 of the European Convention established *the European Court of Human Rights* as a permanent authority of the Convention,[48] with headquarters in Strasbourg.

Proceedings before the European Court take place in two stages. In the first stage, the Court examines the admissibility of the complaint and only if it satisfies criteria specified in the Convention, the Court considers the merits of the case.[49]

Conditions for eligibility are clearly determined in the text of the Convention and there are more of them. First of all, the complainant must be a direct or indirect victim of violation if rights by the state he/she is suing and that at the time of a violation of a right the complainant was under authority of the state that ratified the Convention.[50] [105] As to the time limit, the complainant must submit the complaint within *6 months* from the date when a final and legal verdict is reached by a national court. Before he/she turns to the European Court, the complainant must *use up all legal remedies* in proceedings before national courts, therewith all the remedies must be available and effective. The application is dismissed as unacceptable if it is substantially the same as some previous one or if it has been submitted to another international level for investigation, and there are no new facts that may be relevant for decision making. The Court declares unacceptable any complaint that is incompatible with the regulations of the Convention or the Protocols along with it, if it is obviously unfounded or when it is based on evidently mistaken facts, or the claims of the authors are not supported by credible evidence. The court is also going to reject the claim that in the opinion of the Court represents an abuse of the right to appeal.

48 Before the adoption of Protocol 11 along with the European Convention existed Commission for Human Rights (began operations in 1954) and the European Court of Human Rights (founded in 1959). Adoption of Protocol 11 abolished the Commission, and the jurisdiction of the European Court of Human Rights has become mandatory. The Commission on Human Rights continued to work and solve cases that had been declared eligible within one year from the coming into force of Protocol 11, and those whose analysis was not concluded at that time it left to the Court.

49 The conditions for eligibility are determined in Article 35 of the Convention.

50 This means that the proceedings before the Court can be initiated by foreign nationals too, regardless of whether the country whose citizens they are has ratified the Convention, if they are legally on the territory of the state member of the CoE and if they are entitled to some of the rights guaranteed by the European Convention

4 .2.1.2. The European Court and discrimination

In all cases when the applicant is complaining about discrimination, it is his/her obligation to prove that he/she is the victim of the violation of a right, and is differently treated regarding that right, and it is up to the state to prove that the different treatment is legitimate. In the Court›s opinion, the different treatment is unjustified when there are no founded grounds that the state authorities act in a discriminatory manner and if it is disproportionate in relation to the interest that must be protected, which results from the right of the state authorities to use certain liberty to interpret international obligations in accordance with specific social circumstances.[51] (About stands taken by the Court deciding on the merits of applications submitted regarding discrimination, see sections 3.3.2.1.1.1. and 3.3.2.1.1.2.)

4 .2.1. 3 . The nature of the decision of the European Court

It is the great advantage of judicial monitoring in the implementation of international norms because the decisions of the European Court are reached in the form of a judgment, they are enforceable, and the state must fulfill them. When the Court establishes the existence of a violation of a Convention right in its judgment, it as a rule, requires the state to reimburse the victim and recompense judicial and administrative costs. Besides that, the Court may recommend other measures, such as change of national legislation, the implementation of systematic measures ensuring that the violations are not repeated, running / quick ending of proceedings against persons who committed the violation of the right in question and punishment if their responsibility is determined. The Court, as a rule, requires the state to publish the judgment in order to present to the general public its contents, and that in certain time inform the Court of the steps taken to execute the judgment. The monitoring of the execution of judgments of the European Court is entrusted to the Committee of Ministers, the authority established by the Statute of the Council of Europe, which consists of foreign ministers of the member states or their representatives.

4.2.2. The European Committee of Social Rights

Non-discrimination is the governing principle of numerous other documents of the Council of Europe. Among them is the European Social Charter adopted in 1961 (put into effect in 1965). It contains 19 principles by which states can

51 For the permissible extent of limiting rights the European Court uses the term "margin of appreciation".

choose the ones that will legally bind them. The range of protected economic and social rights is extended by the Revised European Social Charter adopted in 1996 (put into effect in 1999). It has taken over the principles of the Charter but has expanded the number of rights that it protects.[52] In 2009 Serbia ratified the Revised European Social Charter and adopted almost all of its regulations with some reserves to certain articles.

The European Social Charter from 1961 did not have mechanisms to provide control of its application, but further development was going in the direction of strengthening control mechanisms by adopting the Protocol on collective complaints and Revised European Social Charter. So today the control mechanism of social rights is based on the examination of state reports and through collective complaints.[53] State reports are examined by the European Committee for Social Rights (formerly the Committee of Independent Experts), composed of 15 independent experts elected by the CoE Committee of Ministers CoE. A state report is submitted to the Committee but also to the national representative organizations of workers and employers. The Committee determines whether the national legislation and practice of state authorities is in accordance with the commitments and submits its report to the Committee of governmental experts and to the Parliamentary Assembly of the Council of Europe.[54] The Committee of Ministers is responsible to give appropriate recommendations to states that do not fulfill obligations assumed.

A more efficient control system was introduced by the adoption of *the Additional Protocol to the Charter*, which establishes a system of collective complaints and in that way raises the level of protection of social and economic rights enabling the international organization of employers and trade unions, international NGOs that have consultative status in the Council of Europe and national representative organizations of employers and trade unions to initiate proceedings before the European Committee of Social Rights by submitting collective complaints.[55] The Committee examines the complaint and if it is declared acceptable a written procedure begins, although the Committee may decide to have a public hearing.

52 Since some states ratified both international agreements their application is solved by the rules of the Vienna Convention on the Law of Treaties of 1968. Article 30 of the Vienna Convention contains a rule on the application of the later treaty in the same matter.

53 Serbia has not yet ratified the Protocol.

54 The Committee of government representatives consists of the representatives of the governments of member states and may, the same as Parliament Assembly, present its opinion to the Committee of Ministers.

55 The Protocol was adopted in 1995 and came into effect in 1998. The appropriate Protocol's provisions have been included in the text of the Revised European Social Charter in 1996 (Article D).

The Committee submits a decision on the merits to the conflicting parties and to the Committee of Ministers which adopts a resolution, and may recommend that the state takes specific measures in order to put the contested situation in accordance with the Charter.

Practice of the European Committee of Social Rights is not large because the Committee passed only 85 decisions.[56] Nevertheless, when it comes to the interpretation of non-discrimination, the Committee in its practice contains some very clear views on the prohibition of violation of this principle when it comes to the enjoyment of social and economic rights. In fact, in the introduction of the Charter adopted in 1961 it was stated that the enjoyment of social rights should be secured without discrimination on the grounds of race, color, sex, religion, political opinion, national and social origin, so later, with the Protocol from 1988 the right to equal opportunities and equal treatment in employment and choosing occupation was included in the text, which protects individuals from discrimination based on sex.[57] The Revised European Social Charter has taken over these regulations, but in Article E it introduced a special principle according to which all rights provided by the Charter must be secured without discrimination.

Example

In the case of MDAC v. Bulgaria[58] [113] the applicants of the collective complaint claimed that in Bulgaria exists discrimination of children with intellectual disabilities who are placed inspecial institutions because only 6.2% of these children are educated in the public schools. The state justified this situation by claiming that in Bulgaria there is a very high percentage of children who do not attend school and that it is not only the case with children who have intellectual interference. The Committee has not accepted the justification provided by the state because the statistical data show that the percentage of children in Bulgaria attending primary school is very high (over 90%). The Committee referred to the practice of European Court of Human Rights and upheld in its decision the view that distinction in democratic societies should not be seen only positively, but it has to aim at achieving real equality, which means that the principle of equality is violated when a state with no objective and reasonable justification fails to treat differently persons who are in a completely different situation than the majority.

56 Decision can be found at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

57 Part I, paragraph 1, item 1, and Part II, Article 1 of Additional Protocol to the European Social Charter.

58 Mental Disability Advocacy Center (MDAC) c. Bulgaria, Complaint No.41/2007.

4.2.3. The European Commission against Racism and Intolerance

Since 2002, when by the resolution of Committee of Ministers, the Statute of the European Commission against Racism and Intolerance (hereinafter Commission) was adopted, one more authority of the Council of Europe began functioning, which, besides other issues, deals with cases of discrimination - *the European Commission Against Racism and Intolerance*. Each member state of the Council of Europe may appoint into the Commission one member and one of his deputies. The main task of the Commission is to *analyze legislation of member states* and measures taken by the states to exterminate racism, racial discrimination, xenophobia, Anti-Semitism and intolerance, recommend actions to be taken at all levels (local,national, European) and formulate recommendations.[59]

The Commission has a mandate to examine the situation regarding the phenomena of racism and intolerance in all member states of the Council of Europe every five years and to publish findings in its report, along with recommendations on how to overcome the unsatisfactory situation. To be sure that its evaluation is based on precisely determined facts, the Commission investigates the situation in the countries by making a visit and opens a confidential dialogue with the government of the state in question.

In order to fight racism more effectively, the Commission has introduced the practice to, whenever possible, organize discussions in the member states and in that way to achieve better cooperation with the government, but at the same time with non-governmental organizations, the media, minority communities and all those parts of society considered to be able to affect the atmosphere in the country to develop in the spirit of tolerance and respect for diversity without discrimination. This method of work resulted from the view that a tolerant society develops not only with the influence on the government and civil service, but also with the inclusion in the discussion of the wider strata of society.

The statute anticipates that besides the examination of the situation in the member states the Commission also deals with general topics, i.e. adopts the recommendations and submits them to the governments so that they could benefit from the experiences of "good practice" in the fight against racial discrimination, intolerance, xenophobia and Anti-Semitism. The Commission, using this mandate has adopted 13 general recommendations so far. Some general recommendations relating to the fight against racism and intolerance towards

59 Article 1 of the Statute of the European Commission against Racism and Intolerance.

certain ethnic groups (Roma, Muslims) as well as in some areas (education, sport) either instruct the states how to establish a special authority to deal with the fight against racism and intolerance or against spreading of xenophobia, racism and Anti-Semitism via the Internet and the like.[60]

4.2.4. Advisory Committee on the Framework Convention for the Protection of National Minorities

Additional protection from discrimination is mentioned in *the Framework Convention for the Protection of National Minorities* (hereinafter: the Framework Convention), which defines the rights belonging to national minorities, anticipates obligation of the States Parties to guarantee to members of national minorities equality before the law and equal legal protection, prohibits any discrimination on the basis of belonging to a national minority, but also the obligation for states to adopt measures for promotion of members of national minorities and to protect persons exposed to threats or discrimination because of ethnic, cultural, linguistic or religious identity.

The Framework Convention was adopted in 1995, but unlike the European Convention on Human Rights, which includes the obligation of each party to ratify it within a year of its accession to the Council of Europe, the membership in CoE itself does not involve such a commitment.[61] The Federal Assembly of FRY confirmed ratification of the Framework Convention in December 1998, but deposited ratification instruments to the Council of Europe in May 2001.

The Framework Convention has established a system of control, which aims at improving the protection of minorities. The control is entrusted to the Advisory Committee composed of 18 independent experts, reviewing state reports on the implementation of Framework Convention. States are required every five years to submit a report to the Advisory Committee made in consultation with representatives of minorities and NGOs. The Advisory Committee prepares a report to be adopted in a form of a resolution at a meeting of the Committee of Ministers, after which meetings in the States Parties are organized where the government and non-government organizations' representatives are considering measures to be taken for better implementation of the observations and recommendations of Advisory Committee.

60 All of the recommendations can be found http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/Compilations_en/Compilation%20des%20Recommandations%201-12%20anglais%20cri09-33.pdf.
61 Belgium, France, Greece, Iceland, Luxembourg, Monaco, Turkey and Andorra have not yet ratified the Framework Convention.

4.2.5. European Commissioner for Human Rights

The Council of Europe confirmed its commitment to human rights once again when the initiative, launched at a summit of Heads of States and Governments, members of this organization, in October 1997, to establish the institution of European Commissioner for Human Rights, was accepted. The European Commissioner for Human Rights (hereinafter European Commissioner), was established by resolution of the Committee of Ministers in 1999, with a mission to strengthen respect for human rights, to promote the ideas of respect of these rights, to assist in the work of national institutions for the protection of human rights and of all governmental authorities, agencies and organizations concerned with human rights, to advise governments and inform them about the omissions in the legislation or practice regarding respect for human rights and make recommendations on necessary reforms in order to improve the human rights situation in the member states of the Council of Europe.[62]

The European Commissioner gets the necessary information in a dialogue with representatives of governments and parliaments, national institutions for the protection of human rights but also with citizens, victims of human rights violations and representatives of civil sector, especially non-governmental organizations dealing with human rights. During a visit to the state, the Commissioner may visit all the institutions where the detained persons are (prisons, asylum centers, psychiatric hospitals etc.) and the places where particularly vulnerable categories of population live or work and collect on the ground the information necessary for the preparation of the report. The report of the European Commissioner contains an evaluation of the human rights situation in the country and recommendations on how to overcome deficiencies and improve the situation of those persons or a group for which the Commissioner determines that are threatened in any way.[63] The last time European Commissioner for Human Rights visited Serbia was in 2011.[64] The report presented to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe pointed to a progress in the legal and institutional framework regarding the fight against discrimination and positively rated the establishment of the Commissioner for

62 Resolution (99) 50 on the Council of Europe Commissioner for Human Rights. First Commissioner for Human Rights from 1999 to 2006 was Alvaro Gil Robles. He was replaced by Thomas Hammarberg and held that position from 2006 to 2012. From 2012 European Commissioner for Human rights is Nils Muižnieks.

63 All the reports of the European Commissioner for Human Rights can be found at http://www.coe.int/t/commissioner/WCD/visitreports_en.asp #.

64 The first visit was in 2008. The report can be found at: https :/ / WCD. coe. int / ViewDoc. jsp? id = 1417013th

Protection of Equality, but Serbian authorities are invited to strengthen efforts to improve the situation of Roma population and LGBT activists. It is pointed to the need to pay special attention to activities on promoting the rights of persons with disabilities. The Commissioner urged the state to better regulate the legislation relating to the removal of working abilities and introduce stricter control in a procedure that takes away office ability because it was noticed that there are certain number of persons accommodated in special institutions, without giving their approval.[65]

The mandate of the Commissioner for Human Rights doesn't make resolving individual applications possible, but it can alert the country of the specific cases for which he/she deems that intervention is necessary in order to prevent further human rights violations. But he/she may, if evaluates that there are grounds for doing so, intervene as an interested party in proceedings before the European Court of Human Rights by providing the information on
the case the Court is considering, and it may also participate in the hearing before the Court.

An important activity of the European Commissioner is the promotion of individual topics that directly affect human rights. He/she usually does so by participating regularly in international and national conferences. Besides that, the Commissioner may analyze a specific area of human rights. In performing this mandate the Commissioner may publish studies on what he/she has done so far, and often deal in them with discrimination of vulnerable groups (immigrants, refugees, asylum seekers, Roma, children, LGBT, etc..). Studies have no legally binding character but contain a number of recommendations to governments and activists for protection of human rights to fight for equality and assist victims of discrimination whether by improvement of legal framework or by adoption of specific policies providing more efficient access to certain rights to particularly vulnerable categories of the population.

65 The report from 2011 can be found at: https://wcd.coe.int/ViewDoc.jsp?id=1852957.

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5

Domestic anti-discrimination legislation*

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5.1. THE PRINCIPLE OF EQUALITY AND PROHIBITION OF DISCRIMINATION IN THE CONSTITUTION OF THE REPUBLIC OF SERBIA

The Constitution of Serbia from 2006 proclaims the principle of equality, the prohibition of discrimination and special measures, as well as collective rights. For most of these issues Article 21 of Constitution is crucial, which carries the rubrum "Prohibition of discrimination." First of all, it generally guarantees that "before the Constitution and the law, everyone is equal"(Art. 21, para. 1) and that "everyone has the right to equal legal protection without discrimination"(Art. 21, para. 2), and then it is specified that "any discrimination, direct or indirect, of any kind, and particularly on race, gender, nationality, social origin, birth, religion, political or other opinion, property, culture, language, age, mental or physical disability is forbidden" (Art . 21, para. 3). In the final provision of this article it is underlined that "special measures which the Republic of Serbia may introduce to achieve full equality of persons or groups of persons who are substantially in unequal position with other citizens are not considered as discrimination" (Art. 21, para. 4). Finally, a special section of the Constitution (Art. 75 – 81) deals with the collective rights of national minorities.

5.1.1. The principle of equality and universality of human rights

The general commitment to equality of all before the law and the Constitution (Art. 21, para. 1) finds its materialization in formulating in appropriate manner the titles of human rights in the Constitution, so that they are acknowledged to everyone, without discrimination.[1] The signification of the principle of equality, that is, the constitutional prohibition of discrimination "is to provide the basic assumption that all other human rights the Constitution guarantees are exercised under equal circumstances "(Pajvančić, 2009:32). It shows that the principle of equality is a supporting right - it is a condition for entitlement to all other rights.[2] This is achieved by using a term that includes the largest range of subjects, such as "all", "any", "none", "who" (meaning whoever) "person", and others.[3] The same re-

1 This does not mean that the principle of equality applies only to rights guaranteed by the Constitution, but they also apply to the rights guaranteed by the law, as can be seen from constitutional formulation: "All are equal before the law and the Constitution."

2 For more on this aspect. supra 2.

3 For example: "Everyone has the right to education" (Article 71 , para. 1 , our italics added); "No one shall be declared guilty for the offense, which wasn't, before being committed, anticipated by the law or other regulations based on the law for a penalty or be sentenced for that offense, which was not anticipated" (Art 34, para. 1 , our italics added) "Who is, without grounds or unlawfully arrested, detained or convicted of a penal offense has the right to rehabilitation and compensation from the Republic of Serbia and other rights provided by law "(Art 35, para. 1 , our italics added): "A person shall not be required, contrary to his religion or belief, to any military or otherservice involving the use of weapons "(Art. 45, para. 1 , our italics added). Such interpretation accepted by our anti-discrimination law which specifies that the terms "person" and "everyone" in the sense of the law, means "one who is staying on territory of the Republic of Serbia or in any territory under its jurisdiction, regardless of whether he is a citizen of the

fers to impersonally formulated norms such as: "Human life is inviolable" (Art. 24, para. 1 of the Constitution), or "physical and mentalintegrity is untouchable"(Art. 25, para. 1 of the Constitution).

This confirms that the human rights guaranteed by the Constitution, the one which are the basis of the legal system - from which all other legal norms emerge, are acknowledged to all the people that are under the jurisdiction of the Republic of Serbia. Although here, by using the term " people" it refers to all physical persons, the holders of a number of these rights can be classified and legal persons,[4] and some constitutions acknowledge these rights to animals, and environment as well.[5] Partly, because of this reason in normative acts, the term human rights is increasingly replaced by the term fundamental rights,[6] which is largely supported by the theory. Besides, universality of human, that is, fundamental rights is not being questioned by guaranteeing these rights, in certain situations only to certain categories of persons (partially by general norms), which those situations are directly related to, such as: Parental and legal guardian's right "to provide their children religious and moral education in accordance with their beliefs "(Art. 43, para. 5), the rights of employees to strike (Article 61, para. 1), or the rights of alien "who has a founded fear of persecution because of his/her race, sex, language, religion, national origin or membership of a particular group or his/her political opinion, [has the right] to refuge in the Republic of Serbia "(Article 57, para. 1 of the Constitution).

However, some bases for distinctions are openly excluded or allowed, regarding entitlement to a number of human rights. So, our Constitution defines as holders of certain rights only its citizens, making a difference, not only between citizens and non-citizens of the Republic of Serbia, but also within the categories of citizens between those who are adult and able to work, and those who have a lack of one of these characteristics. Thus, "every citizen of the Republic of Serbia who is adult and has working ability has the right to elect and to be elected "(Article 52, para. 1), "citizens have the right to participate in public affairs "(Article 53), and "peaceful citizens assembly is free"(Art. 54, para. 1). These situations have in common that

Republic of Serbia, of another country or a person without citizenship or legal entity that is registered or has established activity in the territory of the Republic of Serbia "(Art. 2, para.1, item 2 of the Act).

4 Art. 19, para. 3, of the German Basic Law expressly provides that fundamental rights apply to legal persons where their nature permits it.

5 Thus, Article 80 of the Swiss Constitution is dedicated to the protection of animals, and Article 20a of the German Basic Law obliges the state to protect the natural resources of life.

6 The term "fundamental rights" got its first normative formulation in the German Basic Law in 1949 (Grundrechte), and in 2000, it was accepted by the European Union by adopting the Charter of Fundamental Rights (the Charter of Fundamental Rights of the European Union),which after the ratification of the Lisbon Treaty, in 2009, become a legally binding document.

political rights (the right to vote, the right to manage public affairs, and freedom of assembly) are distinguished from other basic rights, and are guaranteed exclusively to the citizens, which is accidental, nor uncommon in comparative constitutional right. In fact, this issue is closely related to the constitutional definition of the state and general nature of the national state, because of close ties, even the identity between political rights and democracy, that is the performance of sovereignty.[71] In this sense, the Republic of Serbia defines itself as a country "of the Serbian people and all citizens who live there "(Article 1 of the Constitution, our italics added), and specifies that "sovereignty comes from citizens who perform it by referendum, people's initiative and through their freely elected representatives "(Art. 2, par. 1 of the Constitution, our italics added). So, the Republic of Serbia, like other modern countries, defines itself as a national state - state is created and exists to express and accomplish the interests of certain nation (Brubaker, 1997: 54-55) - and guarantees because of it, certain social rights for its citizens only as a form of privileges - the right to social security (Art. 69, para. 1 of the Constitution) and the right to education (Art. 71, para. 3 of the Constitution).[28]

Considering this equation between the state and the citizens Constitution provides that" the Republic of Serbia protects the rights and interests of its citizens abroad "(Article 13, para. 1), and also that "the citizen of the Republic of Serbia cannot be expelled or deprived of citizenship or of the right to change it "(Article 38, paragraph 2). The prohibition of deportation does not apply, however, to foreigners, who may be forced to leave the Republic of Serbia, but under certain conditions and with respecting appropriate procedure (Article 39, paragraph 3 of the Constitution).

However, there is one issue where the Constitution of the Republic of Serbia departs from the principle of equality, for which an excuse cannot be found. It is, in fact, written in Article 13, paragraph 2 of the Constitution which anticipates

7 "The explanation is not essential, but it stems from the development level of international community. States simply do not want to give up their rights to be free to decide who will be their citizen, who will be able to enter their territory, to participate in political life and in the distribution of the collectively created wealth of their society "(Dimitrijević et ali, 2006: 115).

8 Besides all that the Constitution makes no appropriate distinction between the concept of inhabitant and citizen.While Article 2 of the Constitution properly recourses to the term "citizen" because those rights can only apply on adult working capable citizens, in Article 69 , paragraph 1 and Article 71 , paragraph 3 is obviously meant inhabitants, not the citizens, although precisely that term was used, which then loses its meaning in particular in the context of the right to education. On the other hand, Article 1 of the Constitution does not only state that the Republic of Serbia is the state of "all citizens" and yet means inhabitants, but also the category of citizens is further reduced by specifying "those that live in it", from which one might conclude that it is not the state of those citizens living abroad, which would still be in contradiction with Article 13 , paragraph 1 of the Constitution ("The Republic of Serbia shall protect the rights and interests of its citizens abroad ").

that "the Republic of Serbia develops and promotes relations of Serbs, living in abroad, with the home country", which makes the open difference between citizens of the Republic of Serbia on ethnic grounds. The same difference is made by the Law on Changes and Amendments to the Law on Citizenship,[3][9] in Article 18, anticipating that the claim for citizenship, based on Article 23, paragraph 3, of the above-mentioned law[4][10] may be filed within two years from the Law's coming into effect, which introduces discrimination against members of other nations or ethnic communities (minorities) from the territory of the Republic of Serbia, as the restriction under Article 18 of the Law applies only to them.[5][11] This discrimination is overlooked by the Constitutional Court, affirming the constitutionality of the contested Law provision by explaining that "the Constitution does not guarantee the right to acquire a citizenship in ''privileged" or" facilitated" regime only on the basis of will, without fulfillment of any other conditions ... and therefore the violation of the principle of prohibiting discrimination under Article 21 of the Constitution, is not in question"[6][12] failing to notice that the principle of equality applies not only to equality in front of the Constitution, but also before the law, which made the distinction between citizens of Serbia on ethnic grounds, and for that it was not offered an adequate explanation and justification.[7][13]

5.1.2. Prohibition of discrimination and human rights obligators

Within the principles of human and minority rights, and within the same article that proclaims equality before the law and the Constitution (Article 21, para. 1), which normally carries rubrum "Prohibition of discrimination," the Serbian Con-

9 "Off. Gazette of RS ", no. 90/07

10 "(1) A member of the Serbian people without permanent residence in the territory of Republic of Serbia has the right to acquire citizenship of the Republic of Serbia without release from foreign citizenship, if he/she is 18 years old and his/her working capacity is not deprived and if he/she submits a written statement that considers the Republic of Serbia for his/her country. (2) Under the conditions of Paragraph 1 of this article citizenship in the Republic of Serbia can be received by a person born in another republic of the former SFRY which had the nationality of that republic, or is a citizen of another state established in the territory of Yugoslavia, which as a refugee was expelled, or displaced person in territory of the Republic of Serbia, or has fled abroad. (3) Under the conditions of paragraph 1 of this article in the Serbian citizenship can be admitted a member of another nation or an ethnic group from the territory of the Republic of Serbia "(Art. 23rd, Law on Citizenship, "Off. Gazette of RS ", no. 135/04 and 90/07).

11 "The application for naturalization on the basis of Article 23, Para. 3 of this law may be filed within two years from the date of this law's coming into force "(Art.18 of the Law on Changes and Amendments to the Law on Citizenship).

12 The decision of the Constitutional Court of the Republic of Serbia no. IUz 564/2011, "Official Gazette RS ", no. 48/12, 51

13 See Mary Draškić dissenting opinion, Judge of the Constitutional Court in case no. IUz 564/2011, "Official Gazette of RS", no. 48/12, 51-52.

stitution anticipates that "any discrimination is prohibited, direct or indirect, on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, financial status, culture, language, age, mental or physical disability "(Art. 21, para.3). The Constitution, therefore, links the principle of equality and prohibition of discrimination, giving to the concept of prohibition of discrimination perhaps even larger significance, since it is just the way to determine the rubrum of that article. The relation between these two terms is ambiguous, but in the legal analysis it is usual to observe prohibition of discrimination as negative formulation of the principle of equality, which is precisely because of its form - "forbidden is ... "- far more functional and efficient category than the principle of equality.[8][14]

First of all, the constitutional norm on prohibition of discrimination specifies that every discrimination is excluded, the direct as well as the indirect, and by that the constitution framer points to the difference between formal and substantial equality, forbidding not only open but also hidden discrimination. The Constitution, by all means, doesn't go into determining the terms of direct and indirect discrimination, it leaves that to the legislator, who has done it by numerous laws, and the most important among them is the Law on Prohibition of Discrimination,[9][15] as the main law determining different forms and cases of discrimination, and the acts of protection from it.

Besides recognizing the possibility of existence not only of direct but also of indirect discrimination, and prohibiting both of them, the constitutional norm on prohibiting discrimination cites the most characteristic grounds for illegitimate distinction. That list of unallowed grounds for distinction is a little bit different than the one cited in European Convention,[10][16] which does not have by itself some legal value considering that its not detailed (*numerus clausus*)- exactly by using the expression "on any grounds, particularly on race, sex..."- so the recognition of new grounds may occur in the court practice and in the law (in our country, it is done by numerous laws).[17][11]

Likewise, the Constitution does not enter into the definition of the concept of discrimination, since it has a specific meaning in law – unallowed differentiation (Dimitrijević et ali, 2006:114). This meaning is, however, additionally specified by the Law on Prohibition of Discrimination. It follows that the constitutional norm on prohibition of discrimination does not exclude every distinction, but the one

14 See more supra 2.

15 "Off. Gazette of RS ", no. 22/09.

16 see supra second 2.

17 see infra 5.2

that is unauthorized or unjustified according to the perceived truth that "nothing is so unequal as the equality itself. "That is why the Constitution itself states, for example, that "the women, youth and the disabled persons are provided special protection at work and special working conditions, in accordance with the law" (Art. 60, para. 5 of the Constitution), and therefore the Labor Law[1812] anticipated, among other things, that "the working woman during pregnancy cannot work in jobs that are, according to the opinion of a competent medical authority, harmful to her health and the health of the child, especially in jobs that require lifting cargos, or where there is a harmful exposure to UV rays or to extreme temperature and vibration" (Article 89 of the Labor Law), that "employees under 18 years of age may not work in jobs including particularly difficult physical work, work underground, under water or at high altitude "(Art. 84, para. 1 of the Law), and "the employer must provide to a disabled employee the job that he can perform with his /her remaining capacity for work "(Art. 101, para. 1 of the Labor Law).

In practice, of course, is not always easy to evaluate whether the certain categories of the phenomena are the same, or similar, which is why they should be treated the same, or they are different, which would include unequal treatment. This inherent ambiguity of the term equality was expressed even by Aristotle when he asked himself "what constitutes equality and inequality" (Aristotle, 1797: 215) that is, what are the moral characteristics that should be considered when justifying the (un)equal treatment (Westen, 1982: 544-545). Thus, the Constitutional Court of the Republic of Serbia was asked to comment whether the differences in the process on registering churches and religious communities, and in registering other religious organizations lead to violations of the principle of equality under Article 21 of the Constitution, as the Law on Churches and Religious Communities[1913] introduces two different systems of registration: the application system, which applies to the traditional churches and religious communities named by the Law, and the approval system, which cover all religious organizations wishing to get registered.[2014]

18 "Off. Gazette of RS ", no. 24/05, 61/05 and 52/09.

19 "Off. Gazette of RS ", no. 36/06

20 Specifically, Article 18 of the law anticipates adequate procedure for registration of religious organizations. In order to be registered they submit to the Ministry application containing, besides the decision on the establishment of religious organization, the statute of religious organization, display of religious teachings, religious rites, objectives and activities and details of a permanent source of income (Art. 18, para. 2). In addition, they submit application that contains the name of a religious organization, its address and address and the name and surname, as well as the status of the person authorized to represent it (Art. 18, para. 1). According to the explicit regulation of Article 18, paragraph 2, an application of this substance, but not the request above, can also be submitted by "traditional churches and religious communities" listed in Section 10 of the Law, as followed: five churches (Serbian Orthodox, Roman Catholic, Slovak Evangelical, Christian Reformed and Evangelical Christian Church) and two religious communities (Jewish and Muslim communities).

As there is without doubt a different treatment for subjects who are in analogous situations (traditional churches and religious communities and other religious organizations), the question occurs whether there is objective and reasonable justification for this distinction. How difficult and challenging to answer these and other questions on (non) discrimination sometimes is shows the fact that the Constitutional Court has not declared itself yet on this matter, although the proceedings before it began back in 2006. [21] [15]Finally, the constitutional norm on prohibiting discrimination initiates, to a much greater extent than the principle of equality, the issue of human rights obligators, that is the issue of whom the prohibition is addressed to. It is undeniable that the prohibition of discrimination is addressed primarily to all holders of public authority, in accordance with the traditional understanding of the vertical and the immediate effect of human rights (Jouanjan, 1992: 185). The Constitution of the Republic Serbia in this regard explicitly proclaims that guaranteed human and minority rights are directly applied (Art. 18, para. 1), and the Law on Prohibition of Discrimination specifies that the term "public authority" means: "A state authority, autonomous province authority, local government authority, a public company, institution, public agency and other organizations entrusted with public powers, as well as a legal entity established or financed in general or mostly by the Republic, the autonomous province or local self-government" (Article 2, para. 1, item 4). However, human rights can have a horizontal effect, the effect on the third party - *dritwirkung* (Spielmann, 2008: 301), and in this context, the question is whether the prohibition of discrimination is imposed in the relations between private subjects too. Although the doctrine is not generally based on the view that the principle of equality obligates as subjective private law, it is still possible to notice specific legal solutions and court decisions expanding prohibition of discrimination effect on the relations between private individuals (Jouanjan, 1992: 185). Thus, for example, the employer, in terms of the Labor Law, who is obligated by anti-discrimination norms, means any domestic or foreign juristic or physical person (Art. 2, para. 1), and the Law on Gender Equality,[2216] anticipates that "the right to join a political party, active participation in work and participation in the work of a political authorities is exercised without discrimination based on sex, in accordance with the acts of the political party "(Art. 35, para. 1).

21 more on these issues see Marinković T. (2011) Appendix to the public debate on constitutionality of the Law on Churches and Religious Communities, Annals of the Faculty of Law Belgrade, 1, p. 367-385; Avramović, S. (2011) The concept of secularism in Serbia - Reflections from the public hearing in the Constitutional Court, Annals of the University of Belgrade, 2, p. 279-301.

22 "Off. Gazette of RS ", no. 104/09

5.1.3. Special measures

The Constitution provides that "special measures which the Republic of Serbia may introduce to achieve full equality of persons or groups of persons who are substantially in unequal position with other citizens are not considered as discrimination"(Art. 21, para. 4). By this, Constitution allows undertaking of special measures (the measure of so-called positive discrimination) in all those situations where it is necessary to temporarily provide additional rights ("special measures") to the certain categories of the population ("person or group of persons") in order to establish their essential equality with the rest of society ("to achieve full equality"). "Specific measures put in a more favorable position the person or a group of persons who are, in fact, in unequal position with others. Therefore, the regulation on non-discriminatory nature of special measures is necessary, as they would not be rated as unconstitutional "(Pajvančić, 2009: 33).

The Constitution, as a matter of fact, leaves to the legislator to evaluate what these situations are, that is, what the categories of population are regarding which special measures should be introduced, although some of them are already familiar to the Constitution. Thus, in the principles of the Constitution it is stated that "the state guarantees special protection to national minorities to achieve full equality ... "(Art. the 14, para. 2 of the Constitution), and in the section on the rights of national minorities' members it is specified that "special regulations and temporary measures that Serbia may introduce in the economic, social, cultural and political life in order to achieve full equality between persons belonging to national minorities and the citizens belonging to the majority are not considered as discrimination if they are aimed at eliminating extremely unfavorable living conditions which particularly affect them."(Art. 76, para. 3). And very specifically, the Constitution prescribes that "upon the employment in public administration, public services, the autonomous provincial authorities or in local government units the attention should be paid to the national composition of population and appropriate representation of ethnic minorities "(Art. 77, para. 2). Accordingly, although passed before the current constitution, the Law on the Election of People's Deputies[23][17]anticipates that" only electoral lists that have received at least 5% of the total number of voters who voted in the constituency are eligible for the distribution of mandates of people's deputies", but that " political parties of ethnic minorities and the coalitions of political parties of ethnic minorities participate in the distribution of mandates even when they received less than 5% of the total number of votes cast"(Art. 81, para. 1 and 2).

23 "Off. Gazette of RS ", no. 35/00, 18/04 and 36/11.

The Constitution states that "the State guarantees the equality of women and men and develops equal opportunity policies "(Art. 15), and in accordance with this principle of sex equality Law on the Election of Representatives requires that "on the electoral list, for every three candidates on the list (the first three places, the second three places and so on until the end of the list) there must be at least one candidate belonging to the sex which is less represented on the list " (Art. 40 A, para.1), while the mandates received from the electoral lists are assigned to candidates by the order on the electoral list, starting with the first candidate on the list (Article 84).

Finally, this horizontal effect of the principle of equality is also expressed when it comes to special measures, in the sense that private subjects are obliged not only to refrain from discrimination, but are sometimes required to undertake appropriate positive measures to be able to give their contribution to full equality of certain categories of persons. In this regard, the Act on Professional Rehabilitation and Employment of Persons with Disabilities[2418] introduces the obligation of each employer who has 20 to 49 employees to hire one person with disabilities, and for the employer who has 50 or more employees to employ at least two people with disabilities, and for every next 50 employees, one person with disabilities (Article 24, para. 2 and 3).[2519] In the same way, Law on Equality of Sexes anticipates that employer who has more than 50 full-time employees is required to adopt a plan of measures to eliminate or mitigate the unequal sex representation for each calendar year and prepare annual report on the implementation of the plan (Article 13,para. 1 and 2).[2620] Both laws, thereby, define the employer as any juristic or physical person who employs one or more persons.

5.1.4. Collective rights

In addition to the rights guaranteed to all citizens, the Constitution recognizes additional individual or collective rights to members of national minorities,. Under the explicit regulation of the Constitution "individual rights are exercised individually and collective rights in association with others "(Art. 75, para. 1). "Through collective rights" it is additionally specified in the Constitution, "members of national minorities directly or by their representatives, participate in decision-making or make decisions by themselves on certain issues related to their culture, education, information and official use of language and writing, in accordance with the law "(Art. 75, para. 2). It follows that the Constitution does

24 "Fig. Gazette of RS ", no. 36/09

25 For more on this see infra 5.2.2.4.

26 For more on this see infra 5.2.2.1.

not just opt for the concept of collective rights, but seeks to define them, taking as a crucial criteria the manner of performing collective (and individual) rights - the fact they are exercised "in association with others" (Jovanović, 2009: 13-14). In our and foreign literature this approach is challenged, as the collective rights are determined with respect to their holder, and that is collectivity, which, since it has a clear moral identity cannot be reduced to a set of individuals connected by a common interest.[2721] The Constitution, however, is familiar with this view of the nature of collective rights, as it states already in the Principles that "*the state guarantees special protection to national minorities* to achieve full equality and to preserve their identity "(Article 14, para. 2, our italics added). However, there is no doubt that, in the legal theory, as well as in the Constitution, collective rights may be exercised individually or in association with others (Jovanović, 2009: 16-17).

The exercising of the collective rights of national minorities in the association with others, according to the provisions of our constitution, is achieved primarily by self-government in culture, education, information and official use of language and writing, for which members of national minorities may elect their national councils (Art. 76, para.3). Other rights the Constitution guarantees to national minorities, in order to preserve theirparticularities, are such that they are exercised individually and / or in association with others:the right to express, protect, cherish, develop and publicly express national, ethnic, cultural and religious characteristics, the right to use their symbols in public places, the right to use their language and writing, the right, in areas where they make up a significant population, authorities, organizations entrusted with public powers, authorities of autonomous provinces and local self-government units to have proceedings in their own language too; the right to education in their own language in public institutions and institutions of autonomous regions; the right to establish private educational institutions; the right to use their name and surname in their language; the right in areas where they are a significant population, traditional local names, names of streets, towns, and topographic signs are written in their own language; the right to have complete, timely and unbiased information in their own language, including the right to express, receive, send and exchange information and ideas; as well as the right to establish their own mass media (Article 79, para. 1).

27 see supra 2.

5.2. SUMMARY OF ANTI-DISCRIMINATION LAWS

Anti-Discrimination legislation in Serbia is numerous and scattered. Below is a summary of regulations of the Law on Prohibition of Discrimination, as a general law in this matter, and the specific regulations of the relevant special laws so far legislated in our country: the Law on Equality of Sexes, the Law on Protection of Rights andFreedoms of National Minorities, the Law on Prohibition of Discrimination Against Persons with Disabilities and the Law on Professional Rehabilitation and Employment of Persons with Disabilities. Besides them, there is an overview of other significant laws which within its basic matter regulate the prohibition of discrimination: the Labor Law, Information Law, and the Law on Basic Education.

5.2.1. General Law - the Law on Prohibition of Discrimination

The Law on Prohibition of Discrimination stipulates the general prohibition of discrimination, forms and cases of discrimination, and procedures for the protection against discrimination. This law establishes the Commissioner for Protection of Equality as an autonomous state authority, independent in performing his/her duties (Article 1).

The law specifies the term "discrimination" and "discriminatory treatment." In relation to the constitutional norm which prohibits discrimination, the Law determines the characteristics of discriminatory treatment ("any unjustified distinction or unequal treatment, that is, failure - exclusion, restriction or preference "), determines the beneficiaries of non-discrimination ("persons or groups and members of their families or persons close to them "), and expands the area of unallowed grounds of differentiation (skin color, ancestry, nationality, ethnic origin, gender identity, sexual orientation, genetic characteristics, medical condition, marital and family status, criminal record, appearance, and membership in political, trade union and other organizations), while some grounds recognized by the Constitution recognizes are not mentioned in this Law (social background and culture).

The forms of discrimination recognized by the Law are the direct and indirect discrimination, violation of the principles of equal rights and obligations, calling on responsibility, conspiracy to commit discrimination, hate speech and harassment and degrading treatment (Article 5), and it states a severe forms of discrimination (Article 13).

Protection from discrimination is achieved before the Commissioner for the Protection of Equality (discussed in Chapter 12) and in court proceedings (discussed in the Chapter 11).

5.2.2. Special laws in the field of prohibition of discrimination

5.2.2.1. The Law on Equality of Sexes

The Law on Equality of Sexes "regulates the creation of equal possibilities for exercising of their rights and obligations, undertaking special measures to prevent and eliminate discrimination based on sex and gender, and the procedure of legal remedies for persons exposed to discrimination "(Art. 1).

The Law defines the term sex-based discrimination, both direct and indirect (Art. 4 -6), and states that "the public authorities develop an active policy of equal opportunities in all areas of social life," which means "equal sexes participation in all stages of planning, making and implementing decisions that have an impact on the status of women and men" (Article 3). At the same time, " providing special measures to eliminate and prevent unequal status of women and men and ensuring equal opportunities for the sexes is not considered as discrimination nor as violation of the principle of equal rights and obligations "(Art. 7).

The law elaborates these issues in the areas of employment, social and health care (Articles 11 -25), family relations (Art. 26 -29), education, culture and sports (Articles 30 -34), as well as in political and public life (Art. 35 -42).

Any person whose rights or freedom are violated for belonging to certain sex may initiate the proceedings before the competent court and seeks to be provided with legal protection that the law anticipates. (See the section on 11.2.2.).

5.2.2.2. The Law on Protection of Rights and Freedoms of National Minorities

The Law on Protection of Rights and Freedoms was adopted in 2002 by The Federal Republic of Yugoslavia,[2822] in that way fulfilling one of the conditions for admission to the Council of Europe. The Republic of Serbia has in the meantime adopted its new law on the rights of persons belonging to national minorities, if we leave aside the Law on National Councils of National Minorities,[2923]and it didn't abolish this Yugoslav law which means that it is still in effect.[3024] In fact, this thesis is supported by the fact that the Constitution of the Republic of Serbia

28 "Official Gazette", no. 11/02.

29 "Official Gazette of RS", no. 72/09.

30 The Law on National Councils of National Minorities (Article 138, item 1) leaves out of effect only Article 24th (Transitional and Final Provisions) of the Act on the Protection of Rights and Freedoms of National Minorities.

of 2006, anticipates that "the reached level of human and minority rights can not be reduced" (Art. 20, para. 2).

The Law on the Protection of the Rights and Freedoms of National Minorities regulates the rights which members of national minorities exercise individually and collectively with others, as well as the protection of national minorities from all forms of discrimination, and it also establishes instruments that guarantee and protect the special rights of national minorities in the field of education, language, media and culture (Art 1. 1 and 2).

National minority, in terms of this Law, is any group of citizens of the Republic of Serbia, which is sufficiently representative by number, although it is a minority in the territory of the Republic of Serbia, belongs to some population group with a lasting and firm connection to the Republic of Serbia and has features such as language, culture, national or ethnic affiliation, origin or religion that make it different from most of the population, and whose members are distinguished by their concern to preserve together their common identity, including their culture, tradition, language or religion (Article 2, para. 1).

Basic Principles of the Law guarantee : prohibition of discrimination against persons belonging to a national minority; undertaking measures to ensure equality between persons belonging to national minorities and the majority nation, freedom of national affiliation and expression, and freedom to restrain from doing it, the right of cooperation with compatriots at home and abroad; and protection of acquired rights (Art. 3 -8). This section of the Law prescribes the obligation to respect constitutional order, the principles of international law and public morality (Article 7).

The Law guarantees certain specific rights to national minority aiming to preserve its special features: a right to choose and use the personal name; the right to use of the native language; the right to use their language and writing, the right to cherish their culture and traditions; the right to education in their native language; the right to use of national symbols; as well as the right to public information in the language of minority.

5.2.2.3. The Law on Prevention of Discrimination against Persons with Disabilities

The Law on Prevention of Discrimination against Persons with Disabilities[3125] "organizes the general regime on prohibition of discrimination based on disability, special cases of discrimination against persons with disabilities, the process of protecting persons exposed to discrimination and measures taken to encourage equality and social inclusion of people with disabilities "(Article 1). The Law specifies that the term "persons with disabilities" means "people with congenital or acquired physical, sensory, intellectual or emotional disability who, due to social or other barriers are not able or have limited abilities to engage in social activities on the same level with others, regardless of whether they are able to perform such activities with the use of technical supports or support services "(Article 3, item 1).

The Law anticipates that discrimination forms are: direct and indirect discrimination, and violation of the principle of equal rights and obligations (Art6 -7); and that the severe forms of discrimination are: "causing and encouraging inequality and intolerance towards people with disabilities", and "propagation or intentional discrimination by public authorities in proceedings before that authority, through the public media, in politics, in
public service, in employment, education, culture, sports, etc."(Art. 9). At the same time, the Law does not considered as a violation of the principle of equal rights and obligations, nor as discrimination" special measures adopted to improve the situation of people withdisabilities, their family members and associations of persons with disabilities,who are provided with special support necessary for the entitlement and accomplishment of their rights under the same conditions under which they are entitled to and accomplished by others" or "adoption or retention of existing laws and measures aimed to eliminate or improve the unfavorable status of people with disabilities who are provided with special support" (Article 8).

The Law enumerates as special forms of discrimination based on disability the following: discrimination in the proceedings before the public authorities, discrimination in associations, discrimination in access to services and access to facilities for public use and to public areas, discrimination in the provision of health services, discrimination at all levels of education, discrimination in employment and labor rights, discrimination in transportation in all types of traffic, discrimi-

31 "Off. Gazette of RS ", no. 33/06

nation in accomplishing martial rights and family relations, and discrimination against associations of people with disabilities (Art. 11 -31)

For the sake of encouraging equality of persons with disabilities, the Law anticipates the obligation of public authorities, especially local governments, and in certain situations autonomous provinces and countries, to undertake measures and activities required by the regulations of Art. 32 -38, with the aim of creating equal opportunities for people with disabilities, and to provide in these activities the participation of people with disabilities and their associations. The Law regulates the court civil protection from discrimination based on disability (See on this in Chapter 11).

5.2.2.4. The Law on Professional Rehabilitation and Employment of Persons with Disabilities

The Law on Professional Rehabilitation and Employment of Persons with Disabilities organizes: incentives for employment in order to create conditions for equal participation of people with disabilities into the labor market; evaluation of work capacity; professional rehabilitation; employment of persons with obligations disabilities; conditions for establishing and conducting business enterprises vocational rehabilitation and employment of persons with disabilities and other special forms of employment and working engagement of people with disabilities; other issues relevant to professional rehabilitation and employment of persons with disabilities "(Article 1).

The Law anticipates that a person with disabilities must be able to enjoy the right to: the status determination and evaluation of work capacity; to encouragement of employment, labor and social inclusion and affirmation of equal opportunities in the labor market; intentions and activities of professional rehabilitation; employment under general conditions; employment under special conditions; measures of activeemployment policy; and employment in the specially organized forms of employment and the working engagement of persons with disabilities (Article 6).

The Law specifically regulates special measures aiming to encourage employment of persons with disabilities, by the introduction of employment obligation. Specifically, the employment obligation "is the obligation of every employer who has at least 20 employees, to employ a certain number of people with disabilities "(Art. 24).

The Law recognizes the measures of active employment policy for persons with disabilities, and those include "measures and incentives aimed at raising motivation, employment and self-employment of people with disabilities "(Art. 30 -32).

5.2.3. Other laws regulating in their area the prohibition of discrimination

5.2.3.1. The Labor Law

The Labor Law prohibits direct and indirect discrimination of "job seekers and employees, regarding sex, origin, language, race, color, age, pregnancy, medical condition or disability, national origin, religion, marital status, family responsibilities, sexual orientation, political or other opinion, social origin, financial status, membership in political organizations, trade unions, or other personal characteristic." Article 19 of the Law defines the term direct and indirect discrimination, and Article 20 , paragraph 1, specifies the situations in which the discrimination is prohibited: conditions of employment and selection of candidates for particular job; working conditions, and all rights in employment; education, training and improvement, career advancement, and termination of employment.

The law specifically prohibits harassment and sexual harassment.

The law specifies that it does not consider as discrimination "distinction, exclusion or preference regarding particular job when the job's nature is such, or the job is done in such conditions, that the characteristics related to some of the grounds that the law states as discriminatory are actual or decisive condition for performing the job, and that the purpose to be achieved is justified (Art. 22, para. 1). Also, not considered as discrimination are "regulations of the law, general acts and working contracts relating to special assistance and protection of certain categories of employees, especially those on the protection of disabled persons, women during maternity leave and leave for child care, special child care, as well as regulations relating to the special rights of parents, adoptive parents, guardians and foster parents "(Art. 22, para. 1).[3226]

32 In this sense, the Labor Law contains regulations for the protection of maternity (Article 89 -93), on maternity leave and absence from work to care for the child (Art. 94 -95), of absence from work for special child care or other persons (Art. 96 -100) and the protection of disabled persons (101 -102).

Finally, the Law anticipates that in cases of direct and indirect discrimination, and harassment and sexual harassment, the person seeking employment, as well as the employee, may initiate proceedings before the competent court for compensation (Article 23).

5.2.3.2. The Law on Public Information

The Law on Public Information[3327]regulates the right to public information, and the right to freedom of expression, and the rights and obligations of participants in the public information process. (Art. 1, para. 1).

When it comes to standards which fulfill the principle of equality, the Law on Public Information prohibits discrimination on the market of public media - person who distributes the public media "must not refuse to distribute someone's public media without good commercial reason, or for the distribution of public media impose conditions that are contrary to market principles "(Art. 16). However, the Law permits the ban of distribution of information by decision of the competent court at the request of the prosecutor, if it is determined that it is necessary in a democratic society to prevent, among other things, "incitement to direct violence or advocacy to national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and the publication of information leads to direct, serious, irreparable consequence whose occurrence cannot be prevented by other means "(Art. 17).

In the section on the specific rights and obligations in the Public Information the Law prohibits hate speech, which is defined somehow differently in relation to the Law on Prohibition of Discrimination: "Publishing ideas, information and opinions which incite discrimination, hatred or violence against persons or group of persons for their belonging or not belonging to a particular race, religion, nation, ethnic group, sex or their sexual orientation, regardless whether the crime is committed by the publication" (Article 38 of the Law on Public Information).

The person to whom, as the member of a group, is addressed the information that has elements of hate speech is entitled by the Law to "the right to file a lawsuit against the author of the information and against the (chief) editor of the public media in which information is published, where he/she may require a ban on its re-publication and reaching the verdict at the expense of the defendants "(Art. 39 , para. 1). The Law also anticipates that against the author and (chief)

33 "Off. Gazette of RS ", no. 43/03, 61/05 and 71/09.

editor a lawsuit may be filed by each organization whose aim is to protect the rights and freedoms of man and citizen, that is, to protect interests of the groups against whom the hatred is directed, except that if the information that has elements of hate speech personally refers to a particular person organization may file a complaint only with the consent of that person (Art 39 , para. 2 and 3). In litigation on these claims, the regulations of the law organizing civil proceedings are applied properly. (Art 39, para. 4 of the Law on Public Information).

However, the Law states that there will be no violation of the prohibition of hate speech, if the information that has elements of hate speech is a part of a scientific or journalistic text, and is published without intention to incite discrimination, hatred or violence against persons or group of persons (especially if such information is part of objective news reports), or if it is published with the intention to critically point to the discrimination, hatred or violence against persons or group of persons, or to the phenomena that constitute or may constitute incitement to such behavior. (Article 40).

5.2.3.3. The Law on Basics of Education System

The Law on Basics of Education System[3428]regulates the basics of preschool, primary and secondary education (Article 1, para. 1).

The system of education in the Republic of Serbia is based, among other things, on the principle of equal rights and access to education without discrimination and separation on the basis of sex, social, cultural, ethnic,
religious or other affiliation, place of residence, or domicile, material or health conditions, difficulties and handicaps in development and disability, and other bases for all children, students and adults (Art. 3, para. 1, item 1).

According to that, the Law anticipates that "every person has the right to education" (Art. 6, para. 1), and that citizens "of the Republic of Serbia are equal in their right to education, regardless of sex, race, nationality, religion or language, social and cultural background, financial status, age, physical and mental constitution, handicaps in development and disability, political affiliation or other personal characteristic "(Art. 6, para. 2). In accomplishing the idea of substantive equality, the law prescribes that "persons with handicaps in development and with disabilities have a right to education that respects their educational needs in regular education, with individual, or group additional support, or in special

34 "Off. Gazette of RS ", no. 72/09

preschool group, or school, according to this and special law." (Art. 6, para. 3); and analogously, "persons with exceptional abilities have the right to education respecting their special educational needs in regular education, in special classes or special school, in accordance with this and special law " (Art. 6, para. 4). Finally, implementing to the end the relation between the principles of equality and universality of human rights the Law anticipates that "foreign citizens and persons without citizenship have the right to education under the same terms and conditions prescribed for the citizens of the Republic of Serbia "(Art. 6, para. 5).

Also, by regulating organization of the (pre)schools' institutions, the Law stipulates that "in an institution of education, it is prohibited to carry out activities threatening, underestimating, discriminating or separating individuals or group of persons on the grounds of: racial, national, ethnic, linguistic, religious or sex, physical and psychological characteristics, handicaps in development and disability, health status, age, social and cultural background, financial status, or political views, and encouraging or failing to prevent such activities, as well as on other grounds determined by the law that prescribes prohibition of discrimination "(Art. 44, para. 1). The Law defines the term of discrimination (Article 44, para. 2), specifying at the same time that "Special measures, introduced to achieve full equality, protection and advancement of persons or group of persons who are in an unequal position, are not considered as discrimination." (Article 44, para. 3).

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6

The concept of discrimination*

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Every human being is unique and unrepeatable. It has a need and right to be esteemed and respected. A person with its unique destiny, experience, and adventures is unrepeatable. Therefore, by the very fact that someone is born as a human being he/she has the right to be esteemed and his human dignity respected.[1] This right is inherent and inalienable. This idea is in the basis of all human rights and it is inseparable from one of the most important legal, ethical and civilization principles - the principle of equality. It means that all human beings are equal in dignity and rights, have equal status and equal legal protection. Discrimination is a negation of the principles of equality and as such is prohibited. The original meaning of the word "discrimination", which is taken from the Latin language, is "differentiation", but eventually the term, at least in law lost neutrality and got a negative connotation unallowed differentiation (Dimitrijević, 1997:185).

The principles of equality and prohibition of discrimination in the Republic of Serbia are constitutional principles, developed through more laws. *The obligation to respect the principles of equality and to restrain from discrimination is on everyone*.[2] In other words, the discriminator may be any physical person, any juristic person, public authority[3], an association of citizens (regardless of whether is registered or not, and whether it has acquired the status of a legal entity), the movement, as well as any facility or institution.

In everyday speech, media and the like, the word discrimination is used to indicate the various unfair treatments, violations of various rights, inadequate reactions, and the like. However, the legal sense of the word is a quite complex phenomenon, where all the elements should be well understood in order to make a clear distinction in relation to other forms of unlawful and unallowed behavior.

The Law on Prohibition of Discrimination, as a basic and generalanti-discrimination law, defines "discrimination" and "discriminatory treatment" as *any unjustified distinction or unequal treatment, or omission (exclusion, restriction or preference), compared to individuals or groups as well as members of their families or persons close to them, openly or hidden, that is based on race, color, ancestry, citizenship, nationality or ethnic origin, language, religious or political beliefs, sex, gender identity, sexual orientation, financial status, birth, genetic characteristics, health condition, disability, marital and family status, criminal record, age, appearance, membership*

1 This right is guaranteed by the Constitution of the Republic of Serbia ("Official Gazette of RS", No. 98/2006), see Article 23

2 Article 4 , paragraph 2, of the Law on Prohibition of Discrimination (Official Gazette of RS ", No. 22/2009).

3 Who is a public authority is defined in Art. 2, item 4 of the Law on Prohibition of Discrimination

to political, trade union and other organizations, and other real or supposed personal characteristics[4].

The quoted definition is followed by the most important elements of discrimination:

- Discrimination is unjustified discrimination or unequal treatment, that is omission, which is done in an open or hidden way.

- The basis for performing discrimination is real or assumed personal characteristic of the discriminated subject (a person or a group, members of their families and persons close to them).

Unjustified unequal treatment must be based on personal characteristics of the discriminated subject. If unjustified unequal treatment has no basis for a personal characteristic, then it could be some else forbidden, unlawful behavior, but not the discrimination.

Because of the importance of these elements for understanding the essence of discrimination, each of them will be described in more detail in the following text.

4 Article 2, item 1 of the Law on Prohibition of Discrimination. .

6.1.
UNEQUAL TREATMENT

Discrimination implies making distinction, that is, unequal treatment. What logically arises from this statement is that *discrimination is different (unequal) treatment of people who are in the same or similar situations*. However, if the unequal treatment is to be defined only by unequal treatment in equal cases, it would be a formalistic approach that would not lead to substantial prohibition of discrimination and to the respect for the principle of equality. In fact, the same criteria in the very different situations cannot be applied. In other words, discrimination exists even when people are treated equally, and they are in different situations.

Let's consider that on a hypothetical example:

A Cinema X is screening the premiere of the latest American blockbuster on 15.9.2012. Tickets are for sale days before. On the opening night, one hour before the movie showing, a boy and a girl of darker skin pigment come to the cash register. According to their skin color, the cashier concludes that they are Roma and, following the instructions of her boss, answers that all the tickets are already sold out. The boy and the girl are disappointed and slowly go away from the box office. Shortly after that, four white boys are coming and without any problem are buying tickets and are entering the movie theatre. Just before the start of the movie, a woman in a wheelchair comes to the cash register with her sister. Without any trouble the two of them buy tickets for the movie and enter the hallway that leads to the movie theater. However, a number of very steep stairs lead to the movie theater auditorium . Since the auditorium is completely inaccessible to them, they give up on watching the movie.

In the case of the Roma boy and girl, the Cinema X treated them differently from white boys, although they are in the same, that is, comparable situations. These are the people who came to see the movie, tickets existed. The Cinema X denied services to the Roma boy and a girl and refused to sell them tickets, just because of their skin color and race. So, the treatment was different in the same situations. The woman with disabilities and her sister were also discriminated because although the Cinema X did not deny them the possibility to buy tickets, they were also actually disabled to receive the service they paid for, because the cinema›s auditorium is not accessible to people with disabilities. The Cinema X failed to obtain platform for persons with disabilities, and to make possible for those persons free provision of its services. It cannot be expected from people with disabilities to overcome obstacles (stairs) in the same way as people without disabilities do. Therefore, there is a discrimination made *because there was equal treatment in very different cases*. In this particular case, the Roma boy and

a girl were discriminated, as well as the woman with disabilities, and her sister, by various acts of committing, but with the same consequence. Both pairs were unable to obtain the service provided by the theater.

Discriminatory action in the case of the Roma boy and girl was made by committing (the owner of the cinema X instructed the cinema employees to not let Roma men and women), and in the case of the woman with disabilities and her assistant by omission (the Cinema X owner failed to obtain a platform for persons with disabilities, and by that to enable them to freely enter the movie theater). Discrimination can therefore be made by:
• Committing - cases where the discriminator actively perform the prohibited act, although he must act on the contrary (the owner of the pool prohibits entry to public pool to Roma chief editor of the publication of the text which allows the calls for hatred and physical violence against "sick fagots"; school principal forms a special class of the first grade where are signed in only Roma children and grants them a special room that is away from the main school building, so the Roma children would not be mixed with white children, a group of citizens organizes demonstrations and invites fellow citizens not to buy pastries at a bakery whose owner is Albanian).

• Omission - situations where there is an obligation to take specific actions to prevent discrimination, that is, when the addressee of obligation fails to do what it should to avoid discrimination or in the cases where the discrimination has already occurred fails to punish the perpetrators of the acts of discrimination (a public institution fails to architectural barriers adapt to a free and unobstructed movement of persons with disabilities; Ministry of Education does not provide the printing of books in Braille for visually handicapped children; in the case of racially motivated attacks the State fails to carry out the procedure and adequately punish the perpetrators of violence[5] whose identity is known).

In the quoted legal definition of discrimination is stated, for example, that the unequal treatment, by its content, usually reflects in the exclusion (e.g. a pub owner prohibit entry into the pub to Roma transvestites), restriction (e.g. the court determines that the working hours for the contracts certification are eight in the morning until eight in the evening for all persons, except for those with dis-

5 See a very significant verdict of the European Court of Human Rights and Nachova and Others v. Bulgaria (application no 43577/98 and 43579/98), in which, among alia, is stated that there was a violation of Art. 14 of the Convention (prohibition discrimination) in accordance with Art 2 (right to live), regarding that authorities have not investigated the possibility that the events that led to the death mr. Angelov and mr. Petkov could been racially motivated. The verdict is available at 09/11/2012 Internet.)

abilities for whom is open from 11.00 am to 2.00 pm, so that the security guards would not be engaged all day long on assisting for the use of the platform for people with disabilities) or preferences (e.g. the party in power gives the directive to all school principals to hire only persons who are members of that party).

From the perspective of content, unequal treatment always has two main aspects:
• Putting the ones in worse position, which is often reflected in deprivation of rights and
• Putting the others in a better position, which is called privileges or benefits (Vucić, 2003:3).

Discrimination can be open or hidden. The open discrimination occurs when the discriminator does not hide his discriminatory intention (e.g. landlord refuses to grant an apartment Roma single mother, who has five children). In hidden discrimination discriminator acting is apparently neutral and applies equally to all, but only in analysis of the consequences of such action is established that such seemingly equal treatment puts a person or group of persons, because of some of their personal characteristics, in disadvantaged position compared to other persons or group of persons.

Example

In the southern states of the United States setting of apparently neutral rules has been a cover for racial discrimination for long time. for racial discrimination. For example, every citizen was required to register in the list of voters to show that he/her is literate and knows the basis of the constitutional system of the United States and of the appropriate federal entity where he/her lives. While it was well known that black people are typically poorer and less educated, and that it will be more difficult for them to pass the exams, even in front the most objective committee, not to mention the one composed of biased white citizens that will require them grammatical knowledge which don't have the majority of white people and ask them the most complex constitutional questions that could be answered only by educated lawyer. (Dimitrijević 2007: 117). So, in this example, there was apparently neutral rule, which applies equally to all - every citizen had to pass the test in order to be registered as a voter. However, the black citizens were asked much harder questions than white citizens. At the same time the black citizens, because of previous long history of slavery, racism, exclusion from education system and so on, were much poorer and less educated than white citizens. Thus, in this case, behind seemingly neutral rule that applies equally to all, in fact was hidden the racial discrimination.

On the forms of discrimination, see Chapter 7. On discrimination cases, see Chapter 9

It should be borne in mind that distinction, by itself, is not discrimination. For differentiation and unequal treatment being a discrimination, is needed for unequal treatment to be unjustified. In other words, there are situations where the differentiation is justified

Sometimes it is very easy to determine whether is making differences justified or unjustified. For example, a health institution announced the competition for position of analyst and as a condition of employment specified "degree of medical school – course: a laboratory technician."

If in such a position a person applies who has graduated from some other high school and is rejected, by that he/she is not discriminated on the basis of education because that requires specific knowledge and skills[6]. However, if the mentioned health facility, besides that condition, requires that a person must not be older than 25 , it is illegal because such a distinction in unallowed as it is irrelevant fact for performing the job. There is no indication that the person of 24 years of age will perform the job better then a person who is 26. Also, it is obviously justified to have male and female toilets, but it is unjustified to prohibit women to enter the sports betting place.

In some cases, the legislator him/herself prescribes when unequal treatment is allowed. For example, citizenship as a basis for distinction is allowed when it comes to the rights which under the Constitution and the law, only citizens of the Republic of Serbia can have[7] (active and passive right to vote, the right to traveling document). Special measures, introduced to achieve full equality, protection and advancement of persons or group of persons who are in unequal position, are not considered as discrimination[8].

However, there are situations when it is difficult to evaluate if the unequal treatment is justified or not, and this is certainly one of the most complex questions

6 See Article 16 Paragraph 3 of Law on Prohibition of Discrimination. .

7Art. 3, para.2 of the Constitution of the Republic of Serbia. The explanation is not essential, but stems from the level of development of the international community. States simply do not want to give up their rights to freely decide who will be a citizen, who will be able to enter their territory, to participate in political life and in the distribution of collective wealth created by their societies. There must not be made, however, the distinction among the foreigners themselves on the basis of a prohibited characteristics, for example: Among French citizens of Jewish and "Aryan" origin (Dimitrijević, 2007:115).

8 Article 14 of the Law on Prohibition of Discrimination.

of anti-discrimination law. In order to determine if the unequal treatment is justified, it is necessary to apply the test, originally developed inpractice of the European Court of Human Rights, which our legislators incorporated in the Law on Prohibition of Discrimination,[9] by which it is examined whether there is objective and reasonable justification for the unequal treatment (discussed in Chapter 8 and 9).

9 See Article 7 and 8 of the Law on Prohibition of Discrimination.

6.2.
PERSONAL CHARACTERISTICS AS THE GROUND FOR DISCRIMINATION

The basis for discrimination is a personal characteristic of a discriminated subject. If unallowed distinction or unjustified unequal treatment is not based on individual characteristic, then that is not discrimination. Discriminator observes a person or group of persons only through their personal characteristics and just because of that their personal characteristic treats them unequally. Discriminated persons are exposed to unequal treatment just because of some of their personal characteristics (e.g. the reason why the pool owner will not let Roma to the pool is just because he is Roma).

Personal characteristics as a basis of discrimination is the key element of demarcation between discrimination and other unlawful behavior.

Consider that in the following examples:

(1) At a regular meeting of all employees in a company, one of the employees, for the first time, gave the opinion expressing strong disagreement with the boss›s work plan on one of the projects. After that, the boss began to give to that employee tasks that are not in his job description, determined unreasonably short deadlines for realization of very extensive jobs, in meetings with clients he mocked and humiliated him, which he did not do to other employees, has determined, for increased volume of work that the employee has to work every Saturday, even though such obligation was not introduced for other employees.

(2) In the construction company X all employees are men, except a lawyer, coffee maker and the director›s secretary. The Director called his new secretary to dinner and she refused. After that he began to harass her, to address her by inappropriate and unprofessional names, to whistle behind her in the hallway, to make inappropriate and vulgar jokes on her account, to use every opportunity to tap her on her knees and buttocks, etc. Although in both cases an unjustifiably different behavior of the boss toward the employee exists, there is discrimination only in the other case, because the boss's behavior toward the employee is not based on any personal characteristic of the employee, while the behavior of the director toward secretary is discrimination since the unjustified unequal treatment is based on personal characteristic of the employees - her sex. The director would not behave in that way toward a male employee.

So, in the second example the ground for discrimination is the sex of the employee. Of course, the first example is also unallowed and unlawful behavior, it represents a violation of labor regulations, but it is not discrimination, because it is not

based on any personal characteristic of the employee. Personal characteristic may be defined as a personal characteristic of one person which determines his/her physical, psychological, spiritual, economic or social identity. Our legislator has provided a large and detailed list of personal characteristics (race, skin color, ancestry, nationality, nationality or ethnicity, language, religion or political belief, sex, gender identity, sexual orientation, financial status, birth, genetic characteristics, health condition, disability, marital or family status, criminal record, age, appearance, membership in political, trade union and other organizations. It is good that this list is not closed, but the legislator noted that the grounds for discrimination may be other personal characteristics as well. This allows those who apply the law to qualify as discrimination and unequal treatment that are based on those personal characteristics that are not explicitly stated in the law, and that exist and are possible in everyday life. On the other hand, it disables the discriminators to avoidresponsibility for discriminatory behavior.

Discrimination exists regardless of whether it is based on actual or supposed personal characteristics. The grounds for discrimination may be personal characteristics of the very discriminated person or group of persons, family members and people close to them (more on this in the section 8.1.2.4.).

6.2.1.1. Personal characteristics related to sex, gender and gender identity

Discrimination can be made on the grounds of sex and gender. (The concepts of sex and gender, see Section 1). The correct understanding of concepts sex and gender is very important for the understanding the discrimination based on sex, gender and gender identity.

According to Art. 20 of the Law on Prohibition of Discrimination discrimination based on sex exists if acting contrary to the principle of equality of sexes, that is, contrary to the principle of respecting equal rights and freedoms of women and men in political, economic, cultural and other aspects of the public, professional, private and family life. The denial of the right, or public or hidden granting of privileges regarding sex, or because of the sex change. physical violence, exploitation, express hatred, humiliation, blackmail and harassment regarding sex, as well as public advocacy, support and acting according to prejudices, customs and other social patterns of behavior based on the idea of the inferiority or superiority of sexes or stereotypical roles of sexes, is prohibited.

The quoted article of the Law points to one more personal characteristic, which is the ground for discrimination, and that is transgender.[10] Specifically, our legislator, a discrimination on the grounds of sex change treats as a discrimination based on sex. Transgender implies the existence of deep disparity and the gap between biological sex of a person and his/her gender identity. Transgender person has a permanent, rooted and extremely strong feeling of psychical belonging to the opposite sex while is fully aware of his/her anatomical sex. This conflict between sex and gender identity causes to the transgender person a deep emotional and psychological suffering. The only successful treatment is the change (adaptation) of the sex, which is very difficult and complex process. Transgender people in Serbia are one of the most discriminated and marginalized groups. Although the surgeries on sex change have been done in our country for more than 20 years, we still do not have a law that regulates the documents change and recognition of the legal consequences of sex change (adaptation).

Gender identity is a part of personal identity that is related to social and personal perception on belonging of an individual or not belonging to his/her own biological sex (Jarić: 2010:138). Most people identify their gender with their biological sex. However, people whose gender identity is not classically male or female are transgender. Transgender is also one of the personal characteristics that could be a ground for discrimination. Transgender persons are persons who through individual identity construct, permanent or variable character, express, deny or exceed the socially given and shaped sexual and gender norms and roles. The gender identity and / or gender expression of these persons is different from the traditional, socially defined gender roles and norms. Transgender is the position of the self-identification of person as a male, a female or beyond both of these possibilities.

From discrimination based on sex and gender identity, discrimination based on sexual orientation should be distinguished. (on the forms of sexual orientation, see section 1.3.4.).

Discrimination based on sexual orientation is A common ground for discrimination. Sexual minorities belong to the most discriminated and the most vulnerable social groups, despite the fact that the World Health Organization removed homosexuality from the classification of mental disorders on May 17, 1990.

10 In our everyday language the term transsexuality is often heard. However, the transsexuality is not an appropriate term, since it is literally translated from English (transsexual). The word sex in English besides the meaning sex (gender) means and a sexual intercourse. In our language, the word sex means only sexual intercourse only, but not sex (gender).

Sexual and gender minorities[11] are often exposed to physical and psychological violence and hate speech, and they are the only social group to whom the right to peaceful assembly is denied.

6.2.1.2. Personal characteristics in relation to cultural-biological affiliation or origin

Personal characteristics such as race, skin color, nationality and ethnicity are inherent and people see it as an important part of their identity. Through these properties people felt affiliation to certain social groups, and a deep connection to their ancestors. These are reasons why people tend to preserve and cherish them. On the other hand, we are witnessing that through history racial discrimination, segregation, politics on racial superiority and the like have been the source of various inhuman and degrading treatments, of wars and a serious violating factor for peace, stability and development of international community and good and friendly relations among nations.

Although most international documents prohibit racial discrimination, only the Convention on the Elimination of All Forms of Racial Discrimination[12] defines racial discrimination as any distinction, exclusion, restriction or preference based on race, color, ancestors, national or ethnic origin which has as the purpose or as the effect to jeopardize or compromise recognition, entitlement or practicing, under equal conditions, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of public life.

In Serbia's most expressed is racial discrimination against Roma population, which is one of the most vulnerable social groups in the economic, cultural and social terms.[13]

Also is prohibited the discrimination based on genetic characteristics, which are also inherent, human being inherits them. Discrimination based on genetic

11 Internationally accepted acronym LGBT people that means lesbian, gay, bisexual and transgender people, which sometimes extends to LGTIQ, where I means Intersex and Q means Queer. Intersexed person is born with sexual and reproductive organs that are not explicitly defined as male or female. Queer is a term "umbrella" term for all sex, gender and sexual differences and simultaneously deny them all.

12 Law on Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination ("Official Gazette of SFRY", br.31/67).

13 For example, Roma children are still subjected to segregation in schools.See reviews for Commissioner on Protection of Equality, No. 84 of 20.01.2012.and No. 88 of 17.01.2012. Available on the website http://www.ravnopravnost.gov.rs/ (website accessed on 13/07/2012.

characteristics exists, for example, when a teacher forces left-handed children to write with their right hand.

6.2.1.3. Personal characteristics in relation to beliefs and values

Freedom of thought, conscience and religion, freedom of opinion and expression are the basic human rights and freedoms.[14] These are spiritual freedoms based on the modern concept of human rights, which is based on the fact that a human being is an autonomous entity, capable of rational thought, conclusion, judge, forming and changing beliefs and value judgments. Also, it reflects the tendency of modern society to the existence of a pluralistic, multicultural society. Freedom of religion means freedom to manifest one's religion or religious beliefs, conduct religious rites, attending religious services or teaching, individually or in association with others, and to privately or publicly present own religious beliefs, but also the freedom of not having a religious belief (atheism).

Freedom of assembly and freedom of association are the preconditions for the existence of modern life. They are the basis of communication between individuals with similar interests or political beliefs, and make a special form of freedom of expression. Therefore they have an important political dimension. (Dimitrijević: 2007:249). A human beings must be free to form their own political beliefs, to join freely the political, trade union and other organizations for accomplishing their rights and interests and fight for their own values. A person must not be discriminated because of his/her religious or political beliefs or membership in political, trade union and other organizations.

However, it should be noted here that the freedom of expression is not absolute and that is prohibited to express ideas, information and opinions inciting discrimination, hatred or violence against persons or group of persons because of their personal characteristics, in the press and other publications, meetings and places accessible to the public, writing and displaying messages or symbols, or otherwise[15]. This means that any spiritual freedom cannot and must not be an excuse for discrimination. For example, according to the explicit letter of the Law, it is not considered as discrimination the priest's acting or other religious officials' which is in accordance to a religious doctrine, beliefs or goals of churches and religious communities registered in religious communities register, in accordance with the special law. regulating freedom of religion and the status of churches

14 See Article 43 and 46 of the Constitution of the Republic of Serbia.
15 Article 11 of the Law on Prohibition of Discrimination.

and religious communities[16] However, religious doctrine cannot and must not be an excuse for hate speech and calling for violence against a particular social group.[17]

Also, restrictions relating to persons performing certain government functions and limitations necessary to prevent advocacy and pursuing fascist, Nazi and racist activities, prescribed in accordance with the law are is not considered as discrimination because of political or trade union membership.[18]

6.2.1.4. Personal characteristics in relation to the cultural identity

Acceptance and respect for cultural specificities helps the advancement of human rights, the development of greater tolerance, mutual respect and understanding and creates the preconditions for more effective cooperation in the sphere human rights. Cultural rights are crucial for the development and appreciation of human creativity and tradition. The cultural rights, include the right to education.

Our Law on Prohibition of Discrimination guarantees to everyone the right to preschool, elementary, secondary and high education and professional training under the same conditions, in accordance with the law.[19]

A very important aspect of cultural rights is the right to protection of the cultural identity of minority groups. For the minority groups cherishing of their language is vital for the preservation of cultural identity.[20] Thus, the personal characteristics such as education and language are special grounds for discrimination.

16 Article 18, para. 2 of the Law on Prohibition of Discrimination.

17 See the opinion and recommendation of the Commissioner for Protection of Equality no. 171/2011 of 28.02.2011 , regarding a speech of Metropolitan Amfilohije Radović of October 11, 2010, to the inhabitants gathered in the village Klinci in Lustica, which was transmitted by many media in Serbia. Available on the website http://www.ravnopravnost.gov.rs/ (website accessed on 13.07.2012).

18 Article 25, paragraph 2 of the Law on Prohibition of Discrimination.

19 Article 19, paragraph 1 of the Law on Prohibition of Discrimination.

20 See the opinion and recommendation of the Commissioner for Protection of Equality 1291/2011 of 29.10.2011 regarding the municipality of Priboj which did not take action in its competence in order to introduce the official use of Bosnian language and Latin script, on an equal footing with the Serbian language and the Cyrillic alphabet, although, according to to the latest census, in the municipality of Priboj live more than 15% of the Bosniak national minority, by which discrimination on the basis of nationality was made, prohibited by Article 24 of the Law on Prohibition of Discrimination. Available on the website http://.Ravnopravnost.gov.rs / (site accessed on 13.7.2012.).

6.2.1.5. Personal characteristics in relation to social status

Discrimination based on financial status is a concept that is clear by itself. It exists when a person or group of persons is unjustifiably treated unequally because of their financial situation.

Example

On the Draft of the Law on Civil Procedure, the Commissioner for the Protection of Equality expressed an opinion[21] that the regulation contained in Article 85, paragraph 1 of that draft, which anticipates: "The parties may take actions in the proceedings in person or through a representative, who must be an attorney," in the current real social and legal context, it puts at a disadvantage those persons who are unable, for any reason, to take the procedural steps in civil court proceedings personally, and do not have the financial resources to pay fee for lawyer's representation, compared to those who are capable of taking processing operations personally and have the financial means to pay fee for lawyer's representation. This violates the principle of equality in accomplishing the right to access Court, as an element of the right to a fair trial, guaranteed by Art. 32 of the Serbian Constitution and Art. 6 of the European Convention on Protection of Human rights and Fundamental Freedoms.

Place of birth of each person is a mere coincidence. For example, a woman who has residence in town X, in the eighth month of pregnancy went on a short visit to her relatives in another town Y, where she gave a premature birth. After the mother and child left the hospital, they returned to the city of X, where the child grew up and has lived all his life. There is no reasonable justification for local government to deny to the child certain rights that the residents of town X have, just because a child was not born in that town.[22]

Discrimination on the basis of medical condition exists when the person or group of persons is treated unequally regarding to their health status, as well as their

21 No. 1038/2011 of 27.09. 2011, available on the website http://www.ravnopravnost.gov.rs/ (page accessed 14.9.2012.).

22 See the opinion and recommendation of the Commissioner for Protection of Equality 820/2011 of 28. 07. 2011 regarding the Decision on Financial Aid for couples no. 011-92/10-10-1 Assembly of Jagodina of December 23, 2010, which prescribes the terms, conditions and procedures for accomplishing the right of couples to one-time support, violating the principle of equal rights and obligations, which by is committed discrimination on the basis of birth, and marital and family status of certain categories of citizens Jagodina. Available at website http:// www. ravnopravnost.gov.rs / (page accessed 13/07/2012.).

family members[23]. For example, a child whose father is HIV positive, is separated on an extra bench in the classroom, and the teacher recommends that children do not play with that child, while the father of the child, an employee in a private company gets fired once his condition becomes known. Disability is a very common ground for discrimination. The Law on Prevention of Discrimination against Persons with Disabilities defines that the term "person with disabilities" means persons with congenital or acquired physical, sensory, intellectual or emotional disability who due to social or other obstacles are unable or have limited opportunities to engage in activities of society at the same level as others, regardless of whether they are able to perform such activities with the use of technical aids or support services[24].

There are two models of approach to people with disabilities, such as traditional medical approach and the social approach based on the concept of human rights. The medical model assumes that the existing problem and needs to be solved is the lack of ability, that is solved by expert actions of doctors and other professionals / specialists. People with disabilities have a role of patients who only need treatment and rehabilitation, and they should be taken care of by other people (family members, friends, health care institutions, social services), who know the best what is good for them.

Social model puts the situation of people with disabilities in social frames. Society includes people with disabilities and gives everyone equal opportunities. This model recognizes and acknowledges the skills of the persons with disabilities for solving problems related to their life and functioning. They participate in decision making and equally are involved in the community. The expected result of actions taken by the social model is a person who lives the life he/she chooses, the ability to self-organize and to accept assistance / support that is directed to his/her needs, in various aspects of life in the community[25].

23 See Article 27 of the Law on Prohibition of Discrimination.

24 Article 3, Item 1 of the Law on Prevention of Discrimination against Persons with disabilities ("Off. Gazette" no. 33/2006).

25 See the opinion and recommendation of the Commissioner for Protection of Equality 685/2011 of 15.06. 2011, about the decision of the National Employment Service Office in Belgrade no. 0100-1002-1081/2010 of January 25, 2011,by which the J. Č. from B. is determined the third degree of difficulty and barriers to work, and determined the status of a person with disabilities who can not be hired and maintain employment under general nor under specific conditions, the act of discrimination in the work is committed on the basis of disability, prescribed by Article 16 Anti-Discrimination Act in accordance to Article 26, Paragraph 1 of the Law on Prohibition of Discrimination. Available on the website http://. Ravnopravnost.gov.rs / (site accessed on 13.7.2012).

Discrimination on the basis of marital and family status exists when an individual or group of individuals are treated unequally regarding to whether they are married or not, whether they are in illegitimate union or not, what their family conditions are and so on. In determining whether there is discrimination on the grounds of marital and family status, it is important to keep in mind all the diversities and varieties that are possible and happen in real life. There are traditional families - parents and children, there are families of single parents with children. There are families of the same sex with children (for example, two women in a long and permanent community with the child of one of them). Two persons of the same sex living in permanent community. Equal protection must be provided to all these forms of communities , without discrimination.

Example

In the case of the European Court of Human Rights Karner v Austria (2003) the applicant claimed to be a victim of discrimination on the basis of his sexual orientation because the Austrian Supreme Court refused to recognize him the status of "life companion" of his deceased partner, in terms of the relevant Austrian legislation, which made him unable to inherit the leasing contract for the flat which was signed by his partner. He relied on Article 14, in relation to Art. 8 of the European Convention. The applicant has lived in an apartment that was leased to his partner, and if there was not for his sexual orientation, he would be qualified as a life companion, and that, under the relevant legislation, is followed by the right to inherit the contract of lease. The European Court accepted the state's argument that the protection of the family in the traditional sense of the term represents a serious and legitimate reason which could justify the difference in treatment.However, this goal is, in the opinion of the Court, rather abstract and a large range of specific measures for its fulfillment could be applied. In the case of differences in treatment based on sex or sexual orientation, states are approved to have the narrow interior area of free evaluation. Therefore, the principle of proportionality between the applied means and the goal which is aimed by their application does not require only that the selected measure is suitable for achieving a given target; it should also be demonstrated that it was necessary to exclude homosexual couples from the scope of a given legislation, in order to achieve this goal. The state did not present any argument that would support such a conclusion and, therefore, failed to provide a convincing and serious reasons justifying a narrow interpretation of the arguable regulation. For these reasons, the Court took the stand that in this case Article 14 of the Convention is violated regarding the relation to Article 8.[26]

26 Quoted according to Interights' guide for Lawyers – Prohibition discrimination under the European Convention on Human Rights (Article 14), p.47th

The meaning of the prohibition of discrimination on the basis of conviction is preventing unjustified unequal treatment of persons who have been convicted of some unlawful conduct and of their rehabilitation. For example, there is no reasonable excuse for a person being refused an application for admission to the bar association because 15 years ago he/she was convicted of a crime of endangering public traffic.

Discrimination on grounds of age exists when a person or group of persons is unjustly treated because of their age, either by the benefits and advantages given to younger people, either by favoring the older ones. For example, for the job of a nurse is required a person who is not older than 35 or to the younger woman is made impossible to come to a leading position, even though she fulfills all the requirements for that position and has the best results in the work, under the pretext that she does not have enough life experience and wisdom and she will not be authority to older colleagues.

Example

The Commissioner for Protection of Equality received a complaint of E.P. against the bank A, where it is stated that the applicant requested renewal of the contract on approved overdraft but the bank officially refused to extend her contract explaining that there is a regulation which does not allow banks to make contracts on overdraft with people older than 68. During the proceedings on the complaint the Commissioner has determined that in the general act of the Bank the product description is: a loan for current account, prescribed acceptable categories of clients - "physical person not younger than 18 years of age at the time of application and not older than 67 at the time of full payment - the duration of the overdraft." The Commissioner has expressed the opinion that these rules denied the right of persons older than 67 to use banking services – loan for current account, by which these persons are directly discriminated on the grounds of personal characteristics - age. In the explanation, among others things, it is stated that "the legal principle of equality (equal treatment) requires that all persons who apply for using the service of loan for the current account are treated the same way, on the basis of comparable and objective criteria. It is obvious that the age, which the bank anticipated as a criterion for the use of overdraft, deprives a person that does not meet this criteria, of a possibility to have his/her credit-worthiness evaluated by the bank, based on comparable and objective criteria, and to approve him/her, if creditworthy, the overdraft for current account in the relevant amount. In this sense, the criteria of the age prescribed by the bank leads to unequal treatment of persons older than 67 compared to all

other (adult) persons under the age of 67, by which persons over 67 are directly discriminated".[27]

Discrimination based on appearance exists when there is unequal treatment of people because of their exterior. For example, the ad for the job in a bakery prescribes as the requirement that a person should have "a pleasing appearance".

Examples

In Texas in 1994 a woman who was overweight was rejected for a bus driver job. Physician of the firm claimed that she "gags through the hallway" and that is why she is not up to the task. After that, the company defended itself in court by that she would not be able to evacuate the bus in case of an emergency. However, the physician of the firm did not do any tests of her ability to determine whether she would be able to do so, but only on the basis of appearance came to such a conclusion.

In New Jersey, in 2005, a waitress was fired from the hotel after gaining weight due to problems with the thyroid gland and after asking for a new uniform. One of the conditions in her employment contract was to have a "figure of hourglass".[28]

27 See the opinion and recommendation of the Commissioner for Protection of Equality 947/2011 from 1.08. 2011. (website accessed on 13.07.2012).

28 DL Rhode, "Why looks are the last bastion of discrimination" (May 23.2010), The Washington Post, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052002298.html , Page accessed on 8..9. 2012

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7

The forms of discrimination*

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Discrimination is usually marked by different terms:unequal treatment, differentiation regarding personal characteristics, violations of the principle of equality, unequal treatment, deprivation of rights, putting in unfavorable position, privileging, giving preferences, putting in a favorable position and so on.

The Constitution of the Republic of Serbia in 2006 talks about discrimination in Art. 21 in the following way:

> *"Before the Constitution and the law everyone is equal.*
> *Everyone has the right to equal legal protection without discrimination.*
> *Any discrimination, direct or indirect, on any grounds, especially on grounds of race, gender, nationality, social origin, birth, religion, political or other opinion, financial status, culture, language, age or mental or physical disability. "*

In determining the content and form of discrimination, from historical and comparative-law perspective, attention is attracted by terms such as "apartheid," "racial segregation, "" caste system, "" ethnic cleansing, "" hate crime ", "hate speech, "" homophobia, "" xenophobia "and others. All these words denote or describe what is forbidden to do - discrimination. However, although it can often be heard in public speech, they do not fully deplete the content and the list of unlawful behavior forms. Discrimination is a very complex legal phenomena. Not every differentiation between individuals regarding their personal characteristics is prohibited – sometimes the unequal treatment can be justified, or marked as allowed.

Discrimination can take many forms, sometimes hidden, as a rule it is defined as unallowed behavior in the various laws or other juristic sources, often is a subject to different or even opposite interpretations by the courts and other state authorities, and the like. Therefore, opposing to discrimination by legal means implies, above all, accurate and complete definition of the content of discrimination and some of its forms.

In Article 4 of the Law on Prohibition of Discrimination the principle of equality is prescribed, together with the obligation to respect this principle. The regulations that follow (Articles 5 -14), define the various forms of disrespect of the principles of equality, that is, the discriminatory treatment. There are two basic forms of discriminatory treatment, and these are direct and indirect discrimination. Other forms of discriminatory treatment in their practical manifestations may be subsumed under one of these two basic forms.

7.1. DIRECT DISCRIMINATION

7.1.1. The concept of direct discrimination

Immediate or direct discrimination, as it is often called, is a typical form of discrimination. It is immediately or directly apparent because those who behave discriminatory do not hide their act. On the contrary, they will
often publicly defend the differentiation act referring to the need to protect their "legitimate" interests or "higher" goals.

Our living environment is full of examples of this kind of discriminatory treatment - here are some of them:

- Burning Roma settlements and the expulsion of Roma from those settlements, usually is justified by "hygiene" reasons;
- Beating up homosexuals who publicly express their sexual orientation is justified by the concern for the mental health of the nation, as well as by care for the family and children;
- Burning of mosques in Belgrade and Niš was justified by the desire to make fair revenge for the ethnically motivated violence that was, just before these events, suffered by the Serbs in Kosovo.

According to the Law on the Prohibition of Discrimination, direct discrimination exists if an individual or group in the same or a similar situation, by any act, action or omission, put or is put in unfavorable position, or could be put in an unfavorable position. (Article 6). A typical example of this type of discrimination is the refusal of the owner of a public swimming pool to let persons of the Roma nationality to swim there.

7.1.2. Elements of direct discrimination

The Law determines discrimination as unjustified differentiation, unequal treatment or omission (exclusion, restriction and giving preferences), of a person or a group regarding their personal characteristics. In accordance with the concept determined in this way, the process of determining whether, in the particular case there was an act of direct discrimination should be relied on analysis of the following five elements

7.1.2.1. The distinction or unequal treatment

Three aspects of the unequal treatment deserve special attention. The first refers to the content of distinction, the second to the nature of different treatment, and the third to its manifestations, that is, a form.

Content

According to its content, distinction is reflected mostly in exclusion, restriction or preference.

Examples: Exclusion exists if a restaurant owner refuses to host Roma. Restriction exists if to a disabled person the health care in a Health Center is not provided when its his/her turn but only at the end, when there is no one else in line. Privilege, or giving preferences, exists if the Minister for employment in the ministry receives only by persons who are members of his/her political party.

From the perspective of content, unequal treatment always has two of its basic aspects:

- Putting some in unfavorable situation, which is usually consisted of rights deprivation and
- Putting the others in favorable situation, which is called giving privileges or preferences.

In relation to the consequences of unequal treatment, it can be easily concluded that on the daily basis giving privileges to some will mostly represent the rights deprivation of the others and vice versa.

The nature

By its nature, unequal treatment may be consisted either in committing or in omission.

If the unequal treatment is done by undertaking some act or performing an action, then it is about discrimination that was made by an act or treatment.

Example: the owner of the pub acts discriminatory by hanging at the entrance a board that says that homosexuals are unallowed to enter the pub.

If there is unequal treatment because of lack of action, omission, or failure to act, then we talk about the discrimination that occurred by omission.

Example: Probably one of the most famous examples of the omission is keeping or not-removing the architectural obstacles for people with disabilities - authority in the local community discriminates persons moving in wheelchairs if it does not

lower the curbs of the sidewalks. So does the owner or the user of the facility for public use, such as shops, cinemas, colleges, sports center, etc., if it fails to provide people with disabilities with easy access to the facility.

The form

By its form, discrimination has a lot of features, and aspects. Sometimes it is consisted of deprivation or denial of the rights to some, or privileging, or the recognition of the rights to others. Sometimes it is consisted of undertaking or inaction of a physical act, and sometimes of humiliating, degrading or harassing speech. Sometimes it is about a mere discrimination, and sometimes it is a serious form of discrimination.

One of the main objectives of the Law is to identify and name all of these forms of discrimination. As the list of prohibited forms of discrimination is longer, the protection from discrimination it will be more effective.

7.1.2.2. Unequal treatment coming from individual or legal entity

When we ask who the discrimination comes from, then in every particular case we ask about two things: first, that to which person refers the prohibition of discrimination, or who is the addressee of the obligation to respect the principle of equality, and second, what is the nature of this obligation of his, what it is consisted of.

Obligation addressee

Everyone must respect the principle of equality. No one has the right to discriminate. Thus, the addressees of legal obligation to refrain from performing discrimination are all persons, individuals, as well as all firms, organizations, institutions, government agencies and other public authorities, or any legal entity.

Examples: The prohibition of discrimination equally refers to:

- Public authority, such as the Assembly adopting legislation which provides privileges only for members of certain religious communities;
- A public institution, such as a school that refuses to sign in a student who is infected with HIV;
- Company, for example the one that manages the shopping mall and that prohibits entry to Roma;

• The employer, whether in the public or private sector, such as the one who fired the employee for whom it was found out that he is homosexual;
• Public media, such as the editor who publishes articles containing hate speech;
• The individual who is conducting a business, such as a dentist who refuses to fix a tooth to a person with mental disabilities;
• The individual, such as the one who writes messages or symbols of discriminatory content, or the one who destroys the gravestones of one ethnic community, and the like.

The nature of obligation

The obligation to respect the principle of equality can be either negative or positive. The first obligation of everyone is not to act discriminatory,and to refrain from discrimination, and because of that, this obligation is callednegative. The prohibition of discrimination is usually depleted in the negative obligation.

Examples: All examples mentioned regarding the addressee of the obligation, would point to its negative obligations. Therefore, the assembly has a negative obligation to refrain from adoption of discriminatory laws, the school must refrain from discrimination of a students with HIV by receiving him/her in school, editor and reporter are obligated to refrain from publishing hate speech and the like.

Sometimes, however, the addressee may also have a positive obligation consisting from the obligation to undertake certain activities, or to perform activities in order to prevent or punish acts of discrimination, and that is because this obligation is called positive. If the addressee, as a rule it shall be a public authority, does not act according to this obligation of his, it will be considered that he/she acted discriminatory.

Examples: local governments have a positive obligation to remove architectural obstacles in the streets, squares, parks and other public areas, the police have an affirmative obligation to prevent hooligans to physically attack participants of regularly reported meeting of homosexuals and lesbians, as well as to prevent burning Roma settlement and expulsion of Roma or burning mosques in the city center; besides that, the police have an obligation to thoroughly and effectively investigate who the perpetrators of these acts are.

Besides, the state has other positive obligations of a general nature, such as the obligations of creating the legal framework for entitlement to freedom from dis-

crimination and providing effective mechanisms of protection from discriminatory treatment. The major part of this obligation the state fulfilled by adopting the Law on Prohibition of Discrimination

7.1.2.3. Discrimination is performed against a person or a group

A victim of discrimination could be any person, individual or legal, individual by him/herself or as part of a group that suffers discrimination, and even members of his/her family or people close to him/her.

Individual and legal entity

The most common victims of discrimination are physical persons, or individuals. However, all legal entities (companies, institutions), as well as entrepreneurs performing economic activity may become victims of discrimination, as well as individuals.

Example: If the private law schools to students who have permission to work from Ministry of Education, is excluded or limited the right to take the Bar (expert) Exam under the same conditions as students who graduated in state law schools, then it is about unjustified putting of burning position, or discrimination while students and private legal faculty.

A person and a group

A person can be victim of discrimination or individually or as members of the group of persons who share certain common personal characteristics. Number of the group or its other characteristics, such as location, social structure of members, etc-have no significance.

Examples: Beating Roma only or mainly because of his/her national origin, is discrimination made against him/her personally. In contrast, publishing in a newspaper an article advocating dislodging by force Roma from one part of the city, is the hate speech directed against the whole group, and all members of the Roma community.

Family members and close persons

In some cases the victim of discrimination is not only an individual himself, but his family and people close to him as well as .

Example: The family members of persons infected with HIV or suffering from AIDS, often suffer equal discrimination as that very person -denial of registering into school to children or employment for the spouse or common-law spouse or partner, denial of medical care for family members, exclusion from social environment, public humiliation and the like. The same refers to a person who is in particularly close relationship with infected or ill-girlfriend or boyfriend or mate, friend and the like.

7.1.2.4. Discrimination is performed on the grounds of personal characteristics of a person or a group

Discrimination is a distinction between persons or groups which is based on their personal characteristics. Discrimination occurs when one person is put in unfavorable position only because of his/her personal characteristics - because of having or not certain skin color or ethnicity or religious belief or sex and the like. For unequal treatment to be considered discrimination, it is therefore necessary to abstract a person from his/her entire personality in all his/her aspects (identity, character traits, habits, etc..), reducing it to just one of his/her personal characteristics – that he/she is Jewish or disabled or homosexual, etc.

In this context, the answers to three questions essentially determine the possibility of egal protection from discrimination. First, regarding to which personal characteristics of a person discrimination is prohibited, and second, how to define certain personal characteristics and third, whether the personal characteristics really exists.

The list of personal characteristics

The generally accepted rule is that discrimination is prohibited with regards to all the personal characteristics, or regarding to any personal characteristic of one person. The lists of personal characteristics that are encountered in numerous legal documents (international conventions, constitutions, laws, court decisions, etc.), should not be locked, i.e. reduced to specific and enumerated personal characteristic. So, these lists are informative, they only refer to the examples of personal characteristics, and explicitly prohibit discrimination on the grounds of personal characteristic thatis not mentioned in the list.

Defining personal characteristics

Usually it is not necessary to define more closely one personal characteristic. Personal characteristics such as nationality, ethnicity, religious and political orientation, marital status, age and the like does not require a particular definition - it is completely clear what these terms refer to. However, there are personal characteristics that should be defined in order to avoid confusion regarding their meaning.

Example:
What is sexual orientation? According to the sexual orientation people are usually divided into heterosexual and homosexual. However, already known acronym «LGBT population «refers to a larger definition that distinguishes lesbians (Lesbian) gays (Gay), bisexual (Bisexual) and transsexuals (Transsexual).

Real or assumed personal characteristic

Personal characteristics of the victims of discrimination usually really exists, it is real characteristic of that person. However, a person may be exposed to discriminatory treatment and in the case that his personal characteristic is only assumed or although it really does not exist or there is no certainty regarding to its existence.

Example: though she is not a lesbian herself, an activist of an NGO fighting discrimination against the LGBT population, suffers discriminatory treatment by neighbors openly insulting her and messages of discriminatory content written on the facade of her house, on the basis of her assumed sexual orientation.

7.1.2.5. Discrimination means unallowed differentiation, or prohibited unequal treatment

Not every distinction between people regarding their personal characteristics is unallowed discrimination.
Compare the two examples:

- If you go to a restaurant and you are required to declare whether you are a smoker or not, or to opt for a smoking or non-smoking area in the restaurant, you are going to perceive favorably on this choice options (especially if you are non-smoker!). If you would like then to go to the toilet, you are not going to

think a lot in which of the two you are going to enter - male or female, and by doing it so, you are going to accept this options as natural, normal and even desirable;

- If you are Roma, and at the entrance to the restaurant they say to you that Roma are not allowed to enter, you are going to have a strong sense of humiliation and you are going to consider that it is about unjustifiable discrimination. The same feeling you are going to have if they let you in the restaurant, but ask you to sit down in the restaurant area reserved for Rome. In this other case it is understood that you are going to be offered a special toilet reserved only for those who are Roma ethnicity.

These two examples point to the one of the most difficult issues in the field of discrimination - to the question of the permissibility of unequal treatment, or about when it will be considered that creating differences among individuals regarding their personal characteristics is not discrimination. Sometimes the answer to these questions will be easy, just as in the two examples above. However, sometimes the answer to a question about the permissibility of different treatment is going to require the use of special legal rules or the application of very complex legal methods of weighing out the interests.

Legally-methodologically speaking, the answer to the question on the permissibility of different treatment may be contained or in the general rule, or "test" how it is often called, or in a series of special rules.

The general test

As a general rule developed in the jurisprudence of the European Court of Human Rights in applying the European Convention on Human Rights, the different treatment is unallowed, or in particular case, the discrimination is going to exist if, as first, the purpose or consequence of the taken measures are unjustified, and, as second, if there is no proportionality between the taken measures and the goals to be achieved by these measures. This rule, that is, test, is adopted by our legislator who incorporated it in the Law on Prohibition of Discrimination Act (Article 8).

Examples:

- According to this test, a restaurant owner in the example above acts allowed when treating differently smokers and non-smokers, because the goal of his

measures, and that is to protect non-smokers from inhaling tobacco smoke, is justified. In this case also there was no disparity between the measures taken and the goal, because the owner of the restaurant limited the rights of smokers only to the extent justified by the purpose that he wanted
to achieve- he was not prevented them from entering the restaurant, only separated them in a separate area of the restaurant in order to prevent so-called «Passive smoking» of non-smokers.

- If, however, the general test is applied to the case in which the restaurant owner unequal treatment is focused on Rome, it shows that there is no need to consider the issue of proportionality, because the goal itself, that is the circumstance of different treatment is unjustified, illegitimate and unfair. In other words, the prohibition of entry for Roma in a public facility such as a restaurant, or their isolation from the other guests, cannot be justified by anything and is therefore an unallowed unequal treatment or discrimination on the grounds of national origin.

Special Rules

Besides this general rule, or test, and the law knows the rules determining whether differential treatment is permissible or not in special cases. These rules are contained in the anti-discrimination laws, but also in other legal regulations.

Examples from special anti-discrimination rules:

- the unequal treatment in employment is allowedwhen an employee is required to possess particular personal characteristic to perform the job, if the purpose of employment is legitimate and the need for specific personal characteristic is justified, such as when an employee is required to have a university degree or they are seeking a Roma for the role in a commercial, or a young woman for the role of a mother in a play, etc.. (Article 16 of the Law on Prohibition of Discrimination);
- it is allowed to deny to a foreign citizen rights and freedoms deriving from the relation between nationality or citizenship, as it is the right to vote and to be elected for the central authorities, the right to have a passport, the right to a name change etc.. (Article 3, Law on the Prohibition of Discrimination);
- it is allowed to please the justified interests of the discriminated, or taking the «affirmative action measurements» by which one group of persons sharing certain personal characteristic is equalized with the position of other persons, for example, measurements providing adequate representation of women in public authorities, measures providing the employment of people with disabilities and the like. (Article 14 of the Law on Prohibition of Discrimination).

7.2. Indirect discrimination

Already in Article 21 of the Constitution the indirect discrimination is explicitly prohibited. Of course, the prohibition of indirect discrimination is also included in anti-discrimination regulations, and other legal texts containing anti-discrimination provisions.

7.2.1. The concept of indirect discrimination

Direct or indirect discrimination is primarily characterized by being hidden - one who discriminates does not want that his/her discriminatory treatment is visible. He/she is hiding behind the seemingly equal treatment, although his/her acting is entirely or primarily motivated by discriminatory intentions.

Examples: restaurant owner wants to avoid the employment of Roma and to achieve this goal of his requires from candidates for the position of waiter to have natural blonde hair and blue eyes, and the owner of a pressroom wants to avoid employment of a deaf-mute person and demands of the candidates for the position to show that they know to sing beautifully.

According to the Law on Prohibition of Discrimination, indirect discrimination exists if an individual or group because of his/her or their personal characteristics, is disadvantaged, by act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a legitimate goal and the means for achieving that goal are appropriate and necessary (Article 7). This rule is retrieved directly from the anti-discrimination directives of the European Union.

7.2.2. Elements of indirect discrimination

During the analysis of the concept of discrimination one of its most important features has already been highlighted - discrimination implies unequal treatment, that is, making distinction. In indirect discrimination occurs seemingly paradoxical prohibition of equal treatment and than it could cause confusion.

However, the European Court of Human Rights in Strasbourg in the case of *Thlimmenos against Greece* had the opportunity to point out very precisely that discrimination exists when *"States Parties without an objective and reasonable justification do not treat people differently who are in very different situations."* Thus,

indirect discrimination is illegal precisely because two persons or groups who have different personal characteristics are unjustly treated in the same way.

Therefore, indirect discrimination differs from direct only in this element of the term that refers to the existence of different treatment, while regarding to other elements of the concept, which are related to the consequences of treatment (disadvantage or privilege), to the form of treatment (act, action, omission), to addressees of the obligation to refrain from discrimination, to protected persons and to objective test of determination of justification of the goal and proportionality of treatment, has no difference from basic forms of discriminatory treatment.

Example: One of the typical examples of indirect discrimination has recently been noticeable in the legislation of Serbia and it concerns the issue of so-called "Legally invisible Roma." In fact, for a number of years in public the very noticeable problem is the failure of registration of those persons, mostly Roma, who can not meet the requirements, prescribed by Law on Parish Register relating to proving facts related to their birth, such as the time and place of birth, data on the parents and the like.

A number of NGOs submitted to the Constitutional Court of Serbia the initiative for evaluation the constitutionality of regulations of the Law on Parish Registers with explanation that this legal text indirectly discriminates legally-invisible Roma because it sets before them same requirements for registration in the birth register as and before other citizens, although it is well known that this group of people cannot fulfill these conditions because objectively is not possible to determine all the facts related to the birth of these persons which are required to be determined so their claim to registration could be positively resolved.

On this situation, and without waiting for the decision of the Constitutional Court reacted the legislator, in such way, that in August 2012, he/she adopted amendments of the Law on Extrajudicial Procedure allowing legally-invisible persons, in court proceedings, based on the mild criteria for determining the facts related to their birth, to provide for themselves the court decision, based on which they could still require registration in the birth register.

7.3. VIOLATION OF THE PRINCIPLE OF EQUALITY

General legal rule or a basic legal principle of modern law is that all individuals, regardless of their differences, have equal rights and obligations. «Everyone is equal before the law» - this is the phrase repeated every time when one wants to point out that the law applies equally to individuals regardless of their personal characteristics. However, not every discrimination is at the same time a violation of the principle of equal rights and obligations. In the given example, when the owner of the restaurant divides the room into two areas, one for guests of Roma nationality and another for everyone else, then he by its discriminatory treatment does not violate the principles of equal rights-in fact he actually discriminates Roma. However, the discriminatory treatment is often reflected precisely in the deprivation of rights of some, or in legal, or in general lawful privileging of others, on the basis of their personal characteristics.

According to the Law on Prohibition of Discrimination, violation of the principle of equal rights and obligations exists if to the discriminated person are unjustifiably denied his/her rights and freedoms or are imposed obligations which are not denied or imposed to other person or a group in the same or similar situation. (Article 8) Although the elements using which can be determined the existence of this type of discrimination are the same as when it is about a direct and indirect discrimination, which represent the two basic forms of discrimination, violation of the principle of equal rights and freedoms in practice has a very complex structure that can be considered from two standpoints.

From the standpoint of law, discriminatory treatment can have three aspects:

- Legal or legitimate privilege exists when an individual orgroup that shares the same personal characteristic is provided with a right that others do not have,such as the right to organize religious classes in public schools is providedfor members of certain, and not all religious communities;
- Deprivation of rights exists when to a person or group is denied the right that others have, such as to a child infected with HIV is denied the right to register in the school, or the right to attend classes;
- Restriction of rights exists when to a person or group are partially denied rights that others are fully entitled to, for example, when to women are set lower wages than those received by men for work of the same kind in the same working place. From the standpoint of obligations, it is also possible to notice the difference between three forms of discrimination:
- Imposition of an obligation that the others do not have, for example, a soldier of the Roma nationality commander ordered to clean the toilet instead of all the others until the end of the military service;

• Imposition of unequal obligations, such as a museum headmaster sets higher ticket prices for foreigners;
• Imposing equal obligations in favor of one side, for example government by regulation imposes obligation to purchase additional stamps for all shipments in postal traffic, and defines that the entire realized income is going to thefavor of one religious community.

7.4.
CALLING ON RESPONSIBILITY AS A FORM OF DISCRIMINATION

Calling on responsibility, or victimization, as it is also called, is a form of discrimination implying that the one who seeks legal protection from discrimination, or the one who is willing to help to the other who is victimized to protect his rights, is put in the position of the victim, or in the position where suffers unequal treatment. Victimization therefore, has two forms, one that is focused on the initial victim of discrimination and the other that is directed to other persons. Victimization focused to the victim of discrimination exists is in the case when a person who has already suffered discriminatory treatment, is placed in an unequal position because he/she seeks or intends to seek legal protection from discrimination. For example, a disabled person who has suffered humiliation by colleague, seeks legal protection from the employer, and the employer, instead providing legal protection to the victimized, transfers the disabled person to an other, lower position, without providing working conditions suitable for the nature of his/her disability, or with defining lower wages.

Victimization directed to another person exists if there is a person who did not suffered discriminatory treatment him/herself, is willing to help or assist another person to obtain legal protection from discrimination. For example, a person who is willing to testify against the hooligans who physically abused Roma children or has already testified in favor of the victims, and subjected him/herself to threats or physical abuse by bullies.

According to the Law on Prohibition of Discrimination, victimization exists if the discriminated person is unjustifiably treated worse than someone else would be treated, entirely or mainly because the discriminated person sought, or intends to seek legal protection from discrimination or because he/she offered or intends to offer evidence on discriminatory treatment (Article 9).

7.5.
CONSPIRACY TO COMMIT DISCRIMINATION

The general rule is that behind the human rights and freedoms, in this case freedom of association, can not be sheltered those who violate the rights and freedoms of others. So, conspiracy to commit discrimination, leading to it, or propagation of discrimination can not be considered, as a matter of law, as manifestation of freedom of association, but only as a prohibited form of discriminatory treatment.

According to the Law on Prohibition of Discrimination, it is forbidden to «associate in order to commit discrimination, or activities of organizations or groups that are aimed at violating by the constitution, rules of international law and the law guaranteed freedoms and rights, or provoking of national, racial, religious or other hatred, discord or intolerance «(Article 10).

In developed democracies, mechanisms of protection of human rights and freedoms usually mean prohibiting the work of Nazi, Fascist and Communist political parties and other associations formed with the aim to perform or promote racial, religious and other discrimination. Procedures for determining criminal responsibility are often initiated against members of these prohibited associations . In this regard, Article 25, paragraph 2 of the Law on Prohibition of Discrimination, explicitly states that are not considered as discrimination «limitations necessary to prevent advocacy and pursuing fascist, Nazi and racist activities «.

In our country, the activities of these associations seem to be expanding, starting with those who advocate racial discrimination and that are characterized as an «Aryan» or Nazi or fascist, and some of which are so- called «Skinheads» and «National Front», and they only one of many groups, through those associations pleading for religious discrimination and rise against minority religions and ethnic minorities, to organized groups of football fans whose anger often turns against homosexuals, liberal and democratic minded political opponents, religious and other objects of minority religious communities communities, Roma and people with disabilities.

Example: In September 2008, members of the organization «Cheek», waited for and attacked the participants in the Queer Belgrade Festival, after leaving the premises of Rex Cultural Centre where the festival took place. On this occasion, four persons were beaten on the basis of their assumed sexual orientation. It is well known what kind of organized violence were faced the Pride Parade participants in 2010, as well as officers who were guarding this meeting, and with what kind of organized threat of violence have been faced the Pride Parade organizers 2009, 2011 and 2012.

In relation to this form of discrimination, it is important to point out the decision of the Constitutional Court of Serbia of June 2, 2011, in which the Court, among other things, found that the actions of the «National Front» organization is prohibited because it is an organization that aims to spread ethnic and religious hate or discriminatory treatment.

7.6. HATE SPEECH

The European Court of Human Rights in Strasbourg has on many occasions repeated that "hate speech" is not legally permissible manifestation of freedom of expression and that those who utter "hate speech" cannot hide behind Article 10 of the European Convention on Human Rights. Similarly to conspiracy to commit discrimination, this is about whether it is necessary to prohibit public speech that promotes discrimination, hate or violence towards those who share certain personal characteristics, that is, speech that incite others to perform discriminatory acts.

Hate speech is in practice identified through three individual aspects of discriminatory treatment:

Public expression of discriminatory attitudes, such as writing graffiti or highlighting messages ("Gypsies get out of Serbia!", "Knife, Wire, (it's a, it's a) Srebrenica "and others), or a symbol of discriminatory content (including
the most represented Nazi swastika), on the facades of buildings, memorials, mostly of members of the Jewish community, and at public meetings, sports events and other manifestations. According to the Law on Prohibition of Discrimination it is forbidden to write and display in public areas and other ways of spreading messages and symbols that call for discriminatory treatment of other persons (Article 11)

> LGBT people are often targets of hate speech in public meetings. Especially disturbing are the cases in which hate speech against sexual minorities is used by government representatives. During the debate on the adoption of the Law on Prohibition of Discrimination, we had the opportunity to hear a large number of offensive and discriminatory statements against LGBT people, and just from the very rostrum of the National Assembly of the Republic of Serbia;

Hate speech in the media, which gives a motive to a person or group against which hate speech is directed to demand from court the prohibition of repeating the publishing of the information. A classic examples of this form of discrimination would include the publication of opinions that "Gypsy stink" or Roma are beings with the lower IQ because the circumference of their head is narrower than in other people, that all Roma should be expelled from the country and the like.

According to the Law on Public Information, "the publication of ideas, information and opinions that incite discrimination, hatred or violence against individuals or groups because of their belonging or not belonging to a particular race, religion, nationality, ethnicity, gender or sexual orientation is prohibited" (Article 38).

At first sight it is clear from these legal regulation that the hate speech is prohibited if directed against persons or groups who share an explicitly enumerated personal characteristics, but not if it is directed against those who share some different personal characteristic. The main reason that motivated the legislator to shorten the list of personal characteristics in relation to the protection of hate speech, is the need to establish balance between press freedom and individual rights that might be violated by publishing the information. However, according to the Law on Prohibition of Discrimination, as well as to changes on Criminal Code of Serbia in September 2009, the protection of hate speech is extended on all individuals or groups who share any personal characteristic, not just the one explicitly stated in the Law on Public Information;

The qualified form of hate speech, that gives motive to the Public Prosecutor to require from the court to prohibit the distribution of information that is not yet published in the public media. According to the Law on Public Information, the court shall prohibit the distribution of information if it considers it necessary in a democratic society to prevent "incitement to direct violence or advocacy of national, racial or religious hatred that represents incitement to discrimination, hostility or violence " (Article 17) Behind this seemingly complex legal regulation, a very clear idea is hidden: it is prohibited to publish information that incites to acts of direct discrimination, hatred or violence against a person or group that shares of any personal characteristic. So, first of all, this is not about classic hate speech, for example, on expressing the opinion that all Roma should be expelled from the country, but rather on something which is far more dangerous-public media editor decided to publish such information in which readers are invited to participate in a violent burning of Roma settlement, with the precise determination of the location and time of the meeting, or threatening risk of publishing information which calls on the destruction of gravestones of the Jewish community, or the information calls on crashing the window of pastry shop owned by ethnic Albanians, or calls on the violent prevention of regularly registered meeting of homosexuals and the like. In each of these cases, the legitimate aim of the legal system is toprevent the release of such information. On the other hand, for the legal system it does not matter against whom the incitement to violence, hatred and discrimination is directed, and so, a list of personal characteristics is not limited by the Law on Public Information. So regardless of which personal characteristic is shared by individuals against whom the information is directed, whether these are Roma or members of other national minority or religious organization, homosexuals, people with disabilities or others, the legal system can protect these individuals and groups by prohibiting the distribution of this information.

7.7. HARASSMENT AND DEGRADING TREATMENT

Offensive behavior, degrading or harassing others, primarily represents a flagrant violation of human dignity. Probably nothing is so easy to hurt the dignity of man as inhuman behavior. Regardless it is accompanied by other forms of discrimination, humiliation and harassment of a person because of his/her personal characteristic is, by itself, unlawful discriminatory conduct.

There are two basic aspects of this form of discrimination:
Verbal humiliation and harassment exists where one person is discriminatory conducted against, by using words either in writing or speaking, for example, when to Roma is said, "Get away from me, I do not talk to the Gypsies", or when persons with disabilities are addressed in a derogatory way of speaking, with the words "retard", "blind man" "limping" and the like;

Humiliation and harassment by gestures and actions exists when one person is discriminatory conducted against by gestures, such as lolling out, closing the nose, showing the middle finger and the like., or performing other actions such as spitting, pushing off, pulling the ears, taking away crutches or a stick, frightening guide-dogs and the like.

This particular form of discrimination is dealt with in the Law on Prevention of Discrimination Against People with Disabilities. Art. 6, para. 4 of this Law states that discrimination exists when "the discriminated person is clearly being humiliated, entirely or mainly because of his/her disability." In social life, the persons with disabilities are often faced with degrading treatment of environment. Degrading and humiliation pervades deeply the everyday life of these people, even to the extent that it might be concluded that it is specific aspect of their lives tradition. Thus, it is common addressing and even naming of persons with disabilities according the nature of his/her disability or medical diagnosis.

According to the Law on Prohibition of Discrimination, this form of discrimination will exist in the case of harassment or degrading treatment, which is aimed at, or represents the violation of, the dignity of a person or group, especially if it creates fear, or hostile, humiliating or offensive environment (Article 12).

A special case of degrading conduct is sexual harassment, primarily of females. To sexual harassment occurs particularly often in situations where there is a dominance relation to the victim, such as the relationship between employer and employee, or the professor and the student and the like. Sexist behavior, as this case is also called, includes on the one hand verbal assault on the victim,

such as calling out or sending messages using obscene words and phrases, inviting to sexual intercourse, indecent "courtship" and the like., on the other hand, verbal attacks violating the physical integrity of the victim, such as pinching, petting, peeping under the skirt, slapping the buttocks and the like.

7.8. SEVERE FORMS OF DISCRIMINATION

Among the many forms of discrimination cases, the legislator selects those that are, from the perspective of the legal system of the country, shown as a particular serious violation of the principle of human equality. The purpose of this singling out is primarily to signify, qualify those illegal acts that are considered particularly dangerous to the community. On the other hand, the qualification of unauthorized treatment immediately directs everyone, especially the courts and other authorities which task is the protection of human rights, to stricter legal reaction as a result of unlawful behavior.

So, whether it is a civil law, criminal law or other legal protection from discrimination, the state agency is directed
to more severe sanctions of such forms of discrimination that legislator qualified as extremely serious. In the Law on Prohibition of Discrimination (Article 13), as particularly severe forms of discrimination are identified:

- Incitement and encouragement of inequality, hatred and intolerance on the grounds of national, racial or religious affiliation, language, political opinion, sex, gender identity, sexual orientation or disability;
- Advocating or performing discrimination by public authorities and in proceedings before public authorities;
- Advocating discrimination through public media as a qualified form of hate speech;
- Slavery, human trafficking, apartheid, genocide, ethnic cleansing and their promotion as particularly serious crimes that are conducted against individuals and groups that share certain personal characteristics;
- Discrimination of individuals on the grounds of two or more personal characteristics, which is called multiple or crossed discrimination;
- Discrimination conducted against the same person or group several times, which is called a repeated discrimination, and also a discrimination conducted against the same person or group during a longer period, which is called extended discrimination;
- Discrimination that leads to serious consequences for the discriminated person or group, other persons or property, especially if it is about a criminal act in which entire or exclusive motive for the commission of an offense was hatred or hostility towards the victim, which is based on his/her personal characteristic.

Similarly, the Law on Prevention of Discrimination against Persons with Disabilities (Article 9), determined in a general way that is specifically prohibited and punishable:

- Provocation and incitement to inequality or hostility toward persons with disabilities, and
- Advocating or intentional discriminating by Public authorities in the proceedings before that authority, through the public media, the political life, in public service, in employment, education, culture, sports, etc

Among all these severe forms of discrimination, it is easy to identify those forms of discrimination that have so far been sanctioned and within the legal system of the country, as it is the case with the spread of racial, religious and other hatred and intolerance, discrimination before state authorities, serious crimes committed in the time of war and warfare, hate speech and the like. However, a special attention should be paid to those severe forms of discrimination that could be considered a novelty in our legal system. So, first of all, multiple or crossed discrimination is very present in the life of some groups of people, such as Roma belonging to the LGBT community, as well as women, children and the elderly with disabilities.

Repeated or extended discrimination, on the other hand, often characterizes those situations in life where there is a permanent and in advance defined relation between the perpetrator and the victim of discrimination, as is the case with employment, relations in the sphere of education, marital and family relations and so on.

Finally, the severe form of discrimination are also those criminal offenses perpetrated out of hatred for the victim and because he/she has a certain personal characteristic. Famous examples of beatings and even killings of people of Roma nationality by skinheads and of young men and women for whom the attackers assumed to belong to the LGBT community. Besides, this form of discrimination that leaves a heavy consequences on the discriminated persons, could also lead to serious consequences to other persons or their property, as it was the case when the Pride Parade was organized in 2010, or when the mosques in Belgrade and Niš were burned.

8

Practical Aplication of the objective justification Test*

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In examining whether an unequal treatment is objectively justified, the test is applied which the European Court developed in its practice, and which is accepted by our legislator (Article 7 and 8 of the Law on Prohibition of Discrimination). By applying this test is evaluated whether there is an objective and reasonable justification for unequal treatment: is the purpose of unequal treatment lawful and legitimate and whether there is proportionality between the measures taken and the goal to be achieved by them.

The application of this test will be shown in a few examples.
In the case of the verdict of the European Court of Human Rights *Thlimmenos v. Greece* (Application No. 34369/97), the court was deciding on the case of indirect discrimination.[1]

Mr. Thlimmenos, in 1983, because of his religion (Jehovah's Witnesses member) at the time of general mobilization declined to wear the military uniform and was sentenced to four years in prison, but after two years and one day he was released on parole. June 1988, the took a public exam for the appointment of nine certified accountants, as in Greece is a free-lance profession. Among the 60 candidates, he passed as second according the results. However, on February 8, 1989, the Executive Board of the Greek Institute of Certified Accountant refused to appoint him as certified accountant referring to his previous conviction of a serious crime. The Supreme Administrative Court of Greece confirmed that decision and dismissed the revision.

The verdict reached by the European Court of Human Rights firstly stated that discrimination exists even when the state-treaties, without an objective and reasonable justification, do not treat people differently who are in very different situations. Then the European Court engaged in a test of whether the fact that the applicant was not treated differently from other persons, previously convicted of a serious crimes, has a legitimate purpose, and then examined whether there was a necessary proportionality between the engaged means and the goal to be achieved.

The Court took the stand that the States Parties, in principle, have a legitimate interest to exclude some of the offenders from profession of certified accountants. The court, however, considered that, unlike other convictions for serious crimes, the verdict reached on the basis of a person's refusal on religious or philosophi-

1 Available on the website accessed on 13/09/2012.

cal grounds to wear the uniform cannot imply dishonesty or moral depravity, which would, probably, undermine the ability of offender to be engaged in that profession. Therefore, it is not justified that the applicant was disabled to employ on the basis of ineligibility.

The Court considered the Government's claim that persons who refuse to serve their country must be appropriately punished. However, the Court noted that the applicant had served a prison sentence because he refused to wear the military uniform and that, in such circumstances, by the Court's opinion, introduction of new sanctions for the applicant is disproportionate. It follows that the applicant's exclusion from the profession of certified accountant is not an expression of aiming to the legitimate goal. As a result, the Court concluded that there was no objective or reasonable justification for the applicant not to be treated differently from other persons who had been convicted of serious criminal offenses.

A good example to illustrate the general test is the case no. 297/2011 of 24.02.2012,[2] in which the Commissioner for Protection of Equality acted.

The complainant is Mrs. M. Đ., a citizen of Germany since 2007, who until 2007,had had the nationality of the Republic of Serbia, where she attended primary and high school and the Faculty of Law. She changed her sex from male to female at the end of 2010, which is noted in the decision of the Municipal Court in Frankenthal no. ... ... of January 21, 2011. The decision of the German court is recognized in the Republic of Serbia, by the decision of the High Court in Belgrade (...) of July 29, 2011. Based on this decision, the competent authority of the Municipality of Savski Venac issued to M. Đ. a new birth certificate, which contains new data on personal identity. The Elementary School "V. K. " in B. and "P. B." High School had carried out the required "correction" and published "corrected diplomas" with the new name of the complainant.

The complainant submitted, through his attorney, on October 6, 2011, to the Faculty of Law, " the request for the rectification of the acquired diploma on higher education ", issued on March 21, 1997, under no. ... ... on behalf of M. Đ., asking to, because of her sex change from male to female and her new name, make corrections of diploma, and issue a new one on the name M. Đ. On November 8, 2011, the complainant's attorney submitted the conclusion on rejection of that request, against which he on November 23, 2011 submitted the appeal to

2 Available on the website http://www.ravnopravnost.gov.rs/lat/polRod.php?idKat=18, accessed on 07/25/2012

the Council of the Faculty of Law, which rejected the appeal with the decision of December 28, 2011. In the explanation of the Council of the Faculty of Law it was stated that a diploma is a public document and, and as any other public document, not a legal act. That is why a diploma is not subject to "correction" since the term "correction" means the correction of technical errors in legal documents.

In the complaint on discrimination the complainant claimed that the Faculty of Law by "non-issuance of certificate with a new name" discriminated her on the ground of gender identity.

In its statement in response to the complaint the Faculty of Law sated, referring to Article 99, Paragraph 1 of the Law on Higher Education, which regulates the issuance of diplomas and other official documents, in Article 101 , Paragraph 1 of the Law on Higher Education which regulates declaring diplomas as invalid, and article 161, para. 1 and 2 of the Law on Administrative Procedure, which regulates the issuance of certificates and other documents, as well as to advice and practice of the University of Belgrade, that to M. Đ. is issued a valid certificate and that the subsequent change of name or surname is not a basis for correction of a public document. Besides, in the explanation it was stated that among the students of the Faculty of Law there is 63% of female population, who upon graduation are issued a diploma on the basis of the data from official records, and that they, after getting married and after changing their surnames, when being hired for job submit a diploma issued in the name and surname which they had at the time of studying and they prove their identity by another public document. (excerpt from the marriage registry), not by "issuing new public document on higher education."

The Commissioner in her opinion stated that regulations of the Republic of Serbia do not particularly regulate the way in which faculties should act in cases where a person, who after graduation changed gender and name, wishes to obtain a new certificate issued to the new name. However, in view of the content of the request, the motive and the reason for submitting it, the interest that is aimed to be achieved, and especially the fact that regulations on the actions of faculties in these cases are deficient, it is obvious that, despite the wrong formulation, the complainant's request for correction of diploma, which instead of the name M. Đ., is going to be registered to the name M. Đ., fundamentally speaking, represents a requirement for the issuance of a new diploma because that is what she was looking for, and requesting, along with the above, to "deliver the corrected diploma in a cardboard case."

Therefore there was no reason to consider the complainant's request in light of fulfillment of the requirements for the declaring of a public document as invalid (Article 101 of the Law on Higher Education), as it has been done. After analysis of all the facts, evidence and statements of the Faculty of Law, the Commissioner took the stand that in this case indirect discrimination was committed.

According to Article 7 of the Law on Prohibition of Discrimination indirect discrimination occurs if a person or group of persons because of his/her or their personal characteristic, are placed in unfavorable position by act, action or omission which is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a legitimate aim and the means for achieving that aim are appropriate and necessary. Indirect discrimination occurs not only when people, who are in the same or similar circumstances, without an objective and reasonable justification, are treated differently, based on their personal characteristics, *but also when the persons who are in very different situations are not treated differently, except if for that there is objective and reasonable justification* (italics added).

To investigate whether the M. Đ. was indirectly discriminated by being denied her request to "correct" the diploma and to issue new diploma that would be on her new name, the Commissioner first considered whether M.Đ., as a person who changed sex, is in substantially different situation compared to other persons with whom it is not the case. The Commissioner took the stand "that the position of the complainant, as well as all others persons in her situation, is significantly different compared to all other persons. Specifically, *persons who have a legitimate sex-change have justified interest to use public documents in legal operations, including certificates on acquired education, in their own new name, in line with their new sexual identity, because this ensures that the sex change is fully integrated into their personal and professional life* "(italics added). The explanation of the opinion is highlighted "the name itself regularly carries the gender characteristic, so that the discrepancy in name indicated in the diploma and in a public document which proves in the legal operations the identity could objectively lead to violations of the right to privacy and discrimination in all those situations in which a person submits a certificate as a proof of his/her education, such as employment, continuing education etc.. It is concluded that "it is *unacceptable for the situation in which there are people who have changed their gender is identified with the situation of persons who have changed their name by marriage*" (italics added).

Looking at all the facts, the Commissioner took the stand that "the complainant is indirectly discriminated because at her request the Faculty of Law made a decision it always makes whenever the party seeks a "correction" of certificates and issuing new ones with new data on their identity, without considering a specific situation in which she and all other persons who have changed the name because of gender change are. "

In the explanation of the opinion it is stated: "The key issue in this case was *whether the equal treatment of person who is in substantially different position regarding the persons who changed their name for other reasons, and not because of gender change, is permitted*." (italics added). Specifically, according to Article 7 of the Law on Prohibition of Discrimination, this form of discrimination *would not exist if the equal treatment 1) is justified by a legitimate aim, and 2) if the means of achieving this goal were appropriate and necessary* (italics added). In the statement of the Faculty of Law in Belgrade was not explicitly stated which is that legitimate goal to be achieved by the rejection of the complainant's request. However, the Commissioner has concluded that it "could be concluded that *the goal of this conduct was a respect for legal rules which do not provide the possibility of "corrections" and issuing new certificates so that it is on the new name of the person acquired after receiving diploma. It can therefore be concluded that the goal was legitimate and non-discriminatory* "(italics added). Then was investigated the appropriateness and necessity of the means that were used for achieving a goal. It was stated that "the law does not prohibit the issuance of a new certificate. The issuance of new certificates is regulated by Art. 102 of the Law on High Education which prescribes that the institution for high education issues the new public document after the declaration of an original public document as invalid in the "Official Gazette of the Republic of Serbia ", on the basis of the maintained records. According to paragraph 2 of the article, a new public document has significance of original public document, on which, as anticipated in paragraph 3 of this article, is put a note that it is a new public document that was issued after the declaration of the original public document as invalid. "

The Commissioner, in this regard, considered "whether, after declaring the diploma as invalid new certificates may be issued on the new name or it must be on the name that person had at the time of graduation," and noted that the law does not provide explicit answer to this question. "In the first paragraph of Article 102 is prescribed that the new diplomas is issued "on the basis of the records maintained by the high education institution" According to Art. 9 of the Rule book on the content and the manner of keeping records which keeps the

institution ("RS Official Gazette", no. 21/06), records on issued degrees, diplomas and additions to diplomas, among other things, contains a last name, middle initial, and a name of the student. She took the stand that "*these provisions do not exclude the possibility that to the person who, after graduating has changed the name because of gender change, is issued a new certificate on the new name* (italics added), noting that "the purpose of these regulations isto exclude any possibility of issuing certificates to the person who has not graduated, as *to prevent possible frauds. This possibility, however, is completely excluded if in the procedure for issuing new certificates person submits a valid public document proves the change of its name and certifies that this is the same person to whom, according to data from the register of issued certificates, diploma was issued* (italics added)." Additionally she pointed out that "Art. 154 of the Law on General Administrative Procedure prescribes that documents issued in a prescribed form by a public authority within its jurisdiction, enterprise or other organization within the legally entrusted-public authority (a public document) prove what is confirmed or determined by them, as well as the Art. 156 of the same law prescribes that if the in charged authority has already determined some of the facts and circumstances or they were proved in a public document (ID card, birth certificate, etc.), the authority which runs the procedure will take those facts and circumstances as determined."

Perceiving all the circumstances of the case, Commissioner for Protection of Equality expressed the opinion that "*the equal treatment of people who have changed their name because of gender change, and people who have changed their name because of other reasons is not allowed, for although the Faculty of Law had reasonable and legitimate purpose, the means for achieving that goal were neither appropriate nor necessary, that is, there was no proportion between actions taken and results*, (italics added), and in this case the Faculty of Law committed an act of indirect discrimination of M. Đ. ".

How the test is applied in cases of violation of the principle of equal rights and obligations (Article 8 of the Law on Prohibition of Discrimination), is going to be presented on one more example from practices of the Commissioner for Protection of Equality (Opinion No. 905/2011 of 08.05.2011.).[3]

Association "A" from B submitted a complaint on April 28, 2011 against the Belgrade City Assembly, stating that the provision of Article 1 of Decision on Amendments to Decisions on the Rights in Social Protection of Belgrade (further: Deci-

3 available on the website http://www.ravnopravnost.gov.rs/lat/polRod.php?idKat=18, accessed on 13/07/2012.

sion), which prescribes that the right to a permanent income support is given to "a woman who is subjected to family violence, after leaving the Safe House," is discrimination against women who are victims of violence regarding the type of services they use, that is, it represents the conditioning of the use of a particular type of service (Safe House) in order to be entitled to financial support. It was also stated that the regulation of Article 2 of the Decision, which prescribes that "the applicant is not a returnee to the safe house in the moment of putting into effect of the decision" is discriminatory, since the phenomenon of family violence recognizes the occurrence of multiple leavings and returns to the violator. The complaint pointed out that the stated decision (Articles 1 and 2) is contrary to the Law on Prohibition of Discrimination, Law on Gender Equality and the Law on Social Protection. Imposing the requests that a woman victim of violence uses a service of a "safe house" is discrimination against women who are in the same, similar or worse situation of violence and financial vulnerability, and who could not have decided to use this service or were not placed there due to limited capacity.

The Commissioner for Protection of Equality requested from the Belgrade City Assembly a statement on the merits of the complaint and a statement about the reasons for limiting the use of this right only to women who are beneficiaries of the Safe House and who are not returnees.

The Belgrade City Assembly has not submitted the statement to the complaint within the set deadline. Having in mind that not even in the Decision does an explanation exist from which the purpose of enacting the measures could be determined, the Commissioner for Protection of Equality while deciding on this case analyzed the documents that were submitted with the complaint (Decision of the Belgrade City Assembly and the Protocol on Cooperation between the Department for Social Care and Counseling office to fight family violence), as well as the relevant provisions of international and national legislation in the sphere of protection from discrimination and violence. It was noted the following:

Art. 2 of the Decision on Amendments to the Decision on the Rights of the Social Protection of Belgrade prescribes that the right to a permanent income support is achieved by women who are subjected to violence in the family, from the day they leave the safe house, and the longest period is 12 months, as follows: a) for a woman with no children - in the monthly amount of 11,000.00 dinars, b) for a woman with one child - in the monthly amount of 16,000.00 dinars, v) for a woman with two children - in the monthly amount of 21,000.00 dinars, g) for women with three or more children - in the monthly amount of 26,000.00 dinars. This

right of women subjected to the family violence after leaving the safe house, is realized under the following conditions:

a) that before applying for the recognition of the rights to permanent financial support, as a victim of family violence is in the records of the City Center for Social Work of Belgrade

b) that the applicant has a regulated residence in the city of Belgrade, for at least 12 months before entering the safe house,

c) the total regular monthly income of the applicant do not to exceed 20,000.00 dinars

g) that has not a property in ownership on which basis could generate income and

d) that the applicant is not a returnee to the safe house at the time of putting into effect the decisions.

The regulation of Article 8 of the Law on Prohibition of Discrimination is prescribed that a violation of this principle occurs if a person or group of persons because of his/her or their personal characteristic, unjustly deprive the rights and liberties, or impose obligations which in the same or a similar situation are not denied or imposed to another person or group of persons, if the purpose or consequence of the measures taken are unjustified, and if there is no proportionality between the measures taken and the goals to be achieved by these measures.

The Commissioner by a decision analysis, in terms of the Law on Prohibition of Discrimination and other relevant regulations, determined "that, regarding the conditions for achieving the right to a permanent income support, obviously are placed in an unequal position:

• *the women subjected to family violence and did not use the services of the safe house, compared to those who are beneficiaries of this type of service,*

• *the women subjected to family violence and who are returnees ia safe house, compared to women subjected to the family violence and not being returnees in a safe house* (italics added). To examine whether the Decision violated the Principle of equal rights and obligations, the Commissioner has considered:

• whether the goal achieved by this measure is allowed and justified,

• whether the goal or goals could only be achieved by the prescribed measure, that is, is there proportionality between the measures taken and the goals to be achieved by this measure,

• whether there is an objective and reasonable justification to deny rights anticipated by this decision to certain categories of women subjected to family violence.

In the explanation of the opinion the Commissioner noted that "it is certain that the *Belgrade City Assembly is authorized to make decisions increasing social security of its citizens. Accordingly, it has the right to grant resources from the city budget for social protection for vulnerable citizens, to establish rules for the distribution of these funds and to distribute them according to the regulations*.(italics added) That right is not in any way disputable. Furthermore, the willingness to focus the part of available funds on material support and assistance to women subjected to family violence is a positive example of care and support to women suffered domestic violence. This is especially important if having in mind that statistics show that from year to year the number of reported family violence cases increases, and the fact that the Republic of Serbia is obliged to national and international acts to take all available measures to prevent violence against women in families and protect all victims of violence as much as possible. In this sense, measures the Belgrade City Assembly takes to contribute to the National Strategy for the Improvement of Women's Status and Promotion of Gender Equality ("Off. Gazette RS", 15/2009), specially the goal defined by para. 4.5. of this Strategy: Preventing and repressing violence against women and improving the protection of victims.

Perceiving the presented facts, Commissioner for Protection of Equality took the the stand that the aim of Decision is allowed and justified.

The Commissioner then analyzed whether the condition by which "the right to permanent financial help the woman subjected to the family violence realizes after leaving the safe house" (italics added), has an objective and reasonable justification and concluded it does not, stating in explanation the following:

RS Constitution guarantees the right to social protection to all who need social welfare to overcome social and existential problems, and the Law on Social Security,[4] among other things, prescribes that the beneficiary has the right *to free choice in services, and providers of social services. The requirement that the women who were subjected to family violence use the services of the Safe House, that is, they were staying in a safe house to be qualified for a permanent financial aid is not justified as by the Law on Social Protection is regulated the freedom of choosing services and providers of services. Besides, it should have in mind that environmental and other subjective and objective circumstances may be very different in each case of family violence against women* (italics added) Thus, in many cases women do not decide to use the services of accommodation in a safe house because they are able to provide security otherwise (accommodation at rela-

4 Article 36th of the Law on Social Protection ("Off. Gazette" no. 24/2011)

tives and friends). On the other hand, the safe houses have limited capacity and not every woman is able to use this service, even if she chooses. It should, also, keep in mind that women with disabilities often can not use this service because most of the safe houses are not architecturally accessible, which is an additional problem that this category of women's faces with. Besides, some women who have suffered family violence have no need for accommodation in a safe house because to the perpetrator of violence were imposed emergency security measures or other measures in accordance with the law, so that the risk of compromising security is eliminated (e.g. detention, temporary protection measures by Family Law, a measure security measures under the Criminal Code or the protective measures of the Law on Offenses).

The explanation states: "There is no doubt that certain number of women who suffered family violence in Belgrade addresses for the help and support to Counseling, but it is not, by all means, the total number of women who are victims of violence and who need material support in order to step out of the cycle of violence. *From the fact that women who suffered violence did not use the services of the safe house cannot be concluded that she has no need for financial assistance which is given for the economic empowerment of women to help them overcome life problems they face with and to start a life without violence* (italics added). Therefore, *having in mind the goal that financial support should achieve, there is no objective and reasonable justification for women who have suffered family violence, and that did not use the services of a safe house to be treated differently from women who used the services of safe house, since both categories of women are in a similar position* "(italics added).

The Commissioner took the stand that "*there is no objective and reasonable justification or requirement for obtaining financial aid that is reflected in the fact 'that the applicant is not a returnee to the safe house at the time of putting into effect of the decision'* "(italics added).

In the explanation is further stated: "By placing this requirement *is ignored the fact that the phenomenon of family violence is occurrence of tied multiple leaving and returning to the bully*, (italics added), which is not conditioned by the behavior and characteristics of the victim herself, but by the characteristics of the family and social context, including cultural, economic, and social factors. It is well known that, on average, women stay in safe houses for about seven months, and that many of them return to the perpetrator, and as the most common reason for returning they state economic dependence. It is confirmed by the data of

Counseling for the fight against family violence in Belgrade. On the other hand, it is certain that going out of the woman who suffered violence from a safe house does not mean that she will no longer be exposed to family violence because the important characteristic of this type of violence is also its cyclic expression. That is why when creating measures of support for women suffering family violence is necessary to properly understand the phenomenon of family violence, its causes and characteristics, and to reinforce women who want to step out from the cycle of violence, that they are given the *proper support*, (italics added), regardless the fact whether they are "returnees to the safe house" or not, or whether they have already tried to leave the abuser. Neither social services should be denied to them because they have repeatedly tried to get out of violence, and especially not the financial support which would enable them the economic independence. Under these circumstances, the denial of financial assistance to women who are "returnees in safe house "is not only discrimination, but also a kind of stigmatization of women who did not immediately managed to step out from the cycle of violence. This category of women, in fact, is imputed to blame themselves for the violence they suffer and it *is maintained one of the typical prejudice - that women exposed to family violence is always able to leave the abuser and the violence will stop then.* "(italics added).

Based on perceiving of all the facts and legal regulations, the Commissioner concluded that "*there was no objective and reasonable justification* for prescribing (italics added) conditions under which women, subjected to family violence and were not the beneficiaries of a safe house or were the returnees in a safe house, are put in unequal position compared to women subjected to family violence who were beneficiaries of a safe house and were not returnees in a safe house. It clearly shows that there was no proportionality between the measure taken and goals to be achieved by it. "

9

Discrimination Cases*

* *Kosana Becker, MA, Assistant of the Commissioner for Protection of Equality.

The concept of discrimination, as previously stated, is regulated and elaborated by the Law on Prohibition of Discrimination[1], in such way that includes all cases of discrimination, regardless of the grounds of discrimination and regardless of the sphere of social relations in which it occurs. However, having in mind that certain cases of discrimination are in practice widespread and that they affect a large number of citizens, and that there is a need to raise awareness of everyone the law applies to (citizens, public authorities, employers, etc.). By the Law on Prohibition of discrimination[2]are regulated some special cases of discrimination. Some of these cases are related to discrimination in certain areas, while other special cases of discrimination are related to personal characteristics of persons subjected to discrimination. Regulations regulating special cases of discrimination facilitate the elimination of discrimination because prescribe more detailed what behavior are prohibited, and allow the discrimination to be recognized more easily. It should have in mind that these are not the only special cases of discrimination because by other laws are also regulated some special cases of discrimination.[3]

1 "Official Gazette of the Republic of Serbia ", No. 22/09

2 Art. 15-27. ZZD

3 Eg. The Law on Prevention of Discrimination against Persons with Disabilities ("Official Gazette of RS ", no. 33/2006), the Law on Gender Equality ("Official Gazette of RS", no. 104/2009)

9.1.
DISCRIMINATION IN PROCEEDINGS BEFORE PUBLIC AUTHORITIES

Discrimination in proceedings before public authorities[4] exits when to a person or a group of persons is denied or made more difficult to achieve rights to equal access and equal protection of rights before the courts and public authorities, because of their real or assumed characteristic, and discriminatory acting of an official or a competent person within a public authority is considered as severe violation of duty.

The public authority, in the sense of Law on Prohibition of Discrimination, is the state authority, an autonomous province authority, local government authority, public enterprise, institution, public agencies and other organization entrusted to perform public authorization, or a legal entity who is established or financed entirely or mostly, by the Republic, the autonomous province or local government[5]. Therefore, the law is to the state itself, as well as to their agencies, organizations and officials, prohibited to act discriminatory and discrimination before public authorities determined as a severe form of discrimination.

Examples:

- Some courts and municipal government do not allow to people with disabilities, who for any reason are not able to sign, when verifying signatures use a seal with name and surname written in technical writing (facsimile) instead of a handwritten signature;
- The failure to provide an interpreter for people who have disabled hearing or failure to provide translators for people who do not understand the language in which the proceedings are conducted.

4 Art. 15 ZZD
5 Art. 2, para. 1, item 4 ZZD

9.2. DISCRIMINATION IN THE SPHERE OF WORK, DELINEATION OF DISCRIMINATION AND ABUSE AT WORK

Prohibition of discrimination in work is very widely defined[6] by prescribing that discrimination in the sphere of work is prohibited, that is, the violation of equal opportunities for employment or entitlement under the same conditions in all areas of work, such as the right to work, to free choice of employment, promotion, and to professional training and professional rehabilitation, equal payment for the work of equal value, to just and satisfactory working conditions, to rest, to education and joining the union and to protection against unemployment. This prohibition applies to all employers, regardless of whether it is a public, private or joint venture company, state or entrepreneur, all are obliged to respect the prohibition of discrimination.

The range of persons who are entitled to protection from discrimination is determined as more extended in relation to the Labor Law[7], by prescribing that to the protection of discrimination is entitled the employed person, the person who performs temporary and casual jobs or jobs on service contract or other agreement, the person on additional work, a person who performs a public function, a member of the army, the person looking for a job, a student and student on the practice, the person on the professional training and development without employment, volunteer, and any other person who participates in work on any grounds. So, the prohibition of discrimination does not apply only to those who are employed, but also to all working persons as well as to jobseekers.

Examples :

- Employers often publish ads for job that require a particular sex of the candidates (e.g. women needed to work in a newsstand), age (for example, seeking candidates between 25 and 35 years of age), pleasant appearance (and sometimes required the submission of photos), although it concerns the jobs which could be very well and professionally performed by people of both sexes, regardless of age, and certainly regardless of appearance;
- The employer requires the employees to stand all the time in the shop selling wardrobe, regardless of whether or not there are customers in the store. This discriminates most people with disabilities and older people or people who have certain health problems that can not stand a long time;
- The employer does not permit an employee who is not the member of majority

6 Article 16th, ZZD
7 "Official Gazette of RS", no. 24/2005, 61/2005 and 54/2009.

religion, to use a day off for his/her religious holidays, explaining that it is enough for the the employee not working when the Orthodox Easter and Christmas are celebrated;
• The chief of the department punishes union activists for the delay in fulfilling the job tasks, while others employees only warns for the same mistakes;
• The employer fires a pregnant woman on the grounds that he/she needs employees who will come to work;
• Impossibility to be promoted and/or transfer to lower positions of women who used the leave for child care.

Keeping in mind every peculiarity that exists in the sphere of work and employment, exceptionality of certain work processes and job's requirements, it is prescribed that it is not considered as discrimination if making distinction, exclusion or preference for a specific job characteristics where the person's personal characteristic is a real and crucial condition for job performance, if the purpose to be achieved is legitimate. Also, it is not considered as discrimination if taking measures of protection of certain categories of persons, such as women, pregnant women, women in labor, parents, minors, persons with disabilities and others.

In determining whether a distinction in the sphere of work and employment is discriminatory or not, it is necessary to examine whether certain personal property, in particular case, is a real and crucial requirement for performing a particular job, regarding nature and singularity of work, as if the purpose to be achieved is legitimate.

Example:

Health service facility has announced a job vacancy for the position of 'nurse / technician' and prescribed requirement that candidates can not be older than 35 years. In order to determine whether by prescribing this condition a discrimination is committed against persons older than 35 years, it is necessary to examine: a) whether in this case age to 35 years is a real and the crucial condition for performing this job, regarding nature and specificity of this work, and b) whether the purpose to be achieved is legitimate. Although the permissibility distinction is going to be examined in each case, it is important to point out that age rarely can be a real and crucial requirement of performing tasks of a certain job, so that prescription of age limits for employment, in most cases, represent an act of discrimination. Exceptions are rare: e.g. it could be set as a condition that the candidates should not be older than 30 years, if it comes to performing coeval education for youth. There are also tasks

for whose performing is necessary for candidates to have certain personal characteristics - models for a fashion show of male or female clothing, actors and actresses to perform specific roles, certain psycho-physical features for working at height and the like. However, it is important to test each time if the distinctions are allowed, keeping in mind stated law regulations, or it is about the unallowed discrimination which is often a reflection of deeply rooted stereotypes and prejudices that people of a particular gender, age or any other personal characteristic better perform certain operations (e.g. usually are required (female) maid, saleswomen, secretaries, and on the other hand, are generally required (male) drivers, couriers, chiefs etc..)

Discrimination in the work is very often identified with some other violations of labor rights and work-related, and most often is equated with mobbing, i.e., abuse at work[8]. Mobbing is a term we've taken from the English (mobbing - attack, swoop), and means any active or passive behavior towards an employee, or group of employees, by employer that is repeated and which aim is, or which is the violation of the dignity, reputation, personal and professional integrity, health, employee status; causing fear or creates a hostile, humiliating or offensive environment, making worse the working conditions or results by employee's isolation or by making him/her to quit the employment on his/her own initiative. From the definition of discrimination and abuse at work, we can conclude that these are two related, but different concepts. Abuse at work may represent discrimination only in situations when the behavior based on personal characteristics of the employee or group of employees, that is, discrimination in the sphere of work exists only if there is unequal treatment caused by personal characteristic of the employee or group of employees.

Example :

Also, are not uncommon situation at the workplace where there are certain problems and disputes between employees and their bosses. If the person who has the leadership position harasses and humiliates an employee just because he/she doesn't like that person, we have a case of abuse at work. However, if the in the same situation, the behavior of the boss toward employee is caused by the fact that the employee is a member of a national minority, not a member of the majority population, it is a case of discrimination.

8 The Law on the Prevention of Abuse at Work ("RS Official Gazette", no.36/2010)

9.3. DISCRIMINATION IN PROVIDING PUBLIC SERVICES AND USING THE FACILITIES AND AREAS AND IN THE SPHERE OF EDUCATION AND PROFESSIONAL TRAINING

Discrimination in providing public services[9] exists if a legal entity or individual, within its activity, or profession, based on personal characteristic of an individual or a group, refuse to provide services for the provision of services, demands fulfillment of the requirements that are not required from other persons or groups of persons, or if while providing services provides advantages without justification, to another person or group of persons.

Although the term "public service" could be referred to the services provided by certain public subjects (government, public companies, agencies and the like.) when interpreting this provision may be concluded that this is any service which within its activity or profession, is provided by an individual or legal entity, or state authorities.

Examples:

- Security at the entrance of the restaurant which is the part of the well-known chain restaurants prohibited the entrance to the Roma children;
- Local government provides special transportation for people with disabilities, having in mind that public transportation is not available. The right to use specialized transportation have persons with disabilities who live in area of the first city zone, is prescribed. To persons with disabilities who do not live in the first city zone is the added requirement for the use of the service, and that is a request to have at least three users in the same area, in order to organize specialized transport;
- Salesman in a store selling luxurious wardrobe refuse to serve a Roma woman, saying that she certainly does not have the money to buy any of the goods selling in the store.

Discrimination is prohibited referring the use of public facilities and public areas, by prescribing that everyone has the right to equal access to facilities in public use (the facilities where are the headquarters of the public authorities, facilities in education, health, social welfare, culture, sports, tourism, facilities are used to protect the environment, to protect from elemental catastrophes and the like) and public areas (parks, squares, streets, pedestrian crossings and other public roads, etc..), in accordance with the law. To this form of discrimination are often exposed people with disabilities, because public facilities and areas are not accessible to people in wheelchairs or with walking difficulties of any reason.

9 Art. 17 ZZD

Examples:
Architectural inaccessibility of public facilities and areas for people with disabilities: high curbs, sidewalks and intersections misfit, stairs at the entrances to schools, municipalities, courts, and the like. These barriers prevent people with disabilities to perform jobs independently, to use libraries, courts, institutions of culture and education.

The right to education is one of the most important rights, and therefore the Constitution of the Republic of Serbia itself[10] guarantees the right to education, prescribing that everyone has the right to education, that primary education is obligatory and free, that secondary education is free, as well as that all citizens under equal conditions, have access to high education[11]. A similar regulation exists for decades in the legal system of Serbia, but it is not consistently implemented in practice, so there are children, mostly from vulnerable groups, who were not attending school. Therefore the right to education without discrimination is guaranteed by the Law on Prohibition of Discrimination[12], by prescribing that everyone has the right to pre-primary, secondary and high education and professional training under the same conditions, and by prohibiting for a person or group of persons on the basis of their personal characteristics, to make difficult or prevent signing in to educational institutions, or to exclude them from these institutions, obstruct or prevent the possibility of attending classes and participating in other educational activities, to categorize students according to their personal characteristic, to abuse them, or in other ways to make unjustifiably distinction and to treat them unequally.

Examples:

• At an elementary school where it is performed the preschool program as well, classes are organized so that Roma children are singled out into separate classes located in a separate building of the school. This apparent segregation of Roma children in education, the competent persons tried to justify by the fact that the parents of other children do not want their children to go to school along with Roma children;
• By the Law on the Foundations of the Education System, was in effect until 2009 .[13] it was prescribed that for the signing in the primary school is needed to submit a

10 "Official Gazette of RS", no. 98/2006
11 Art. 71 of RS Constitution
12 Art. 19 ZZD
13 "Official Gazette of RS", no. 62/2003, 64/2003 - correction, 58/2004, 62/2004 - corr, 101/2005 - ot. law, 79/2005 - ot. law, 81/2005 - corr. other Law and 83/2005 - corr. other laws

birth certificate, residence registration and medical certificate. Although apparently there is nothing disputable or discriminatory in this rule, its consistent application led to a situation in which Roma children living in families with no documents and/or with no regulated the registration of residence, prevented to sign in a primary school.

Some schools refuse to sign in children with disabilities, citing physical inaccessibility of schools and lack of financial resources for adaptation.

Discrimination of qualified educational institutions which perform activities in accordance with the law and other regulations, as well as persons who use or have used the services of these institutions in accordance with the law, is prohibited. So prohibition of discrimination applies to legal entities (educational and training institutions, regardless whether their founder is a legal entity or an individual), as well as to all those who have used the services of these institutions.

Example:

Internal documents of the employer prescribe that the employee may be only a person who has graduated a state university. This is an example of discrimination, because so-called private universities that are accredited, must have the same status as the state university.

9.4. RELIGIOUS DISCRIMINATION AND DISCRIMINATION OF ETHNIC MINORITIES

Religious discrimination[14] exist if acting contrary to the principle of free expression of religion or belief, or if a person or group of persons are denied the right to acquire, maintain, express and change his religion or belief, and the right to private or public expression or action in accordance with their beliefs. Prohibition of religious discrimination does not apply only to people who believe (believers, the faithful), but also to people of other beliefs (atheists, agnostics). On the other hand, it is prescribed not to consider as discrimination the conduct of priests, and religious officials, which is in accordance with a religious doctrine, belief or objectives of churches and religious communities registered in the register of religious communities, in accordance with the law regulating the of freedom of religion and status of churches and religious communities.

Examples:

- Opposition of a majority population to be built in their neighborhood mosques or synagogue;
- Failure to provide nourishment that respects the religious specifics in prisons;
- Muslim female employee union president says he can not union to go on tour because they will tour the Orthodox monasteries;
- The employer refuses to promote an employee who achieved the best results because he/she is of Catholic religion;
- A group of hooligans smashed a window of the Islamic Center in Novi Sad;
- The attack on the mosque and writing a hate graffiti.

Discrimination of ethnic minorities,[15] and their members is prohibited on grounds of nationality, ethnic origin, religious beliefs and language, and the way to achieve and protect the rights of national minorities
is regulated by a special law[16].

Although this provision applies to all national minorities and their members, it should be noted that the Roma minority is currently in the worst situation in Serbia and is exposed to long-term and systematic discrimination, which is reflected in unequal access to education, employment, health and social care, and housing, compared to the majority population but also compared to other national minorities.

14 Art. 18 ZZD

15 Art. 24 ZZD

16 Law on the Protection of the Rights and Freedoms of National Minorities ("Official Gazette", no. 11/2002, "Official Gazette of Montenegro", no. 1/2003 - Constitutional Charter and the "Official Gazette of RS ", no. 72/2009 - ot. law)

Examples:

- Security guards of a nightclub do not allow to a group of Roma boys to enter the club with an excuse that it is necessary to have a prior reservation, while they allow it to other visitors, not asking them to confirm the pre-reservation;
- Refusal to provide health care to Roma;
- Rejection of the landlord to rent a flat to a Roma family;
- Rejecting a social worker to direct a woman of Roma nationality in a shelter for women victims of violence on the grounds that there are no availability;
- The bus driver, by raising voice orders to Roma woman with a child, who has a proper ticket for the first seat behind the driver to go to the back of the bus.
- A group of young men harassing a person thinking, because of the accent in his/her speech, that he/she is Albanian;
- to chant a song where Hungarian and Croatian national name connotes pejoratively at football matches;
- Breaking windows at the national council for national minorities.
- Anti-Semitic statements in the media.

9.5. DISCRIMINATION BASED ON SEX / GENDER AND SEXUAL ORIENTATION

Discrimination based on gender[17] exists if acting contrary to the principle of gender equality and to the respect for the principle of equal rights and freedoms of women and men in political, economic, cultural and other aspects of public, professional, private and family life. It is forbidden to deny rights or public or hidden recognition of benefits regarding gender or sex change. It is forbidden to practice physical and other violence, exploitation, express of hatred, degrading, blackmail and harassment regarding sex, as well as public advocacy, support and acting with prejudices, customs and other social patterns of behavior based on the idea of the inferiority or gender superiority or stereotypical gender roles.

Discrimination based on sex is usually committed on women. Key causes are deeply rooted, traditional and patriarchal stereotypes of gender roles for men and women. Although one of the obstacles in perceiving the position of men and women and lack of gender-sensitive statistics (collection and processing of data referring to sex), based on the available data it can be claimed that women are more disadvantaged than men in all spheres of social andprivate life.

Examples of discrimination based on sex:

- Lack of (the disproportion regarding total number) women in decision-making positions- the National Assembly, local government councils, steering committees, parliamentary delegations;
- Employer prescribing severance pay to employees in different amounts - 300 euros for men and 200 euros for women per year of service;
- Articles in newspapers stating that women should not be involved in politics, and that their place is at home;

Examples of discrimination based on gender and gender identity:

- A man does not get a job as educators because it is unusual to see men performing it
- A man does not get custody of a 3 year old child, because the common understanding is that the mother would take better care of the child;
- Faculty refuses to change the name on the diploma of the person who changed gender, explaining that it can not issue a new certificate every time someone changes name or last name, and comparing (identifying) this situation with the case where a woman gets married and changes her last name;
- The employment service sends concourse notifications for mechanical engi-

17 Art. 20 ZZD

neers job only to men and not women who graduated the Mechanical Engineering Faculty;
• Employees mock and insult a colleague who has submitted an application to use leave to care for a child.

Discrimination based on sexual orientation is very widespread in Serbia, in public and private areas. Escalation of
discrimination and violence occurs, as a rule, each year before the Pride Parade. Even though, in the last few years, is increased the visibility of LGBT[18] population also is increased the visibility of extremely negative social attitudes towards people of different sexual orientations than heterosexual, and increase of the level of homophobia, intolerance, discrimination and violence.

Law on Prohibition of Discrimination prescribes that sexual orientation[19] is a private matter and no one can be asked to publicly declare of his/her sexual orientation, that everyone has the right to decide about their sexual orientation, and that the discriminatory treatment regarding such plea is prohibited.

Examples:

• A press-center director rejecting to allow the conference of an organization dedicated to the protection and promotion of the rights of LGBT people;
• Department of Transfusion does not allow people of homosexual orientation to voluntarily donate blood;
• Attacks and violence against people who are, or for whom the attackers assumed to be homosexual;
• Hate graffiti towards the LGBT population;
• Officer of the municipal administration refusing to issue a certificate on being single in marital status to the person who wants to abroad marries a person of the same sex.

18 An abbreviation that identifies a person of a different sexual orientation other then heterosexual. It is a shortened version LGBTTIAQ acronym, which stands for lesbians, gays, bisexuals, transgender, intersex, asexual and queer people.
19 Art. 21 ZZD

9.6. DISCRIMINATION OF THE CHILDREN AND THE ELDERLY

Children and young people are particularly vulnerable category for many reasons, their position is specific because they are unable to adequately protect their interests and accomplish their rights, regarding their age. Because of this they, very easily, become victims of discrimination, and the problem further complicates when it comes to children from vulnerable groups (Roma, children with disabilities, refugees or displaced, street children, children in conflict with the law).

Law on Prohibition of Discrimination provides[20] that every child, or a minor has the same rights and protection of the family, society and the state, regardless of its personal characteristics, or its parents, guardians and family members. It is forbidden to discriminate a child or a minor on health, marital or illegitimate birth, public advocacy to give priority to children of one sex comparing to children of the other sex, as well as making distinction regarding the health, financial status, occupation and other characteristics of the social status, activities, expressed opinions, or beliefs of the child's parents, guardians and family members.

Examples:

- Directing Roma children in special schools because of insufficient knowledge of the language or because of lack of achievement on tests that do not respect specific features of life and growing up (e.g. a child who lives in an unhygienic settlement, was asked "What is a dolphin?" When the child did not know the answer to the question, it was sent to a special school);
- Inaction of teachers / educators in a situation when a Roma child sits alone at a school desk, because nobody wants to sit next to him / her;
- A school organizing excursion to which a girl is not able to go because of using a wheelchair, as the sights are going to be visited that are not accessible to persons who use wheelchairs;
- Distinction between children born within marriage and children born out of marriage.

There is one more category of people who are often exposed to discrimination because of their age, and they are elders. Law on Prohibition of Discrimination provides[21] that it is forbidden to discriminate a person on the basis of age and should be kept in mind that this prohibition applies to any age. Further it provides that the elders have the right to dignity living conditions, without discrimi-

20 Art. 22 ZZD
21 Art. 23 ZZD

nation, particularly, the right to equal access and protection of neglect and harassment in the health care and other public services.

Examples:

- Gynecologist refuses to perform a regular medical check of a woman who is 70 years old, since, in his opinion, she exceeded the age limit for regular gynecological examinations,
- The list of drugs provided by required health insurance fund prescribes that people over a certain age (e.g. 67) are not eligible for getting some drugs at the expense of the health care fund;
- A bank provides that a current account overdraft may be achieved only by persons up to 65 years of age.

9.7. DISCRIMINATION OF PERSONS WITH PHYSICAL AND MENTAL DISABILITIES

Past several years have improved the legislative framework and the increased visibility of people with disabilities, but this category of citizens is still in much worse position than other citizens. Discrimination of persons with disabilities is expressed in all areas, particularly in the areas of education, employment, access to facilities and service usage. For considering the whole status of persons with disabilities it should have in mind the low level of education, High levels of unemployment, poverty and violence they are exposed to (especially women with disabilities), lack of political participation, the risk of institutionalization and limited access to public facilities and services. Particularly alarming is the situation of people with intellectual and mental disabilities, having in mind that they are often exposed to full deprivation of legal capacity and accommodating ininstitutions.

Discrimination of people with disabilities exist if acting contrary to the principle of respect for the equal rights and freedoms of persons with disabilities in political, economic, cultural and other aspects of public, professional, private and family life[22]. Way of accomplishing and protecting the rights of persons with disabilities is regulated by a special law.[23]

Examples :

- Failure to adjust public areas and public institutions to people who use wheelchairs or who have any other type of disability;
- The employer requires from the employees on the cashier position to stand at cache desk all the time, although this job can be reasonably adapted to the person who is not able to stand, by placing the chair;
- The employer refuses to hire a person with a hearing disability, although hearing disability has no impact on that person's ability to perform the job successfully;
- City Administration prescribes that the right to free use of the specially marked places for vehicles of persons with disabilities have the parents and guardians of children with disabilities who are registered in special schools or who are not at all in educational system, but not the parents of children with disabilities attending regular schools;
- A person with a disability who has over ten years of professional experience, submitted a request to the Commission in charge of determining the characteristics of people with disabilities, in accordance with the Law on Professional

22 Art 26 of ZZD

23 The Law on the Prevention of discrimination of persons with disabilities ("Official Gazette RS ", no. 33/2006)

Rehabilitation and Employment of persons with disabilities.[24] The Commission decided to establish his/her status as a person with disability who can not employ and keep employment neither under general, nor under special conditions, whereby denying the right to work of this person;

• People with hearing disability, when registering in a competent center for social work in order to use some of the social services, it is not permitted the presence of interpreter.

24 "Official Gazette of RS", no. 36/2009

9.8. DISCRIMINATION ON THE BASIS OF POLITICAL OR TRADE UNION AFFILIATION

Discrimination because of political beliefs of a person or group of persons or belonging or non-belonging to a political party or trade union organization[25] is prohibited. On the other hand, it is prescribed that restrictions referring to performers of certain state functions (prescribing conditions for performers of certain state functions can not be members of political parties) are not considered as discrimination, as well as the restrictions prescribed by law that are necessary to prevent advocacy and committing fascist, Nazi and racist activities.

Examples:

- The employer refuses to promote an employee, although he/she has the best results and fulfills all requirements for promotion, because of outstanding involvement in the union;
- A person is not employed, although he /she displayed the best results on the test, because he/she is the activist of political parties whose programs director does not agree with;
- Director fires an employee because he/she organized the establishment of trade union organization within the company;
- A bank loan, in accelerated and facilitated procedure, get people who have membership card of a party to which the director belongs.

25 Art. 25 ZZD

9.9. DISCRIMINATION REGARDING HEALTH CONDITION

Discrimination of persons or groups of persons regarding their health condition as well as of their family members is prohibited[26]. Discrimination based on health condition exists particularly if a person or group of persons because their personal characteristics are unreasonably refused to be provided with medical services, are set specific requirements for the provision of health services which are not justified by the medical reasons, are rejected the diagnosis and are withheld information about the current health condition, measures taken or intended to be taken for treatment or rehabilitation, and harassment, insults and humiliation during their stay in the health care institution.

Examples:

- Health center marks the medical records of people living with HIV / AIDS;
- Local sports club denies to a child further training because the coach found out that child has epilepsy;
- Isolation of an employee who got ill with hepatitis C in special workspace and denial of contact with other employees;
- The separation of a child living with HIV / AIDS in a special classroom in the school;
- Rejection of a gynecological examination of the patient living with HIV / AIDS.

26 Art. 27 ZZD

10

Legal Protection From Discrimination

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10.1
CONTENT OF THE LEGAL PROTECTION FROM DISCRIMINATION

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10.1.1 Types of legal protection from discrimination

The right of any person to be protected from discrimination based on any personal characteristic without reasonable and just cause, and even then to be protected from discrimination which is not in the proportion with the said cause, is guaranteed as the basic human right on equality and non-discrimination by local legislation and by ratified international documents: Constitution of the Republic of Serbia,[1] European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] additional Protocol No. 12 to the Convention,[3] and by International Covenant on Civil and Political Rights.[4] The State of Serbia through its legislation is committed to providing everyone on its territory *due legal protection* in the case of discrimination so that the right to equality is indeed both *practical and efficient*.[5]

Law on Prohibition of Discrimination[6] of the Republic of Serbia prescribes *two possible ways* for the protection of the victim from discrimination. The protection in criminal cases is regulated by the Criminal Code. One possible way for the discriminated person is to seek protection from the Commissioner for Protection of the Equality, as it is stipulated in Chapter V of the Law, articles 35 through 40. Another possibility is the so-called civil legal protection. It is not named as such in the legislation, but its nature cannot be disputed due to the types of lawsuits which are prescribed, active legitimation, elective filing of court cases, etc., and also due to the stipulated type of the judicial proceedings. Civil Legal protection is described in Chapter VI of the Law, articles 41 through 46. The protection is sought from the courts by filing a lawsuit or a proposal for a temporary injunc-

1 Article 21, Paragraph 3 of the "Official Gazette of the Republic of Serbia", No. 98/06.

2 Article 14.

3 Article 1 of the Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, amended in accordance with the Protocol No. 11, Protocol of the Convention for the protection of Human Rights and Fundamental Freedoms, Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides certain rights and fundamental freedoms other than those already included in the Convention and in the First Protocol thereto, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances („Official Gazette of Serbia and Montenegro" –„International Agreements", No. 9/03, 5/05, 7/05).

4 Article 26. of the Law on Ratification of the International Covenant on Civil and Political Rights ("Official Gazette of SFRY", No. 7/71).

5 Stance expressed in a series of the decisions of the European Court of Human Rights in Strasbourg, e.g. Belgian Linguistic Case, 23.7.1968, Paragraph 41, Airey v. the United Kingdom, 9.10.1979, Paragraph 24, Artico v. Italy, 30.5.1980, Paragraph 33, Allenet de Ribemont v. France, 10.2.1995, Paragraph 35, Chassagnou and others v France, 29.4.1999, Paragraph 100. Riepan v. Austria, 14.11.2000, Paragraph 29, United Communist Party of Turkey v. Turkey, 30.1.1998, Paragraph 33.

6 "Official Gazette of the Republic of Serbia", No. 22/09.

tion and it is granted by court decisions such as a court verdict or a decision on the temporary injunction. It is possible to combine several types of lawsuits regarding the same act of discrimination. It is up to the discriminated individual to decide on the form of the protection he/she shall seek or rather which types of the protection the discriminated person finds appropriate in the concrete case.

10.1.2 Source of the Civil Legal Protection

Unlawful discrimination was prohibited even before the Law on Prohibition of Discrimination was enacted (2009) and before the civil legal sanctions were prescribed for such discriminatory acts. This means that a large number of instances of discrimination could have been treated as unlawful because they presented at the same time *an infringement of some of the civil rights (personal rights)*, especially the violation of the right to human dignity. In such instances protection could have been obtained by the use of the civil legal protection measures related to the protection of the civil rights stipulated in the *Law on Contract and Torts*.[7] The Supreme Court of Serbia qualified the unlawful discrimination based on such provisions in a well- known case "Krsmanovača" related to unlawful discrimination of the Roma, who were denied the use of a public swimming pool based on their Roma ethnicity, and provided the protection to the Roma by deciding in favor of their lawsuit which was based on the provisions of Article 157 regarding the cessation of the violation of human rights (preventing the defendant to repeat the discriminatory actions) and awarding of the equitable damages[8] and provisions of Article 199 and Article 200 of the Law on Contract and Torts[9] which define the conditions for filing of a lawsuit based on the violation of individual rights and awarding of the equitable damages in such cases. Since the enactment of the *Law on the Prevention of Discrimination Against Persons with Disabilities*,[10] which placed at the disposal of the discriminated person all of the civil lawsuits[11] that are now recognized by the applicable Law on the Prohibition of Discrimination, it was possible to apply these provisions analogously in the cases of discrimination against other persons, which are not persons with disabilities, since the *ratio legis* of these provisions completely corresponds to these persons as well.

7 „Official Gazette of SFRY", No. 29/78, 39/85, 45/89, 57/89, „Official Gazette of FRY", No. 31/93.

8 Article 157., Paragraph 1 of the Serbian Law of Contract and Torts: "Any person shall have the right to demand from the court or other competent authority to order the cessation of an action violating his integrity as a human person, personal and family life and his other personal rights".

9 Article 199: "In case of violation of an individual right, the court may order that, at the expense of the tortfeasor, the sentence, or the correction, be made public, or it may order that the tortfeasor withdraws the statement causing the violation, or order something else which would reach the purpose, otherwise apt to be achieved by indemnity". Article 200. Paragraph. 1: "For physical pains suffered, for mental anguish suffered due to… freedom or rights of personality, the court shall… award equitable damages ..."

10 „RS Official Gazette", No. 33/06.

11 Article 43 and other

Enactment of the Law on the Prohibition of Discrimination brought *triple changes*. The unlawful discrimination is prohibited as such, regardless of whether the subject of the discriminatory actions presents a simultaneous violation of a legal right, even of a personal right, or if it presents a discrimination only of the persons with disabilities. The types of discrimination are now specifically regulated and prohibited, in such a way that their determination no longer requires a derivation from the concrete legal principle of equality and prohibition of discrimination, nor a making of an analogy with the provisions related to the types of the discrimination stipulated in the Law on the Prevention of Discrimination Against Persons with Disabilities. Because of the *means of civil legal protection that are now specifically prescribed* for the unlawful discrimination, and are at the disposal of the discriminated person, there is no need, like it was the case in the past, neither for the discriminated person nor for the court to be referring to the identical means for protection prescribed for other personal rights or the means for protection stipulated in the Law on the Prevention of Discrimination Against Persons with Disabilities, or to be making some other use of these means. However, even *outside* of the Law on Prohibition of Discrimination there are means that can be used for protection of discrimination (for the Law on Contracts and Torts see below, chapter 11.1.10), which means that Law on Prohibition of Discrimination *is not the only one,* although it is a central source of the civil legal rights on the protection against discrimination.

If a need arises in the *future* for yet another means of the civil legal protection which is not stipulated presently in the Law on Prohibition of Discrimination, and it is not known by other sources of the law, then the court would be able to apply such protection by concretization of the constitutional and international guarantees regarding equality and the prohibition of discrimination, which implies that the state has to provide *all* of the necessary and suitable means for the fulfillment of the guaranteed rights, or else it might stay only as declaratively recognized while truly ineffective.

10.1.3. New features of the Law on Prohibition of Discrimination regarding the civil legal protection

New features in regard to *civil legal protection* brought by the Law on Prohibition of Discrimination, compared to previously established anti-discrimination provisions contained in the *Law on the Prevention of Discrimination against Persons with Disabilities*, consists of the following:

a. Irrefutable assumption of guilt in a case of direct discrimination (about this in 11.2.);

b. Presumed violation of the principle of equality (about this in 11.2.);

c. Temporary measure for the prevention of discrimination can imply order-

ing certain actions and not just prohibiting them, and a court must render a decision on the motion for a temporary measure forthwith or up to three days from the day the motion was received the latest (about this in 11.2.);
d. Discriminated person can request from the court to order the publication of the judgment which adopted the preventive or a reactive claim (more on this in 11.1.11);
e. Any civil lawsuit for the protection against discrimination can be initiated not only by the discriminated person, but also by an organization dealing with protection of human rights, or a volunteer examiner of discrimination (tester) and also by the Commissioner for Protection of Equality. (more about this in 11.2.2);
f. The Commissioner for Protection of Equality can provide a binding opinion, give recommendation, give a warning notice related to failure to comply and also can inform the public regarding the failure to comply based on the complaint (more on this in 13.2.5.) received from the discriminated person or by the organization dealing with human rights protection or any other person/s (popular complaints) (more on this in 13.2.1).

10.1.4. Claim for legal protection and litigation

In a situation of unlawful discrimination, person who suffered the discriminatory treatment *has the right under the law* to request from the discriminator, or rather has the power to ask from the discriminator, the kind of behavior needed so that the person can freely enjoy its threatened or violated right or to repair or prevent further consequences stemming from the violation this right. The Law on the Prevention of Discrimination doesn't use the term *request* of the plaintiff, but the request is *implied* by the legal recognition of the *lawsuit* against the discriminator. Namely, the Law on the Prohibition of Discrimination only regulates the lawsuits related to unlawful discriminatory treatment[12] because it only regulates judicial form of exercising the civil legal protection (which is the most frequent form). The State of Serbia has, through these provisions, concretized its obligation to provide protection against discrimination in a form of a *judicial authority*.

Legal claim against the discriminator can be filed in *non-contentious proceedings* and in the *regular court proceedings*. The discriminated person is authorized to make a legal judicial request from the discriminator to perform actions to rectify the situation and enable the discriminated person to enjoy those rights that were violated or threatened, or to take actions to prevent further consequences related to those violations or threats. If the discriminator complies with the request, the judicial claim can be withdrawn; because the need was consummated

12 Article 41, Paragraph 1, Article 43.

hence there is no need for the lawsuit. However, the discriminated person has the authority but *not the obligation* to try to accomplish the requested in the non-contentious proceedings and therefore filing of the lawsuit is not conditioned by the previously unsuccessful non-contentious proceeding. In other words, antidiscrimination lawsuits are *direct* lawsuits.

10.1.5 System of the Civil Legal Protection

The system of the *judicial* civil legal protection against discrimination prescribed by the Law on Prohibition of Discrimination doesn't rely merely on lawsuits, but also contains other means of protection. Law on Contract and Torts prescribes one mean useful in cases of discrimination, which is not mentioned in the Law on the Prohibition of Discrimination. The following civil legal protection can be obtained from the courts:

A. Main, final and independent protection, which can be

a. Preventive in its nature – according to the lawsuit for omission as stipulated in the law (about it in chapter 8.1.6), while

b. Reactive – according to the litigation for establishment (8.1.7.), litigation for the rectifying (8.1.8), and litigation for reparation of damage (8.1.9);

B. Auxiliary, dependant protection – court penalty (8.1.10) and mandatory publication of the judgment (8.1.11); and

C. Temporary protection – temporary measure (8.2.).

10.1.6. Lawsuit for the omission (ban on the activity that poses the threat of discrimination, a ban on the further discrimination or a ban on the act of repeating discrimination)

Lawsuit for omission[13] contains a preventive claim from the court to *ban* the discriminator from committing a *discriminatory act*, an act contrary to the prohibition of discrimination. This can be used in all three situations that warrant preventive protection. In a claim, the court is being asked to:

a. To ban the discriminator from committing a certain *act that is not yet being performed*, but such action which will be performed would constitute an act of discrimination and a violation of the prohibition of the discrimination; for instance to ban the respondent from putting up a sign which is discriminating people based on a personal characteristic; or

b. to ban the discriminator to proceed with a certain action he/she already committed which constitutes an act of discrimination and a violation of the prohibition of the discrimination; for instance to ban the discriminator form

13 Article 43, Paragraph 1 of the Law on the Prohibition of Discrimination. Also Article 43, Paragraph 1 of the Law on the Prevention of Discrimination against Persons with Disabilities, and Article 43, Paragraph 1, item 2 and Article 3 of the Law on Gender Equality, "Official Gazette of the Republic of Serbia", No. 104/09

a continued boycott of someone based on this persons personal characteristic, in cases of ongoing boycott; or
c. To ban the discriminator for *repeating an act which was already* committed and which presents an act of discrimination or a violation of the prohibition of discrimination; for example, to ban the discriminator to make future refusals to provide a service due to a personal characteristic, if he/she already refused it before.

Threat from discrimination is common in all three situations: someone is threatened by the act that will happen in the future, or he/she is threatened by the actions that may continue or by an action that could be repeated. The sense of this protection is to prevent any of these threats from being achieved; therefore its goal is a preventive one. It is based on a common sense comprehension that it is better to prevent than cure.

The right to seek preventive protection has (active legitimation) a person who is threatened by danger of discrimination if a certain action is performed, continued or repeated, and it is always necessary that the action is *directly related* to the plaintiff. The right on a protection doesn't belong to a person who merely sympathizes with the plaintiff, and in this way is identifying himself/herself with the plaintiff (for example a friend, a relative, member of the same social group, holder of the same personal characteristic which served as a basis for discrimination, company where the plaintiff is employed, etc.). However it is different only when an act of discrimination is pointed against a deceased person and thus is violating the right to a dignified mourning of his nearest.

The respondent of the claim (passive legitimation) is every *actor/perpetrator* of the planned, ongoing or perpetrated act of discrimination. If there is more than one, they are all respondents, even if someone was just an accessory. Of course, a claim may or may not include all.

A person who is threatened or already discriminated doesn't need any *special legal interest, or a special reason* to submit a claim, not it is necessary to state it or refer to it. But if the court already banned a certain action of the respondent, and he commits the act in spite of the ban, or if the respondent continues with the action or repeats it, than a new claim is not submitted but rather the court is being asked to in the effective proceedings enforce the effective judgment.

Since the purpose of this protection is to prevent a violation (an act that will be performed, or it is continued or it might be repeated), the right on a protection exists only if there is a *threat* of a discriminatory act being committed, continued or repeated. The court cannot approve or a reject a claim if it didn't establish

the existence or a lack of threat. The court assumes that the threat exists. It is up to the plaintiff to *prove* the existence of a threat, and it is up to the respondent to prove it no longer exists. What is needed is the *concrete (tangible) and serious threat* of perpetration, continuation or repeating of a discriminatory activity, which is judged on the individual basis for each case. A mere abstract possibility that the discriminatory activity will be committed, continued or repeated, a possibility which is for instance based only on the fact that the respondent continued to conduct the same business through which he/she performed the act of a discrimination (for example the fact that he still has a restaurant in which he refused to serve Roma as such), is not enough per se. It is a different matter altogether if the respondent ordered a making of a sign with inscription "We don't serve Roma", even if didn't commit prior discriminatory actions, since the purpose of the ordering a sign is to place it. If a discriminatory act is already committed or if the discriminatory activity is ongoing there is an assumption that it can be repeated. If a discriminatory act is already committed once before, or if a discriminatory action is ongoing, there is a threat from repetition or continuation, and therefore concrete facts are needed for a founded conclusion that there is no more threat from repetition or continuation. Some of the such circumstances, like the own imitative for an unconditional apology of the respondent to the victim for the perpetrated discriminatory act, can point out to the cessation of the threat, but their significance becomes inconsequential if the discriminator changes behavior and for instance subsequently revokes the apology or refuses to destroy the sign with the discriminatory inscription.

The protection of the court can be requested for *as long as there is a threat* and therefore the timeframe is not equal for all cases and it cannot be determined in advance and equally for all cases. Therefore, it is not obligatory to seek immediate and urgent protection from the moment the preparation to commit discrimination or a possibility for continuation or repetition of the discriminatory action is known. However, the passage of time, along with some other circumstances can contribute to the creation of an impression that the threat has ended.

The same way the *fault* of the discriminator is not a condition for the existence of discrimination, it is not a condition or a request for the discriminator to refrain from the discriminatory actions.

The threat of discrimination is sufficient. It is not necessary for the *damage* to occur, or whether it will be occurred, material and non-material alike.

The courts deliberated based on this principle in the so-called Šabac case of Sports and Recreation Center "Krsmanovača", when in the year 2000. several plaintiffs were prevented from accessing the swimming pool that belonged to

the respondent, just because they are Roma. Preventive claim for the protection against discrimination was approved on the grounds of the stipulation regarding omission from the Article 157 of the Law on Contract and Torts. The respondent is obliged to cease with the violations of the personal rights of plaintiffs in a form of a discrimination related to their entrance in the said centre, during the future conduct of his regular business activities within the Sports and Recreation Centre "Krsmanovača" in Šabac.[14]

10.1.7. Lawsuit for establishment of discrimination

Claim for establishment[15] contains a request from the court to *establish* that the discriminator perpetrated *unlawful discrimination* of the discriminated person or that he violated his/her right on non-discrimination. This type of lawsuit is in the interest of the plaintiff especially in cases where the discriminator is contesting the legal nature (unlawfulness) of his/her actions and the created conditions and claims that he/she has the right to behave in such a way (to perform the said action) and to create and/or maintain the concrete discriminatory conditions. Deliberation of the ruling resolves the litigation regarding the permissiveness of such a discriminatory action and maintenance of the created state of discrimination.

Independent (un-subsidiary) litigation for the establishment (independent because the discriminated person can be protected by other claims or litigations for the protection against discrimination), is justified because it enables the discriminated person to select this type of litigation even when such sort of the protection is *suf-*

14 Supreme court stated: "The first-instance courts have duly concluded that the claim of the plaintiffs is justified, on the grounds of the violation of the personal rights of plaintiffs, which is in conformity with the provisions set in Article 157 of the Law on the Contract and Torts and is sufficient for the claim to be adopted", since Article 157, Paragraph 1 of the Law of Contract and Torts states: : "Any person shall have the right to demand from the court or other competent authority to order the cessation of an action violating his integrity as a human person, personal and family life and his other personal rights". Verdict of the Supreme Court of the Republic of Serbia Rev. 229/04 dated 21.4.2004, verdict of the Šabac District Court in No. 1591/02 dated 3.7.2003, verdict of the Šabac Municipal Court No. 2939/2001 dated 20.2.2002.
Considering that some time ago the wavering in the court practice and legal literature vis-à-vis the conditions for filing a lawsuit and whether the damage and guilt as described in the in Article 157 of the Law on the Contract and Torts are sufficient for fling a complaint, the dilemmas stemmed from the fact that such lawsuits are regulated in the part of the Law on Contracts and Torts which prescribes the liability for the harm (recommendations in Vodinelić, V.V. (1998), Legal protection of persons in Law of obligations as in: Law on Contracts and Torts 1978 –1988, The book on the tenth anniversary, Volume I Belgrade, 1988, from page. 569. on, especially page 571. observation 18.), it is important to note that the provision of Article 43. Paragraph 1. item 1. of the Law on the Prevention of Discrimination against Persons with Disabilities, regulates this lawsuit as independent from any delicate assumption (damage and guilt), since these conditions would greatly diminish the sphere of its application and efficiency.

15 Article 43, Paragraph 2 of the Law on the Prohibition of Discrimination. Also Article 44, Paragraph 3 of the Law on the Prevention of Discrimination against Persons with Disabilities, and Article 43, Paragraph 1, item 1 of the Law on Gender Equality.

ficient, and therefore he/she is not interested in pursuing other types of protection through other litigations. At times, it may present the *only possible form* of protection and legal reaction on unlawful discrimination since no other claim or litigation can be considered because the necessary conditions haven't been met in the concrete case. Without this type of litigation, the unlawful discrimination, although contrary to the legal order, would remain without any legal sanction.

The court is *deliberating* on the *permissiveness* of the respondent's discriminatory action in accordance with the general provisions of the Constitution of the Republic of Serbia, international documents (European Convention for the Protection of Human Rights and Fundamental Freedoms and International Covenant on Civil and Political Rights) and national legislation on the prevention of discrimination, and on which rules are determining the term discrimination, types of discrimination and significant conditions pertinent for the existence of the unlawful discrimination. For discrimination to be considered unlawful, in a concrete case, there has to be the following: making a difference between persons based on some personal characteristic although these persons are in a same or significantly similar situation, lack of a reasonable and legally justifiable cause (goal) for this distinctive treatment, disproportion between a discriminatory action and the reasonable goal it is attaining (in this case the discrimination is unnecessary, unfitting and not appropriate for the attainment of the goal in the concrete case).[16]

The discriminated person is *proving* the act of discrimination and that this act was committed by the respondent.

Fault of the discriminator is not at all needed for this type of protection since the goal of this protection is to legally clarify the situation, unlawfulness of the action and discrimination and its consequences, no matter if the discriminatory can be ascribed to the respondent.

Since the claim is pertaining to the clarification of the permissiveness of the action leading toward the discrimination, whether there is *damage* in the concrete case and future consequences of the discriminatory action are irrelevant.

No *legal interest* is requesting from the discriminated person to prove it or to state it, nor is the discriminated person required to state the reason as to why it

16 Review of the cases related to unlawful discrimination from the practice of the European Court of Human Rights and in making legal parallels can for example also be found in: Frowein, J. A. (1996): Frowein, J. A. - Peukert, W., Europäische Menschen Rechts Konvention (EMRK-Kommentar), Kehl, and others, page 434. and in Starmer, K. –Byrne, I. (2001), Blacktone's Human Rights Digest, London; Damm, S. M. (2006); Menschenwürde, Freiheit, komplexe Gleichheit: Dimensionen grundrechtlichen Gleichheitsschutzes (Der Gleichheitssatz im europäischen Gemeinschaftsrecht sowie im deutschen und US-amerikanischen Verfassungsrecht), Berli; Meyer-Ladewig, J. (2011), EMRK: Europäische Menschenrechtskonvention (Handkommentar), Baden-Baden.

is seeking to establish the unlawfulness of the particular discriminatory action. A respondent/ discriminator cannot object on the grounds of non-existence of the legal interest or a cause. In Article 44, Paragraph 2 of the Draft Law on Prohibition of Discrimination (dated November 12, 2008) it was explicitly stipulated that for the lodging of such a lawsuit a plaintiff is not required to make the existence of the legal interest probable.

In Šabac case, the court of the first instance rendered a judgment, [17] confirmed the plaintiff's claim in the first Paragraph of the announced verdict and therefore the court found that the respondent "Jugent tt" –owner of the Sports and recreational Center "Krsmanovača" from Šabac was responsible for the violation of a plaintiff's personal rights. The personal right which was violated in this case the Supreme Court qualifies as the right to human dignity: "All people have the right to a protection of human rights regardless of their race, skin color, national or ethnic background. All public places and services must be equally accessible to all. Any type of discrimination is a violation of a human dignity whose components are: honor, reputation, personal integrity and similar, and protection against such violation of a personal right is the obligation of the court".[18] However, the right to human dignity [19] is not violated by every unlawful discrimination and not every violation of the human dignity constitutes discrimination. Unlawful discrimination presents a violation of the right to equality and/or right on non-discrimination. Whether the violation of the particular personal right took place (equality or non-discrimination) is determined by the lawsuit for the establishment, which now stems from Article 44, item 2 and is related to Article 41, Paragraph 1 of the Law on Prohibition of Discrimination,[20] where it is being referred to as the "lawsuit for the protection against discrimination". It is sufficient to confirm the violation of the specific right by a discriminatory action; it doesn't necessarily include the violation of some other rights, not even the right on dignity. For the establishment of the violation of *another right* or that in the specific case along with the right to equality or non-discrimination some other right was violated, it is necessary to fulfill the general conditions stemming from the Civil Procedure Law,[21] since there is no special provision like the one related to the right on equality or non-discrimination respectively in the Law on the Prevention of Discrimination Against Persons with Disabilities. If in a concrete case the discriminatory action is simultaneously violating some other rights like for instance the right on human

17 The judgment of Šabac Municipal Court. No. 2939/2001 dated 20.2.2002.

18 The judgment of the Supreme Court of Serbia Rev. 229/04 dated 21.4.2004.

19 About this right Vodinelić, V. V. (1989), Human right on dignity, Collection of papers of the Law faculty in Zagreb, supplement of the issue No. 5-6, pages 713-744.

20 Also Article 43, para 3 of the Law on the Prevention of Discrimination against Persons with Disabilities related to Article 42.

21 Article 194. "RS Official Gazette" No. 72/11.

dignity, for the adjudication on such violation to be possible-even without being specifically foreseen in a legislative document, it would be necessary to abandon the governing understanding that according to the Civil Procedure Law, the litigation for the establishment can be filed only under the specific provisions.[22]

10.1.8 Lawsuit for rectifying of the state of discrimination

Article 43, item 3 of the Law on the Prohibition of Discrimination[23] contains a reactive request from the court *to order* the discriminator the perform a certain action *for the elimination of the condition contrary to the prohibition of discrimination*, a condition of a infringement of the prohibition of discrimination, which was created by an act committed by the discriminator. It serves to eliminate *the state of discrimination* which was created as a consequence of the discriminator's actions and it is to be used *for the duration* of such a condition.

The task of such a (reactive) form of the protection is to eliminate *an already created condition*, which is contrary to the prohibition of the discrimination and which is *ongoing*. Therefore, the request for the elimination is aimed at the discriminator so that he/she may perform *another, new action, different from the one previously committed,* which would *eliminate the ongoing condition caused by previous actions.* In this claim (unlike the claim regarding omission) the respondent is always asked to perform a new and *active* action which can eliminate the produced state of discrimination which is legally unacceptable.

There is no register or a closed list of such actions that can be demanded from the discriminator. *Any appropriate and competent action, capable of elimination of the condition* contrary to the prohibition of discrimination can be taken into consideration. What is deemed fitting is determined in accordance with the circumstances of an individual case, and during the deliberation the court is guided by what is needed and capable for the *elimination of the source of discrimination*. For example, the discriminator can be requested to remove the placed discriminatory sign (e.g. emphasized denial of access for persons with certain personal characteristic), to remove the billboards with discriminatory content, to take down the posted adds in which the discriminator is inviting others to boycott persons with certain personal characteristics, to remove an architectural obstacle which is preventing access to people with certain personal characteris-

22 Regarding justifiability of the expansion of the use of lawsuit for the establishment and for the protection of personal rights in general, see Vodinelić, V.V. (1978), Personal Rights, in: O. Stanković – S. Perović – M. Trajković (in that order) :Encyclopedia of the property rights and joint labor rights, Vol. I, Belgrade, page 933 and other. In Switzerland the lawsuit for the establishment is one of the most frequent means of protection against the violation of a personal right, see Hausheer, H– Aebi-Müller, R.E. (2005), Das Personenrecht des Schweizerischen Zivilgesetzbuches, Bern, page 214. and other pages and Jacobs, M. (2005), Der Gegenstand des Feststellungsverfahrens, Tübingen, page 103. and other

23 Also Article 43, item 2, Law on the Prevention of Discrimination against Persons with Disabilities

tics (e.g. persons with disabilities), to remove a discriminatory clause from a job announcement, to withdraw or revoke a discriminatory statement, etc. The Gender Equality Act is stipulating certain examples of the removal of the conditions of the violation: placing assets and items out of use and out of market, items used as a means of infringement (discriminatory textbooks or textbook with stereotypical representation of genders, printed press, advertising and propaganda material, etc.).[24] Since in the above mentioned examples there is a conflict between right on equality and right on the freedom from discrimination, which enjoys the constitutional and ratified international acts, then just like in any other case of a collision with the guaranteed rights, the request for elimination of the state of discrimination must remain within the principle of proportionality (non-excessiveness): not to surpass by means and measures what is sufficient to fulfill the purpose of the protection. In concrete cases that means that if one part of the publication is discriminatory (a sentence or multiple sentences, individual pages, part of the broadcast, etc.), the placement of the entire publication or a product of a public medium out of use cannot be ordered, just the discriminatory part must be excluded. Also, in the future, based on the litigation for the omission, only a discriminatory content can be prohibited from being used, and not an entire publication or a public media.

The state of discrimination very often *lasts and is not eliminated* consequently just because the discriminator (based on the claim for the omission) is prohibited from continuing or repeating of the discriminatory actions. For instance, from the view of the discriminatory condition, the ban to advertise a vacancy announcement in the future which contains a discriminatory clause is not the same as the order to recall or withdraw such an add.

If a discriminatory action caused the discrimination, but in the present moment the state of discrimination is not ongoing (e.g. last week an invitation to boycott individuals with certain personal characteristics was sent), then presently there is space only for a (preventive) claim for omission of the repetition of the discriminatory action or only for a (reactive) claim for the award of damages (when all of the prerequisites for such a claim are met), but not for the claim for the elimination (for instance a retroactive withdrawal of the invitation for boycott).

It is up to the discriminated person *to prove* that the act of discrimination was perpetrated and that the respondent is a discriminator. *The guilt* of the discriminator here also is not a condition for a claim, because the claim only produces a reaction vis-à-vis the state of the discrimination, which is unacceptable and which must be eliminated in the interest of the discriminated person, regardless if the causing of such condition can or cannot be attributed to the discriminator as guilt.

24 Article 43, para 1, item 4.

Since the claim for the elimination presents a direct protective reaction only on the state of discrimination, which was caused contrary to the prohibition of discrimination, it is irrelevant for this claim whether *the damage* has occurred or it will be, material and non-material alike. Elimination of the discriminatory conditions can therefore be requested solely on the grounds of a violation of the right to non-discrimination – due to the creation of a condition contrary to this right, regardless of the existence of the guilt and damage (quasi negating claim).

Since the litigation for the elimination is prescribed by the Law on Contract and Torts[25] and is related to the awarding of the equitable damages, this might lead to the to a conclusion it cannot be used as a reactive litigation in a narrower since (quasi negating claim), therefore even when there are no conditions for compensation, it is important to note that the provision of the Law on the Prohibition of Discrimination [26] leaves no room for the different interpretation-the protection is offered from the violation alone, from the very state of discrimination, regardless if the condition causes damage and whether it can be attributed to the discriminator as guilt.

The discriminated person *needs neither legal interest nor a special reason* to submit a claim or lodge a lawsuit, nor he/she has to prove it, state it as grounds for litigation, in the same way the respondent /discriminator cannot contest the claim on the grounds of lack of such an interest or a reason.

If the respondent fails to perform an action ordered by the court, the discriminated person may request a writ of execution from the court in an *enforcement proceeding*.

10.1.9 Lawsuit for reparation of damage

The lawsuit for reparation of damages [27] serves the purpose of the discriminated person to overcome *another consequence of the discriminatory actions and conditions-damage* which was caused by such treatment. Whether the discrimination caused a damage (material /property/damage – real damage or loss of potential gain, or non-material/immaterial, moral/ – pain or fear), is naturally not a precondition for the existence of an unlawful discrimination per se, the same way as it is not the purpose of the state of discrimination relevant for the existence of the discrimination. But if the damage exists, as well as the intention or degrees of fault of the discriminator, the discriminated person has the right to be compensated by the discriminator for *all* of the *damages* suffered, *material and non-material alike.*

25 Article 199.

26 Article 43, item 3. equally as Article 43, item 2 of the Law on the Prevention of Discrimination against Persons with Disabilities, and Article 43, Paragraph 1, items 4. and 5 of the Law on Gender Equality.

27 Article 43, item. 4 of the Law on Prohibition of dDscrimination. Also Article 43, item 4 of the Law on the Prevention of Discrimination against Persons with Disabilities, and Article 43, Paragraph 1, item 6 of the Law on Gender Equality.

The actions of the discriminator have to be the cause of the damage, and the discriminator has to be *guilty*.

There are no special rules related to the notion of damage, causal relation between the discriminatory action and the damage, and therefore in such cases the *generally applicable* provisions of the Law on Contract and torts apply. Every harmful discriminatory action that causes the concrete damage creates liability to readdress it.[28] However, there are *special* regulations which are different from the current general regulations, concerning *the fault of the discriminator, assumption of guilt and burden of evidence* which are prescribed in Article 45 of the Law on the Prohibition of Discrimination and Article 49 of the Gender Equality Act.[29]

Material damage exists if the property status of the discriminated person (number and value of his property rights) would have been more favorable if it wasn't for the discriminatory actions. Because the discriminated person would also have the rights which were ceased or the rights whose value would not have been diminished otherwise (real damage), or he/she would have the new rights or the value of the rights could have been increased but it wasn't (loss of gain). For example, due to the discriminatory act of boycotting, the turnover decreased, the goods were not delivered due to the boycott and as a consequence he/she had to obtain the goods at a higher price elsewhere, or he/was was liable to his creditors since he/she was not able to obtain the goods elsewhere; due to the discriminatory actions he/she wasn't employed and therefore didn't have an income; because of the discriminatory actions he/she had to hire an attorney and subsequently had expenses in order to exercise his/her right to a freedom from discrimination; due to the discriminatory action of denial of medical care he/she got very sick, which caused additional medical expenses; because of the discriminatory actions he/she had additional expenses related to change of the place of residence, and so on.

Non-material damage consists of suffering the mental anguish, physical pain and fear. Considering that the discrimination often constitutes a simultaneous violation of a personal right on human dignity (when the person is discriminated because of some human characteristic), the right on the compensation for the non-material damage *in this regard* could regularly rely on the general provision of the Law on Contract and Torts, which stipulates that the plaintiff has the right on the award of equitable damages for the violation of a personal right on dignity and honor, violation of his/her reputation and violations of other personal rights[30]

28 Article 154 and other of the Law on Contract and Torts

29 There aren't any in the Law on the Prevention of Discrimination against Persons with Disabilities.

30 Article 200

Discriminatory act is *causing* the damage if the actions made under such circumstances would cause such damage even under the regular course of things (adequate causality), unless it was bound to happen due to some other, else's actions only at a later stage (surpassed, reserved causality).

The discriminated person is proving the act, the damage and the causal relation between them. The guilt of the discriminator is *assumed beyond any doubt* if he/she commits the act of the *direct discrimination*. (Article 45, Paragraph 1).[31] Direct discrimination occurs if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favorable position through any act, action or omission, while the indirect discrimination occurs if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favorable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.[32]

31 Rule on the burden of evidence, Article 45, Paragraph 1: It the court establishes that a direct act of discrimination has been committed, or if that fact is undisputed by the parties to the lawsuit, the defendant may not be relieved of responsibility by supplying evidence that he/she is not guilty. See also Article 49, Paragraph 1 of the Gender Equality Act. .

32 Direct discrimination, Article 6: Direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission. Indirect discrimination, Article 7: Indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary. Direct discrimination and the features that distinguish it from indirect discrimination are equally defined by the Law on the Prohibition of Discrimination of Persons with Disabilities Article 6, Paragraphs 2 and 3 "Violation of the principle of equal rights and obligations"; Article 8: Violation of the principle of equal rights and obligation shall occur if the person or a group of people , on account of his/her/theirs personal characteristics are unjustly being denied their rights and freedoms or if the obligations are being imposed upon him/her/them which are not being denied or imposed to another person or a group of people people in a same or a similar situation; if the goal or a consequence of the taken actions is unjustified; if there is no proportion between the taken actions and the goal being fulfilled by such actions. Special measures- Article 14: The measures introduced for the accomplishment of full equality, protection and advancement of people or a group of people in an unequal position shall not be considered as discrimination. Articles 7 and 8 of the Law on the Prevention of Discrimination against Persons with Disabilities: "Violation of the principle of equal rights and obligations exists: 1. if the discriminated person is unjustly being denied his/her rights and freedoms exclusively or partially on the grounds of his/her disability or if the obligations are being imposed upon the discriminated person which are not being denied or imposed upon another person or a group of people in a same or a similar situation; 2. if the goal or a consequence of the taken actions is unjustified; 3. if there is no proportion between the taken actions and the goal being fulfilled by such actions" (Article 7).„Not to be considered as a violation of the principle of equal rights and obligations nor a discrimination: 1. provisions of laws and regulations, as well as the decisions or special measures enacted for the purpose of improvement of the position of persons with disabilities, members of their families and associations of the persons with disabilities, which are being provided a special support necessary for the enjoyment and exercising

According to the general provisions of the Law on Obligations, contained in the Law on Contract and Torts, if there is a causal relation between the tortfeasor's actions and the damage, than the liability of the tortfeasor is assumed.[33]However, neither the intention nor the gross negligence is being assumed, only the common negligence of the tortfeasor.[34] The tortfeasor can refute the assumption of his/her guilt by proving that although he/she caused the damage, he/she acted with care and was not even commonly negligent (or rather the tortfeasor didn't neglect the average common care and his/her caution was not lower than average).

In contrast with that, Law on the Prohibition of Discrimination[35] stipulates that if the discriminator committed the act of a *direct discrimination*, which caused damage to the discriminated person, the discriminator may not be relieved of responsibility by supplying evidence he/she is not guilty. The discriminators guilt in such cases is assumed beyond dispute. This is justified: considering the nature of the situations which constitute a direct discrimination, it is hard to imagine real- life cases of direct discrimination which are not accompanied by guilt.

The special provision of the Law on the Prohibition of Discrimination [36] stipulates if the plaintiff proves the likelihood of the respondent's having committed an act of discrimination due to the personal characteristic that differentiates the plaintiff from other persons, then the *burden of proving* that no violation of the principle of equality or the principle of equal rights and obligations has occurred falls on the respondent [37] (more on the burden of evidence, under 11.2.8.). Both rules are stipulated in the EU Directives 2000/43 dated 29.6.2000. on the principle of equal treatment between persons irrespective of their ethnic or racial origin,[38] and Directive 2000/78 on establishing a general framework for equal treatment in employment and occupation.[39]

However, our legislator, when enacting the Law on the Prohibition of Discrimina-

of their rights under same conditions of enjoyment and exercising prescribed for others; 2. Enacting or retention of the existing acts and measures whose goal is to eliminate or to repair the disadvantage of the persons with disabilities who are being provided with special support" (Article 8).

33 Article 154, Paragraph. 1.

34 Principled stance of the XIV joint session of the Federal Court, Supreme Military Court and supreme courts of the republics and provinces, that took place on March 25. and 26. 1980.

35 Article 45, Paragraph 1, same as Article 49, Paragraph 1 of the Gender Equality Act.

36 Article 45, Paragraph 2.

37 Rule on the burden of evidence, Article 45, Paragraph 2: If the plaintiff proves the likelihood of the defendant's having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant

38 Article 8, Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnical origins.

39 Article 10, Directive 2000/783/ECof 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

tion against the Persons with Disabilities was not ready to accept those regulations which present the highest European standards for the protection against discrimination and consequently this Law doesn't contain neither one of those rules which are indeed improving the position of the victims of the discrimination as the weaker side in a relation, thus rising the level of efficiency of the protection against discrimination. Naturally now, based on the Law on the Prohibition of Discrimination, which fulfilled the condition on harmonization of the domestic legislation with the EU laws, both rules are in effect and are applicable even in the cases of discrimination against persons with disabilities.

Considering the nature of the discriminatory actions, the *pecuniary* compensation will be more frequent, than the compensation in kind.

In the above-mentioned Šabac case,[40] the respondent was obliged to publish at his own expense a public apology to the discriminated plaintiffs, in a daily journal of the following content: "Company 'Jugent tt' – sports and Recreation Center "Krsmanovača" Šabac, apologizes to Merihane Rustenov, Vasić Jordan and Vasić Zoran, all from Belgrade, because on the 8.7.2000. they were prevented by the employee of the respondent, solely based on their Roma ethnicity, to access the pool in the Sports and Recreation Center "Krsmanovača" within 15 days from the day the ruling was announced. This adjudication of the court was based on the provisions of Article 199 of the Law on contract and Torts. The stipulations of Article 199 of the Law on contract and torts eliminate the consequences stemming from the violation of personal rights in one of the ways stipulated in this article. The legislator didn't explicitly state all of the possible ways for the elimination of the harmful consequences, precisely due to the delicacy of such violations, and therefore the legislator left a possibility of individualization for each concrete case by formulating it in the following way: "the court may order that the tortfeasor take back the statement causing the violation, or order something else which would reach the purpose, otherwise apt to be achieved by indemnity. "

Law on the Prohibition of Discrimination against the Persons with Disabilities explicitly recognizes the lawsuit for the awarding of damages caused by the discrimination on the grounds of disability,[41] while the Gender Equality Act stipulates that on the grounds of gender,[42] and since there aren't any limitations, the provisions are applicable to every form of damage and therefore to every form of compensation for the damage, pecuniary as well as every other suitable form of non-material compensation.

40 See in the text observation No. 7. Judgment of the Supreme Court of Serbia Rev. 229/04 dated 21.4.2004, ruling of the Šabac County court No. 1591/02 dated 3.7.2003, verdict of the Šabac Municipal court No. 2939/2001 dated 20.2.2002.

41 Article 43, item 4.

42

10.1.10. Judicial Penalty to the Discriminator

The main direction of the protection of the discriminated person is determined by a judgment which is approving the claim stated in the reactive or preventive litigation. However, for the purpose of the efficient protection, it is sometimes necessary to reach a decision on the court penalty. The discriminated person may request from the court to award a *court penalty:* to threaten the discriminator that he/she would have *to pay to the discriminated person* a certain, commensurate amount of money, regardless of the awarding of the damages, if he/she *fails* to fulfill the obligation of the omission of the discriminatory actions or an obligation to eliminate the state of discrimination. By putting in the perspective of the discriminator the private penalty in case he/she fails to perform the main obligation, additional pressure is being asserted upon the discriminator to fulfill the main obligation (refrain from committing a discriminatory action or to eliminate the condition of discrimination) while it is improving the position of the discriminated person in case there is a risk that the discriminator wouldn't be willing to fulfill his/her obligation otherwise.

The Law on the Prohibition of Discrimination is not regulating the court penalties, but the court may at the request of discriminated person award court penalty based on the Law of Contract and Torts.[43]

The amount should be *commensurate* to the situation, so that the amount of the awarded penalty would be able to stimulate the discriminator to fulfill his/her obligation, but it mustn't exceed the amount sufficient for the accomplishment of the purpose.

The claim for a court penalty is *accessory and dependant* since it always depends on the existence of another, main claim (regarding the merits). The court penalty serves to encourage the fulfillment of the request of the discriminated person stated in the main claim for omission or a claim for the elimination.

In cases where the obligation of the discriminator is to refrain from committing the act of discrimination (claim for the omission), the claim for a court penalty is based on the provisions of the Law on Contract and Torts. Freedom from discrimination or the right to non-discrimination respectively is one of the personal rights and the Law on Contract and Torts stipulates the claim for a court penalty as a means of protection of these rights, which can be used alongside the claim for omission, as a measure of additional pressure to the tortfeasor not to commit an act which is violating *any of the personal rights.*[44]

43 Article 157, Paragraph 2, Article 294, Paragraph 1.

44 Article 157, Paragraph 2 of the Law on Contract and Torts: "The court or the other competent agency may order cessation of the action by threatening the payment of a certain amount of money, determined as a lump sum or per time unit, to the benefit of the person suffering damage".

When the claim of the discriminated person for the *elimination* of the already created condition of the discrimination is approved by *effective judgment,* the court penalty for the purpose of putting additional pressure on the respondent to fulfill his/her obligations, is adjudicated on the grounds of the provisions of the Law on Contract and Torts. According to the stipulations of this law[45] court penalty can be used to collect the *awarded non-material damages in general,* and an obligation to eliminate the state of discrimination is a non-material obligation. The court shall determine, based on a claim, an additional deadline for the fulfillment of the discriminator's obligations and also it shall determine the amount of the pecuniary compensation which shall be paid to the discriminated person if the discriminator doesn't fulfill his/her obligations in time. After the debtor's subsequent performance of the obligation, the court may reduce the specified amount, while taking into account the purpose serving as a ground for its payment.[46]

Once a discriminated person requests in the enforcement proceedings an enforcement of the effective judgment ordering the discriminator to eliminate the state of discrimination, the discriminated person *can't* request the court penalty *as well*, *nor* the previously submitted motion for the court penalty can be approved (but if it was approved prior to the request for writ of enforcement, it may eventually be enforced).

Law on the Prohibition of Discrimination,[47] unlike the Model of the Law on the Prohibition of Discrimination,[48] doesn't contain a specific stipulation regarding the court penalty pertinent *for failure to fulfill the obligation ordered as a temporary measure*. But since the court penalty has an equal sense and justification relevant for the temporary measure as well, by putting additional pressure on the discriminator to honor it, nothing prevents the application of the general provisions related to the court penalty, although it would have been appropriate that the relevant stipulations were included in this law for the purpose of making it complete.

For the same reasons, a court penalty can be awarded along with the *temporary measure* until the proceedings of litigation for the omission or for the elimination become effective.

10.1.11 Announcement of the Judgment against the Discriminator

The request of the discriminated person that a judgment is to be made public,[49] unlike all other claims of the discriminated person, is not an individual claim,

45 Article 294, Paragraph 1 Law on Contract and Torts.

46 Article 294, Paragraph 2 Law on Contract and Torts.

47 Neither does the Law on the Prevention of Discrimination against Persons with Disabilitie

48 Article 29, Paragraph 1.

49 Article 43, item 5 of the Law on Prohibition of Discrimination. Law on the Prevention of Discrimination against Persons with Disabilities and Law on Gender Equality have no stipulations regarding this request.

it is always accompanying some other claims in a litigation. The discriminated person is requesting from the court to order that the judgment approving his/her claim in a preventive litigation (for omission) or a reactive civil litigation (for establishing, elimination or awarding of damages) related to discrimination is to be made public.

In the Šabac case of the Sports and Recreation Center "Krsmanovača" the court ordered the respondent to make a public apology to the discriminated plaintiffs and "if the respondent fails to do so, the plaintiffs are authorized to publish the order of the judgment at the expense of the respondent in the same newspaper".[50]

Request for the publication of the judgment is founded if the *discriminatory action was committed in public*. The notion "in public" doesn't relate solely to the discrimination committed by the use of public media, but also in another public way, for instance through internet, billboards, leaflets, in a rally, at the stadium during a public event, etc. Publication of the judgment to the same public in front of which the discrimination was committed is accomplishing that the legal reaction is made public in front of the approximately same circle of individuals who witnessed the discriminatory act.

At the same time the possibility of the publication of the judgment is an important venue for raising the awareness regarding the unlawful and permissible discrimination in the individuals' cases. The general public is thus being informed by the *publication of the judgment rendered in the discriminated person's litigation* that not only the plaintiff's lawsuit was successful, but also that the state provides protection in such cases of the violation of the right to (caused by concrete behavior) freedom from discrimination, that such behavior similar to respondent's is not permissible and that it entails legal consequences (sanctions). Publication of the judgment is also raising the level of legal certainty regarding the distinction between permissible and unlawful discrimination.

The court *never orders* the publication of the judgment *ex officio*, only if such a request was submitted.

The judgment against the discriminator is made public at the expense of the respondent, the discriminator.

50 See in the text observation 7.

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10.2. PROCEDURE IN THE LAWSUITS FOR PROTECTION AGAINST DISCRIMINATION

Authors of this section are Lidija Đukić, Judge of the Supreme Court of Cassation and Snežana Andrejević, Judge of the Supreme Court of Cassation.

Anti-discrimination regulations such as the Law on the Prevention of Discrimination Against the persons with Disabilities,[1] Law o the Prohibition of Discrimination,[2] and Gender Equality Act,[3] contain special procedural provisions which are regulating the proceedings in the litigations for the protection against the discrimination, while for other matters which are not regulated by special provisions, the principles pertinent to the general litigation procedures stipulated in the Civil Procedure Law are being applied.[4] According to the legal principle that special provisions derogate from general ones, in the lawsuits for the protection against discrimination, special procedural provisions stipulated in the above mentioned laws, always have the primary use. In the lawsuits for the protection against discrimination one should always bare in mind that these proceedings are protecting the right on equality, as a basic human right, aiming to create a society without discrimination, and therefore in this sense all of the provisions of the antidiscrimination regulations, especially the procedural ones, should be implemented and interpreted.

10.2.1.Jurisdiction and the composition of the court

Law on Organization of Courts [5] stipulates the rules regarding the jurisdiction of courts which prescribe how each of the courts should act in a certain legal matter.

The subject matter jurisdiction delineates the competences between various types of courts within a unified judicial system[6], as well as the competences of the courts of different instances within the same type of courts. In a lawsuit for the protection against discrimination the real jurisdiction lies with the basic court. The Law on Organization of the Courts doesn't contain a specific stipulation related to the competences of the basic or other courts in such litigations, but there are stipulations which prescribe in which legal matters the basic court adjudicates and there is a rule that the basic court in first instance adjudicates in civil litigation unless it falls under jurisdiction of another court. It is precisely this specific phrasing "unless it falls under jurisdiction of another court" which determines the jurisdiction of the basic courts in litigations for protection against discrimination. Since the civil jurisdiction is divided between the basic and the higher court in such a way, that apart from explicitly determined matters, higher court in first instance shall adjudicate in civil litigation where the value of the subject of litigation permits revisions, and it is also possible that in first instance

1 "Official Gazette of the Republic of Serbia " No. 33/2006.
2 "Official Gazette of the Republic of Serbia " No. 22/2009.
3 "Official Gazette of the Republic of Serbia " No. 104/2009.
4 "Official Gazette of the Republic of Serbia " No. 72/2011 (in the text below CPL).
5 "Official Gazette of the Republic of Serbia " No. 116/2008.
6 According to the Law on Organization of Courts there are courts of general jurisdiction (basic, higher, appellate and Supreme Court of Cassation) and court of special jurisdiction (commercial courts, the Commercial Appellate Court, minor offences courts, the High Minor Offences Court and the Administrative Court).

litigation for protection against discrimination higher court adjudicates if the determined value of the litigation would be more than 100.000 Euros or if there is a request for awarding of damages that exceeds this amount.[7]

In the course of the entire proceedings, the court (judge) shall *ex officio* take due care upon its jurisdiction or a subject matter jurisdiction. but it shall deliberate differently in a situation when a matter doesn't fall under the court's jurisdiction or when a subject matter doesn't fall under its jurisdiction. If the court ascertains that deliberation in a particular litigation doesn't fall under its jurisdiction (absolute incompetence of the court), the court shall declare itself lacking jurisdiction, revoke all actions undertaken in the proceedings and reject the complaint. However, if the court ascertains that it is lacking jurisdiction to deliberate in a particular litigation (relative jurisdiction of the court), it shall declare itself incompetent and shall refer the case to a competent court. In a litigation for protection against discrimination it is possible that the plaintiff submits a complaint to a court which is not competent for the subject-matter, but the plaintiff shall not suffer harmful consequences for it,[8] because the court to which the case has been referred to, shall continue with the proceedings the same way as if the complaint was submitted to this court from the beginning.

The rules on territorial jurisdiction are delineating territorial jurisdiction among the courts of subject matter jurisdiction of the same type and same degree. Considering that the basic court is competent to adjudicate in the litigation for protection against the discrimination, the rules on the territorial jurisdiction are determining which of the existing basic courts should adjudicate in the concrete lawsuit.

Rules on territorial jurisdiction are part of the provisions of the CPL. However, in the litigations for protection against discrimination there is a special provision regarding the territorial jurisdiction that determines the elective (optional) territorial jurisdiction. Namely, apart from the court that has the general territorial jurisdiction, a court located in the territory where the person seeking protection from the court has a registered residence or a seat also has a territorial jurisdiction.[9] This special territorial jurisdiction was established in favor of the persons seeking protection against discrimination for the purpose of easier exercising of this right. The person seeking protection (the plaintiff) against discrimination has the right to choose between two courts with territorial jurisdiction, and the plaintiff decided to which court he/she shall submit the complaint, but once the plaintiff chooses the court and files a complaint, the territorial jurisdiction is established and it cannot be changed.

7 See Article 403, CPL (Civil Procedure Law).

8 If the lawsuit is lodged with the court which hasn't the actual or territorial jurisdiction, the lost time is a negative consequence to be suffered by the plaintiff because the court must deliberate a ruling, wait for its effectiveness and then the case can be transferred to the competent court which can continue with the proceedings.

9 Article 41 of the Law on the Prevention of Discrimination against Persons with Disabilities, Article 42 of the Law on Prohibition of discrimination and Article 46 of the Law on Gender Equality.

The general territorial competence of a court means that any complaint may be submitted against a person to this court. For the natural persons, general territorial jurisdiction of the court is determined on the grounds of permanent or temporary residence of the respondent[10]. In civil disputes against the Republic of Serbia, autonomous province, local authorities and other forms of territorial organization, general territorial jurisdiction lies with the court on whose territory the assembly of the relevant territorial organization is located, while for adjudication in disputes against legal entities, the general territorial jurisdiction shall lie with the court on whose territory the registered seat of a legal entity is located, according the Serbian Business Registries Agency[11]. Apart form these provisions, Article 46 of the Civil Procedure Law stipulates a special territorial jurisdiction for litigations based on the violation of a personal right and apart from the court with general territorial jurisdiction, territorial jurisdiction of the court shall lie with the court on whose territory the alleged violation took place or the territorial jurisdiction of the court lies with the court on whose territory the plaintiff has temporary or permanent residence.

Baring in mind the special and general provisions related to the territorial jurisdiction, a discriminated person who is seeking protection from the court can choose the court to which the complaint shall be submitted based on: permanent or temporary residence/ or a seat of the plaintiff, general territorial jurisdiction of the court, the place of residence/ seat of the respondent or based on the territory where the adverse act took place.

In the litigations for the protection against discrimination the court doesn't pay due attention regarding the territorial jurisdiction ex officio, because the exclusive territorial jurisdiction is not prescribed for such cases. The court shall ex officio pay due attention solely to the exclusive territorial jurisdiction[12] while the court shall pay due attention to the special territorial jurisdiction in a litigation for the protection against discrimination only if the respondent is making an objection and contesting the territorial jurisdiction. In this case, the court must decide within eight days from the day it receives the objection claim (situation of the submission of a response to a complaint), or from the day the preliminary hearing was held or the first hearing of the main trial (situation where the respondent hasn't yet begun to argue the merits of the case).[13]

10 Law on the Seats and Territorial Jurisdiction of Courts and Public Prosecutor's Offices ("Official Gazette of the Republic of Serbia"No. 116/2008) determines the seats and territorial jurisdiction of the courts in their area of competence, while the Law on the Territorial Organization of the Republic of Serbia ("Official Gazette of the Republic of Serbia ", No. 129/2007) determines the inhabited settlements that are entering the composition of the territorial units (municipality, town, city of Belgrade).

11 See Articles 39and 40 of CPL.

12 For instance, exclusive territorial jurisdiction is stipulated in Article 50 of CPL for disputes over property rights and other rights on real property in disputes over trespassing and disputes arising from lease relations on real property, and in such cases, the jurisdiction lies exclusively with the court on whose territory the real property is located.

13 See Article 20 of CPL

Considering that in the lawsuits for protection against discrimination territorial jurisdiction is prescribed, or rather jurisdiction of the several basic courts, it is possible that the plaintiff doesn't submit a claim to any of the courts with territorial jurisdiction. In this case the court shall (based on the objection of the respondent) declare itself lacking territorial jurisdiction and shall refer the case to a court having jurisdiction. However, precisely because there are multiple courts with territorial jurisdiction, the court can't select on its own to which of the courts the case would be referred to, it has to consult the plaintiff, and if the plaintiff doesn't respond within three days time, the court shall refer the case to a court with general territorial jurisdiction[14]. It is a common judicial practice (of judges) to simultaneously pass a ruling declaring itself lacking jurisdiction and a decision on the referral of the case to a court having jurisdiction. When it comes to territorial jurisdiction, the court must first make a ruling declaring itself lacking jurisdiction, and after the ruling on lack of jurisdiction becomes effective, and then the court shall request information from the plaintiff, and if the plaintiff doesn't respond or decide, the court shall refer the case to a court having general territorial jurisdiction.

According to the stipulations of CPL in the lawsuits for protection against discrimination in the first degree a single judge shall adjudicate (Article 35, Paragraph 1 of CPL), while in the second and third degree a chamber composed of three judges shall adjudicate (Article 37 of CPL).

10.2.2. Active procedural legitimation

In the lawsuits for the protection against discrimination, every natural person or a legal entity who claims he/she/it was is discriminated against, is being actively legitimated[15]. By filing a lawsuit such individual acquires a status of a plaintiff in the lawsuit proceedings.

In litigation for the protection against discrimination as a rule a natural person appears in the role of a plaintiff, because by the nature of things, most personal characteristics (race, gender, ethnicity, sexual orientation, disability, age, etc.) are related only with the natural persons.

When a discriminated person appears in litigation as a plaintiff, his/her active legitimation is completely clear and indisputable, because his/her subjective right

14 See Article 20 of the CPL

15 Expressions "person" and "everyone", according to the given examples of the positive legislation on the prohibition of discrimination, are designated to describe an individual residing on the territory of the Republic of Serbia or a territory under its jurisdiction, , regardless of whether that individual is a national of the Republic of Serbia, some other state or a stateless person, as well as any legal entity registered or operating on the territory of the Republic of Serbia; the term "citizen" is used to designate a person who is a national of the Republic of Serbia; each and every one of them has the right to be efficiently protected against all forms of discrimination by competent courts and other the public authorities of the Republic of Serbia.

is violated and he/she is the carrier of this material relation that produced the dispute (discrimination) which should be settled by the court.

According to the Law on the Prevention of Discrimination of the Persons with Disabilities, active procedural legitimation, in the lawsuits for the protection against discrimination on the grounds of disability, belongs only to the discriminated person because his/her right was violated and this person has the status of a party (plaintiff) even when the lawsuit is filed by his/her legal representative[16]. According to the provisions of this law, a person accompanying the disabled person has the active legitimation, but only if he/she were discriminated against in the sphere of employment and exercising of the labor rights.

However, according to the stipulations of the Law on the Prohibition of Discrimination and Gender Equality Act, lawsuit for the protection against discrimination can be filed by other subjects, other persons, who were given such rights by the explicit stipulations of these laws.[17]

According to the stipulations of the Law on the Prohibition of Discrimination, a lawsuit for the protection against discrimination can be filed by other subjects:

- Commissioner for the Protection of Equality,
- Organizations for the protection of human rights, and
- A person who voluntarily subjected himself or herself to the discrimination in order to directly examine the application of the legislation regarding the prohibition of discrimination (so-called volunteer examiner of the discrimination, tester).

In the litigation proceedings, these subjects have the capacity of a party-plaintiff.

Legal provisions prescribe the limitations pertinent to the type of the protection these subjects may seek, by excluding the possibility for them to make a claim for awarding of damages.

Besides that, if the Commissioner for the Protection of Equality and organizations for the protection of human rights are filing a lawsuit against the discrimination which is related to a specific individual, they must have a written consent of this person (described in chapter 13.4.1.). A person who voluntarily subjected himself or herself to the discrimination in order to directly examine the application of the legislation regarding the prohibition of discrimination, can file a lawsuit only related to the concrete case in which he/she was an examiner (Article 46).

16 According to Article 74, Paragraph 1 of CPL, the party holding full disclosing capacities shall be permitted to undertake actions in the proceedings (litigation capacity), while Article 76 of CPL stipulates that a party without litigation capacity is presented by the legal representative.

17 Note: According to the stipulations of Article 26, Paragraph 3 of the Law on the Prohibition of Discrimination pertaining to judicial protection against discrimination of the persons with disabilities, all of the procedural provisions of this law are applicable (Article 41-46), and this fact is highlighted here because the Law on the Prohibition of Discrimination, although being a general law was enacted subsequently to the enacting of the Law on Prevention of Discrimination of the Persons with Disabilities.

According to the Gender Equality Act, the discriminated person has the right (legitimation) to file a lawsuit and he/she retains its status of the party (plaintiff) even when the lawsuit is filed with his/her written consent by other persons on his/her behalf. These other persons can be a union or associations[18] whose goals and activities are linked with the promotion of gender equality. If they haven't filed a lawsuit, these persons may be involved in the litigation on the side of the plaintiff (discriminated person) as interveners.

The union or the associations have an active procedural legitimation and they can be the parties (plaintiffs) in a litigation when they are filing a lawsuit before the court on their own behalf in case of the violation of the rights of larger number of people. In this case the person whose right was violated can join them as an intervener. As a rule, the union and associations have the status of the legal entity,[19] but if they don't, with the special provision (Article 43, Paragraph 3 of the Gender Equality Act) their capacity to be a party is recognized.[20] The exact numerical value that is needed so that we may be referring to "the larger number of people" is not specifically determined, and therefore it is up to the future judicial practice to set the standard on this, which cannot be restrictive in any way, having in mind the subject of the protection and the nature of a protected right.

Access of other injured parties, unions and associations into an ongoing litigation is possible on the grounds of a public invitation of the union or the association which filed a lawsuit, while they (other injured parties, unions, associations) can join the existing plaintiff as interveners or co-litigants (Article 43, Paragraph 4 of the Gender Equality Act).

Subjects (other persons) whose authorization to file a lawsuit for the protection of discrimination was recognized, wherein they themselves are not the participants in a material relation from which the violation of a right emerged, have the possibility to fulfill their goals (human rights protection in general or protection of the rights of a specific group) thought the litigation proceedings (judgment), and they also have the possibility to use the litigation proceedings to draw attention to the discriminated persons or groups and to the discriminatory behavior in general and finally they are participating in the creation of the standards of judiciary practice in the sphere of application of antidiscrimination legislation.

18 For more details regarding the associations see Article 42 of the Gender Equality Act.

19 See Article 238 of the Labor Law ("Official Gazette of the Republic of Serbia ", No. 24/05 and 61/05) and Article 4 of the Law on the Associations ("Official Gazette of the Republic of Serbia ", No. 51/09 and 99/11).

20 See Article 74 of CPL.

Example
In the sphere of labor and employment, the employers are frequently announcing vacancies with special terms of reference which are discriminatory. For instance, when an employer delivers a vacancy announcement to an employment service, describing a potential candidate as a man, which is not justified by the workplace prerequisites, and when the employment service accepts such an announcement and sends only male candidates to the employer, the discrimination based on gender was committed, because of discrimination of the female candidates which meet other requirements of the announcement. Under such circumstances, there would be grounds for filing a lawsuit not only by the discriminated persons, but also by the persons who have the right under the provisions of the Law on Prohibition of Discrimination or Gender Equality Act (Commissioner for the Protection of Equality, organizations for protection of human rights, unions, associations dealing with promotion of gender equality). The employer and the employment service could both be respondents in this case, while the court in such instances doesn't have to establish the identity of the discriminated persons and therefore the proceedings can take place without their participation.

10.2.3. Interveners and co-litigants

According to the Gender Equality Act, union or associations whose goals are linked with promotion of gender equality may be involved in the litigation on the side of the plaintiff (discriminated person) as interveners unless they filed a lawsuit on their own.[21] When a union or the associations files a lawsuit before the court regarding the violation of the rights of larger number of people, in this case the person whose right was violated can join them as an intervener.

According to the stipulations of Article 43, Paragraph 4 of the Gender Equality Act, access of other injured parties, unions and associations into an ongoing litigation is possible on the grounds of a public invitation of the union or the association which filed a lawsuit, while they (other injured parties, unions, associations) can join the existing plaintiff as interveners or co-litigants.

According to the explicit rule stipulated in the Article 43, Paragraph 5 of Gender Equality Act a new plaintiff can subsequently join the litigation alongside the main plaintiff even without the consent of the latter, after the main plaintiff begins to argue the merits of the case in the main hearing.

In view of the stipulations of the Civil Procedure Law regarding the litigation proceedings and roles of interveners and co-litigants, the stipulated special provisions regarding the participation of interveners and co-litigation, they can possi-

21 Article 43, Paragraph. 2 of Gender Equality Act.

bly open up an issue of their collision. Namely, the Civil Procedure Law stipulates rules regarding co-litigants and prescribes the conditions for a submission of the single claim by several persons, also these provisions regulate co-litigants and unified co-litigants, participation of the interveners in a litigation where the main condition for gaining the status of the intervener is that this person has a legal interest to support the plaintiff and is benefiting from the successful lawsuit. Since the stipulations of the Gender Equality Act prescribe that a discriminated person can have either the role of the plaintiff or an intervener in a lawsuit and that unions and associations can file a lawsuit on behalf of the discriminated person or on their own behalf (larger number of persons) or they can be the interveners, this raises the question whether this is determined under the conditions stipulated in the Civil Procedure Law or under the special stipulations of the Gender Equality Act which enable these subjects to choose their role in a litigation, without the court's deliberation on whether the conditions for such participation have been met. The answer to this question is that in a lawsuit for the protection against discrimination based on the gender, general provisions of the Civil Procedure Law do not apply due to the special procedural rules which take precedence.

10.2.4. Complaint - content, claim, disposal of the claims

The court proceedings for the protection against discrimination are initiated by filing of a complaint. When a plaintiff files a complaint he is opting to seek protection of the court and this is his/her primary action related to disposal. The principle pertaining to the parties' free disposal of the claims filed in the proceedings is one of the basic principles of the litigation.[22] Therefore during the proceedings, the plaintiff is freely disposing with the claim filed in the proceedings and may decide to waive or modify the claim or decide to undertake other procedural actions.

The complaint is submitted to the court and therefore it must contain all of the elements stipulated in the CPL for submissions.[23]The content of the complaint is also determined by the provisions of Article 192 of CPL: A complaint must contain a specific claim regarding the merits and accessory claims, the facts on which the plaintiff founds the claim, evidence to support these facts, value of the subject of dispute and other information which are duly enclosed with every submission (Article 98. CPL); and if the jurisdiction, composition of the court, the right to request review on points of law, depends on the value of the subject of the dispute, and the subject of the claim is not pecuniary amount, the plaintiff is obliged to dully indicate the value of the subject of dispute in the complaint.

22 See Article 3 of CPL.
23 See Article 98. CPL.

A claim in the litigation for the protection against discrimination must contain all of the elements stipulated by the general civil litigation legislation, with one exception related to the obligatory indication of the value of the subject of the dispute. The value of the subject of the litigation is relevant both for the subject matter jurisdiction of the court and for the right to a revision, and in such instances revision is always permitted according to the stipulations of a special regulation,[24] while the competence of the basic court is determined by the legislation and therefore the indication of the values of the subject of the litigation is not necessary. Only when the higher court adjudicates in the first instance, it is required to indicate the value of the subject of litigation if it exceeds 100.000 Euros.

When it comes to the elements of the claim which are determined by the general procedural rules, in the lawsuits for the protection against discrimination there are special stipulations only for the subject of the main claim (Article 43 of the Law on the Prevention of Discrimination against Persons with Disabilities, Article 43 of the Law on Prohibition of Discrimination and Article 43 of the Gender Equality Act) which prescribe what a plaintiff may demand through the lawsuit or what may be the subject of the claim, which indicates further the type of the lawsuit at the disposal of the plaintiff.

The plaintiff may file a declaratory claim or a lawsuit for the establishment in which he/she shall ask for the establishment of the discriminatory behavior and actions of the respondent towards the plaintiff or someone else; then a condemnation suit or a lawsuit for the condemnation of actions, in which the plaintiff shall ask from the court to order the respondent to perform actions which shall eliminate the consequences of the discriminatory actions or to order pecuniary and non-material compensation for the damage; and also the plaintiff can request imposing of the ban on an activity that poses a threat of discrimination, a ban on proceeding with the discriminatory activity or a ban on repeating a discriminatory activity. Also the plaintiff may request that the judgment rendered on any of the lawsuits (listed above) is made public (published). According to the provisions of Gender Equality Act, through a lawsuit for the protection against discrimination the plaintiff may request that the assets or items which are used as means in an infringement activity are placed out of market/circulation/use (textbook which are presenting the gender in a stereotypical of discriminatory fashion, printed publications, propaganda material, etc.).

In the context of the subject of the claim, the question of its determination arises, or how to formulate a claim, so that it fulfils the conditions for the regularity of the claim and conditions for the rendering of a judgment.

24 See Article 41. Law on the Prohibition of Discrimination

By the order of things, if through a lawsuit the plaintiff is demanding the imposing of the ban on an activity that poses a threat of discrimination, a ban on a proceeding with a discriminatory activity, or a ban on repeating of the discriminatory activity, or the plaintiff is demanding from the court to order the respondent to take steps to redress the consequences of discrimination, such actions must be determined concretely (place, time and manner of execution) and what is the respondent specifically being banned or ordered to do.

The same provisions apply for the lawsuit for the establishment, whereas the specific stipulation of the Article 189, Paragraph 3 of CPL prescribes that through such claim the court is asked to establish whether the relation in concern exists or does not exist, provided this is prescribed by the law or other regulations. It is precisely the claim for the establishment filed in a lawsuit for the protection against discrimination which is in a correlation with the rule that through such claim establishment of the facts can be sought, because facts establish the discriminatory action which the respondent committed in plaintiff's or someone else's case.

Filing of the lawsuit for the protection against discrimination is not bound to a certain timeframe, but when it comes to the claim for the compensation of damage (material and non-material) the rules stipulated in the Law on Contract and Torts apply, even those related to the statute of limitations in claims for awarding of damages.[25]

Probably due to the fact that the Law on Prohibition of Discrimination is in force just over three years there isn't enough judicial practice in this sphere, and therefore the attorneys-lawyers filed the lawsuits to the courts containing claims for the purpose of:

- *"Establishing the workplace discrimination and compensation of the material damage, or to respectively determine that the plaintiff was discriminated against by the respondent in such a way, that she decided to unjustly alter the decision regarding the job assignment to decrease plaintiff's salary which prevented the plaintiff's further career advancement, (for the reasons)because she proposed an experts opinion on working capacity performed by another health institutions, and the plaintiff is asking that the respondent is ordered to pay the damage caused by the loss of profit that occurred as a consequence of a workplace discrimination and to award the amount of RSD 300,000.00."*[26]

In the Serbian language version of the claim there is no use of adverbs "that is...", the explanation "to decrease her salary" is redundant as well as "for the reasons because..." or "as a consequence of a workplace discrimination," the altered decision on the work assignment is not identified by the number and date, it is

25 See Article 376.of the Law on Contract and Torts
26 Case P.1 1061/10 Basic Court in Novi Sad

suggested that the issue is the change of a workplace or the salary or both and that the plaintiff believes that she is discriminated against without stating the personal characteristic as the grounds for the alleged discrimination.

- *"It is established that the respondent is not fulfilling the contractual obligations from the employment contract, because he is not assigning to the plaintiffs the contracted work, that the respondent is discriminating the plaintiffs in regard to other employees in such a way he is not honoring the contractual obligations by not assigning to the plaintiffs the contracted work and he must commit himself to enable the plaintiffs to do the jobs described in the employment contract and he must pay to them the unpaid salaries along with the allowance for the transportation and meals(board wages)…."*[27]

Such claim is generalized, undefined in the part related to the failure to honor the contractual obligations, because it doesn't specify which jobs (perhaps all), and than this claim is cumulated with the claim for payment, but not as awarding of damages, which is especially problematic.

The given examples most certainly don't present the examples of perfect or properly defined (formulated) claims, but the courts adjudicated on the grounds of such claims, because the courts didn't consider the deficiencies in the formulation of the claims to be an obstacle in carrying out the judicial proceedings, because it was clear from the content of the claim (factual representation) that the subject of the claim was protection against workplace discrimination.

Namely, there is no procedural rule or a firm judicial standard regarding the determination of the claim, because it depends on the type of the protection which is sought, but in any case the claim must be specific (defined and formulated) and also clear, brief (as much as it is possible) and unburdened with explanations. This is especially important for a antidiscriminatory claim (the future order of judgment), which contains an act of violation: facts related to this action must be reduced to a reasonable amount sufficient to give brief and clear answers to the following questions – who, when, what, how, and in regard of the factual basis it should be contained in the factual condition, as an obligatory element of the order of judgment.

10.2.5. Objective cumulation

The rule on the objective cumulation - putting forward several claims in a single complaint is stipulated in Article 191 of CPL: A plaintiff may put forward several claims against a single respondent in a single complaint when these claims stand related by the equivalent factual and legal grounds. If the claims are not related

27 Case P.1 6946/10 Basic Court in Novi Sad

by the equivalent factual and legal grounds they may be put forward in a single complaint against the single respondent only provided the court that has subject matter jurisdiction for each of these claims, and if the identical form of the proceedings is prescribed for all of the claims.

In the procedural provisions of the antidiscrimination legislation there is no special stipulation regarding the objective cumulation, which means that a stated general rule applies. Due to discrimination, as a legal basis, and discriminatory actions, as a factual basis, several claims can already be put forward in the lawsuit, and at the later stage a new claim can be subsequently put forward, along with the previous one (alteration of a lawsuit).[28] The plaintiff decides which claim would be put forward in a lawsuit for the protection against discrimination, one or several or all, and he/she would combine them depending of the goal he/she is aiming to achieve, except the claim for publishing of the judgment, which can't be put forward independently, but only in junction with a claim regarding the establishment or the omission or condemnation of actions (about this in chapter 11.1.11.).

The restrictions for the plaintiff choice or a combination of claims stem from the event in life and related circumstances: if the discriminatory actions are ongoing, there is room for the claim for ban on proceeding with the discriminatory activity or a ban on repeating a discriminatory activity, if there are consequences of the discriminatory actions the plaintiff may submit a claim for the elimination of the consequences, if there is damage, c claim for the awarding of damages can be submitted, et cetera. (about this in chapter 11.1.11.)

When it comes to the claim for the compensation of damage, a question was raised on whether this claim can be put forward together with a claim for the establishing of discriminatory actions in the same lawsuit, because there is a court standard: where there is room for the condemnation (performance) there is no place for declaration (establishment). The claim for compensation of damage is a typical lawsuit for condemnation of actions and if in the proceedings for the protection against discrimination this claim is put forward as the only claim for awarding of damages, the court shall deliberate whether there is discrimination that caused the damage as a previous issue. However, there are no obstacles to put forward in a same lawsuit a claim for establishment of discrimination and a claim for compensation of damage, because a special stipulation doesn't exclude it,[29] and due to the nature of the violated subjective right, plaintiff has a legitimate right to seek to prove through rendering of the judgment that the damage (awarded) was caused by discrimination, which is especially justifiable if it is also accompanied by a claim for the publication of this judgment.

28See Article 199 of CPL.

29 Article 45 of the Gender Equality Act excludes cumulation of claims related to the violation of the labor rights in a workplace and violation of the prohibition of discrimination based on gender in the domain of the labor law.

For the plaintiff and for the court, cumulation of the antidiscriminatory claims in the proceedings shouldn't cause difficulties. However, the same can't be said for the cumulation of antidiscriminatory claims with other claims.

In a court case, the following claim was put forward[30]:

- *"It is established that S.J. an employee of the respondent, in a period from July 2011 to 12.03.2012 performed workplace harassment of the plaintiff as his superior, which consisted of addressing the plaintiff alone or in presence of co-workers by shouting, threatening him and belittling him... he was unjustly throwing the plaintiff out from meetings and was insulting the plaintiff on a racial grounds in the presence of other employees ... S.J., an employee of the respondent is prohibited to behave towards the plaintiff in a way that presents a workplace harassment and is insulting in any way, especially on the racial grounds ..subsequently the respondent is ordered to prevent the employee S.J. in further behaving towards the plaintiff in a manner which constitutes workplace harassment ... The respondent is obliged to pay to the plaintiff 7,500,000.00 dinars as an award of non-material damage where 3,750,000.00 dinars is awarded for the suffering of mental anguish caused by damaging of the reputation, violation of dignity and personal rights, belittling, humiliation and racial discrimination and 3,750,000.00 is awarded as non-material damage due to the fear the plaintiff suffers for his health and his and his family's existence ... The judgment shall be made public upon its effectiveness."*

From the above presented claim, and from the extensive narrative of the claim, it can be deduced that the court protection is sought due to the workplace harassment (mobbing) and the discrimination in the sphere of labor due to the racial affiliation (the plaintiff is a black person). Stipulations of the Law on the Prevention of Workplace Harassment[31] prohibit any form of workplace harassment whereas the Law on the Prevention of Discrimination prohibits the discrimination in the sphere of labor on the grounds of any personal characteristic. Both laws contain procedural provisions for the judicial protection proceedings, which are very similar, even identical in for instance the provisions related to the burden of evidence, but according to the specific provision of the Law on the Prevention of Workplace Harassment, the dispute for the protection against workplace discrimination is a labor dispute.

Considering that the rule specified in the Civil Procedure Law stipulates that the cumulation of the claims which are not related by the equivalent factual and legal grounds may be put forward only provided the court that has subject matter

30 Case P1 738/12 Basic Court in Novi Sad.
31 "Official Gazette of the Republic of Serbia " No. 36/2010

jurisdiction for each of these claims, and if the identical form of the proceedings is prescribed for all of the claims, the question is whether in the given example the cumulation of the claims is permissible. Because the legal grounds are not the same (mobbing and discrimination), nor the same type of proceeding is prescribed for the claims on the grounds of mobbing and claims on the grounds of discrimination, while the same court has the subject matter jurisdiction (basic) and the factual basis is the same for both claims. Therefore, one can conclude that in the concrete case the cumulation of claims is impermissible, which opens up the question of court's action in such situation.

Reasons of efficiency and effectiveness might lead toward a conclusion that it is better to settle a dispute between parties in a single lawsuit, especially if the disputes stem from the same factual basis. However, these reasons cannot take precedence over a procedural rule which determines the conditions for objective cumulation of the claims, and in the above mentioned example, the condition regarding the same type of proceedings was not fulfilled. Therefore the court should, regardless if the respondent submitted a statement regarding this matter, based on the stipulations of Article 328, paragraph 2 of the Civil Procedure Law,[32] to separate the hearing on a claim for the workplace harassment from the hearing regarding the discrimination in the sphere of labor.

Law on the Prohibition of Discrimination doesn't contain the rule related to cumulation of the antidiscriminatory claims with other claims, and this is the deficiency of this law, because there is a need to regulate this issue and in such a way so that the discriminated person can through a single lawsuit achieve a comprehensive protection against the violation of the subjective right. [33]

32 Article 314, Paragraph 2 of CPL stipulates that the court may order separate hearing of individual claims encompassed by a single complaint, and may render separate rulings on such claims upon conclusion of these separate hearings.

33 In Croatia the Anti-Discrimination Act which is in force ("Official Gazette", No. 85/2008) contains a specific provision stipulated in Article 17, Paragraph 3 related to the cumulation of the antidiscrimination claims with the claims for protection of other rights:"The claims referred to in paragraph 1 of this Article may be brought before the court together with claims for the protection of other rights to be decided upon in legal proceedings if all the claims are interrelated and if the same court has the subject-matter jurisdiction over them, irrespective of whether these claims are prescribed to be settled in regular or special legal proceedings, except in cases of trespass litigations. In such cases, regulations relevant for the type of litigation in question shall apply, unless otherwise provided by this Act".

10.2.6. The course of the proceedings

The proceedings in the lawsuits for the protection against discrimination are developing between the initial procedural action and the judgment by which the court is adjudicating the merits of the claim for the protection against discrimination.

Several special procedural rules stipulated in the antidiscrimination legislation are being applied in the lawsuits for protection against discrimination. The Law on the Prohibition of Discrimination prescribes that that the proceedings shall be conducted urgently and that the judicial review shall always be permitted. Other than that, this law prescribes special rules pertaining the passing of the temporary measures (Article 44), as well as the specific rules concerning the burden of evidence (Article 45).

The Law on the Prevention of Discrimination against Persons with Disabilities prescribes special rules concerning the passing of temporary measures (Article 45) and regulates that the judicial review is always permitted (Article 44).

The Gender Equality Act also stipulates that the proceedings shall be conducted urgently (Article 47), whereas in this law the principle of urgency is made concrete by stipulation that the first hearing must take place within 15 days from the day claim was received, while the deadline for the counter-complaint is 8 days. This law also stipulates that the court is obliged to render the decision on the passing of temporary measure within three days from the day the motion was received; that the complaint on the decision on temporary measure must be submitted within 48hours from the receipt of the decision, while the decision on the complaint is rendered within 48 hours. The deadline for appeals is 8 days, while the appellate court is obliged to render a decision on the appeal within 3 months from the day of its submission. This law also contains special provisions regarding the burden of evidence. (Article 49).

All of the mentioned laws prescribe due application of the provisions of the Civil Procedure Law (Article 44 of the Law on the Prohibition of Discrimination, Article 40 of the Law on the Prevention of Discrimination of the Persons with Disabilities and Article 44 of the Gender Equality Act). Therefore, if the antidiscrimination legislation does not prescribe special rules, in the lawsuits for the protection against discrimination provisions of CPL are duly applied.

The course of the first degree proceedings in the lawsuits for the protection against discrimination consists of two phases: preparatory phase and phase of arguing on the motions and deliberation. The goal of the preparatory stage and of all the actions pertinent to this stage, is to examine the permissibility of the providing the legal protection and to secure the conditions for the unimpeded

work of the procedural subjects for the resolution of the concrete legal matter. The stage of investigation and deliberations is aiming to completely clarify and determine the conditions, so that the legal premise for the court decision is formed and so that the lawful judgment can be rendered.

10.2.6.1. Preliminary Proceedings

In lawsuits for the protection against discrimination a properly conducted preliminary proceeding is of the uttermost importance, because it contributes to the accomplishment of the principle of urgency of proceedings, as one of the dominant procedural principles in these lawsuits.

In the preliminary proceedings the court first examines a claim in order to establish the jurisdiction, formal regularity of the complaint, permissiveness of the legal venue and fulfillment of other procedural prerequisites. Also a screening of the procedural material is performed in this phase of the proceedings. From the moment it receives a claim, the court should strive to resolve all of the issues that can be resolved in this phase forthwith, so that there are less unresolved issues in the later course of the proceedings.

The court examines the regularity of the claim upon its submission. If a submission is incomprehensible or incomplete (Article 98. CPL), the court shall as it is stipulated in the Article 103 of CPL, return the document to a party who has not appointed a lawyer to act as its attorney for corrections, unless otherwise provided by law.

If a time-bound submission is amended or supplemented and furnished to the court within a time limit determined for amendment or supplementation, it shall be deemed to have been filed on the date when it was filed for the first time. If the submission is not resubmitted within the determined time limit, it shall be deemed to have been withdrawn, and if it is resubmitted without having been amended or supplemented, it shall be rejected

If an incomprehensible submission was furnished on behalf of the party by an authorized legal representative or a public prosecutor or by an attorney general, the court shall reject it. (Article 101, paragraph 5 of CPL). This rule also applies to submissions furnished to the court by legal representatives-Bachelors of Laws who passed the bar examination who are permanently employed by a legal entity. (Article 85, paragraph 2 of CPL).

If the complaint is directed against the Republic of Serbia, the court is duly obliged to examine whether the plaintiff submitted a proposal for a peaceful settlement of the dispute, in accordance with the provisions of Article 193 of CPL. Namely, this article of the Civil Procedure Law prescribes that the person who is intending to file a lawsuit against Republic of Serbia, or an autonomous province or local authorities, has to, before it files a lawsuit to the Public Attor-

ney's office of the Republic of Serbia or to a competent provincial or municipal public attorney's office, file a proposal for a peaceful settlement of the dispute, unless there is a specified time limit for filing of the lawsuit. The law explicitly prescribes that the sanction for failure to comply with this obligatory procedure- is the rejection of the claim (Article 193, paragraph 4 of CPL).

The court shall within 15 days from the day it received the complaint, serve the respondent with the claim and the enclosures and the respondent is obliged to submit a response within 30 days from the day he received the submissions.

Upon serving of the complaint to the respondent it is incumbent upon the court to duly advise the respondent upon the contents of the reply, as well as to the consequences of its failure to submit a reply within a time limit determined (Article 350, Paragraph 1, item 1 of CPL), about the mandatory designation of the recipient of the submissions, (Article 298, Paragraph 3 of CPL) and also about the respondents duty to inform the court about changing of the address. (Article 144 of CPL).

The respondent is obliged to point out in his/her response to the claim all of the potential procedural objections and he/she must state whether he/she recognizes or disputes the claim. The reply must contain other information relevant for any other submission (Article 100). The respondent shall, in its reply to the complaint, put forward its objections and declare whether he/ she admits or contests the claim. If the respondent contests the claim, the reply must contain facts on which its allegations are founded as well as the evidence to support such facts. (Article 298 of CPL).

If a reply to the complaint contains deficiencies (Articles 100 and 284), precluding a court to proceed upon it, the court shall deem that the respondent failed to submit its reply to the complaint. (Article 300 of CPL). The legal consequence of such deficiency is – default judgment.

According to the Article 299 of CPL, exceptionally, the court may immediately schedule a hearing and order that a copy of the complaint is served upon the respondent if the circumstances of a particular case so require, and especially if it is necessary to rule on a motion for ordering provisional measures. If the respondent fails to come to appear at hearing, the consequence shall be a default judgment.

It is incumbent upon the court to duly ascertain that the subject of a dispute is thoroughly examined, the dispute is not unduly delayed and that the proceedings are concluded, if possible, by a single hearing.

The court is obliged to conduct the proceedings without delays, in accordance with the previously defined time limits for the procedural actions and with as little costs as possible. If a judge is not honoring the determined time limits, this shall serve as a basis for a disciplinary action.

A timeframe presents a preliminary plan for the oral proceedings which contains a determined number of days and hearings and a schedule of activities for the hearings within the main hearing, and it is partially referring to the written submissions and actions, because it includes the determination of the judicial deadlines. (Rakić- Vodinelić, 2011: 517).

In the summons for the preliminary hearing, it is incumbent upon the court to duly advise the parties regarding the duty to propose the time limits, but the time limits is decided by the court ex-officio by rendering a decision in accordance with the Article 308 of CPL which contains: number of hearings, dates for the hearings, schedule regarding the presentation of evidences at the hearings and other procedural activities, court deadlines, and the total duration of the main hearing. respondent upon the contents of the reply, as well as to the consequences of its failure to submit a reply within a time limit determined.

Such content of the decision on the timeframe presents in its legal nature a decision on conducting the proceedings and no appeal is permitted against it.

10.2.7. Examination and Proving

In litigation proceedings the court decides within the limits set in the procedure. The parties are obliged to present all of the facts on which their allegations are founded and to propose the evidence to support such facts. The court examines and determines only the facts presented by the parties and proposes only the evidence presented by the parties, unless otherwise stipulated.

The laws regulating the protection against discrimination don't contain the provisions on the obligation of the court to act *ex officio* not they enable the court to use inquisitorial principle except the authorization to sanction the disposals of the parties which are in contravention to compulsory regulations as it is stipulated in Article 3, Paragraph 3 of CPL, when it is authorized to examine the facts which were not presented by the parties and proposes the evidence which wasn't presented by the parties.

Every party is obliged to present the facts and to propose the evidence on which their claims are founded or on refuting the allegations and evidences of the opposing party, which means that every party must present all of the facts needed to corroborate their allegations, to propose the evidence necessary to support their claims and to comment the allegations and evidences presented by the opposing party, because the court can't base its decision on the facts which were not presented by the parties or on evidences which were not proposed, unless otherwise stipulated.

The court shall, in accordance with the stipulations of Article 313 of CPL, by asking questions, take due care that during the main hearing all of the explanations necessary for the establishment of the facts are provided, since the deliberation on the

merits of the claim depends on it. This is restricting the principle of official leading even more, because it limits the previous complementary method used for clarification of the allegations and circumstances relevant for the rendering of the decision.

In a first instance proceedings *beneficium novorum* is limited. Namely, in the sense of Article 308 of CPL, the party is obliged to, at the preliminary hearing the latest, or at the first hearing of the main trial if the preliminary hearing is not mandatory (Article 302 of CPL) present *all the facts* relevant in support of its motions, *afford the evidence* required in support of its allegations and declare on the allegations and evidence presented by the opposing party and to *propose a time limit* for the conducting of the proceedings.

Parties may present new facts and propose new evidence throughout the course of the trial hearing until the main hearing is concluded, only if they can make a credible allegation that they were not able to present them through no fault of their own or to propose them at the preliminary hearing or the first hearing of the main trial if the preliminary hearing was not held. The court will not examine the facts and evidences which were not presented or proposed in accordance with Paragraph 1 of Article 314 of CPL.

Limitation of the right to present new facts and propose new evidence is also applicable when the *first instance judgment is abolished*. At the new main hearing, the parties may present new *facts and propose new evidences* regarding the same claim, only if they present a convincing argument that through no fault of their own, they were unable to present them, or if the applicant was not a party in the proceedings or if he didn't have the status of a party (intervener) until the judgment is abolished, unless stipulated otherwise by the law. The party *doesn't have the right* to *modify a claim* even in the new hearing, by altering the content of the claim or submit a new claim along with the existing one, which is not based on the same factual condition.

The court shall at the hearing stipulated in Paragraph 1 of Article 308 of CPL determine which facts are undisputed or generally known and which legal matters should be deliberated, which evidence shall be proposed at the main hearing and it shall determine the time limits for the proceedings by rendering a decision about this. The court shall dismiss the proposed evidence which is not deemed relevant for the proceedings by making a decision against which no special appeals are permitted.

Provision of evidences encompasses all of the facts relevant for deliberation and the court shall decide which evidences will be presented for the establishment of the relevant facts. The facts which a party acknowledges in front of the court or the facts which the party didn't contest are not proven. (Article 230 of CPL).
At the preliminary hearing the court decides on the evidence which will be pro-

posed at the main hearing in order to be able to plan ahead the number of hearings, while no special appeal is permitted against the decision of the court to dismiss certain evidence.

10.2.7. 1. Means of evidence

In the lawsuits for protection against discrimination all means of evidence are permitted.

10.2.7.1.1. Witness

In accordance with the rules, witnesses[34] testify directly in a hearing. The court may decide to allow the evidence to be produced by *reading of the written statement of a witness; such statement* contains the information regarding facts relevant for the litigation, how did the witness came to know the facts and what is the relationship between the witness and the litigation parties. Written statement must be certified in a court or by a notary. *Before making of a statement, the person taking a statement must inform the witness about the rights and duties of a witness stipulated by the law.* A written statement of a witness may be submitted to the court by a party or the court may ask the witness to provide it. The court can always summon a witness who gave a written statement or whose statement was recorded to confirm its testimony before the court in a hearing.

The law doesn't stipulate whether the certification of the witness statement will be performed in accordance with the Law on verification of signatures, handwriting and transcripts or in accordance with the provisions for the non-contentious proceedings related to the making of a document and verification of a document, considering that the person who is verifying the written testimony, must warn a witness about the legal consequences stipulated in CPL regarding the testimony of witnesses. One should bare in mind that this is not just a matter of verifying the signature, but also it is about properly warning the witness, which points out toward the application of the provisions of the Law on Non-contentious Proceedings, unless the statement is being recorded by a notary.

10.2.7.1.2. Expert Witness

The court shall order presentation of evidence by expertise[35] if establishment or explanation of a certain fact requires an expert knowledge the court does not dispose with.

It is incumbent upon a party which submits a motion for a hearing of an expert witness, to indicate the subject and the scope of expertise, as well as a particular expert, selected from the court official list of expert witnesses. The court shall send this motion to the opposing side to make a declaration regarding the mo-

34 See Article 245 and 246 of CPL.
35 See Article 259 through 263 of CPL.

tion. If neither of the parties propose an expertise or if they don't provide for the costs of expert, the court shall decide about these facts by applying the rules on the burden of proof (Article 231, Paragraph 1 of CPL). The party may submit to the court written findings and opinion of expert witness of relevant profession, as stipulated in the Article 259 of CPL. The court shall send such findings and opinion to the opposing side to make a declaration on them. The court may reach a decision and determine that the presentation of evidence by expertise is performed by readying of the written findings and the opinion which a party submitted after the opposing party made a declaration (Article 260, Paragraph 2 of CPL).

The proposal stipulate in the Article 260 of CPL, written finding and opinion of the expert witness stipulated in Article 261 of CPL, as well as the declaration of the opposing side, *shall be submitted to the court the latest until the completion of the preliminary hearing or the first hearing of the main trial, if the preliminary hearing was not held.* Presentation of evidence by expertise can be determined by court ex officio, only if it is prescribed by the law.

10.2.7.1.3. Statistical data as evidence

Considering the special rule regarding the burden of proof in the lawsuits for protection against discrimination (about this in 11.2.8.), an issue related to the presentation of evidence which is already in the European antidiscrimination legislation set as a standard, should be pointed out to, and that is the use of statistical data in the lawsuits for protection against discrimination, which enable the person seeking protection to establish the presumption about discrimination more firmly. The statistical data play an important role in proving the indirect discrimination, when contentious rules and practices are seemingly neutral, and therefore their effect should be highlighted to demonstrate that they are disproportionately adverse toward specific social groups compared to the others in a similar situation. Processing of statistical data works in a combination with the transfer of the burden of proof: in case where the data shows that one social group is in a particularly adverse position, the perpetrator of discrimination must present a convincing explanation related to such indicators. (Manual, 2010:122).

It is possible that in the future the court will be faced with offered evidences in a form of statistical data in a lawsuit for protection against discrimination, especially because the practice of the European Court of Human Rights is now available to courts and parties, and will be used by both sides, therefore from the decision of this court[36] related to the use of statistical data the following is here quoted: "The court finds that when the applicant can prove based on indisputable official statistical data that there is, on a first glance, an indication that a certain rule, although formulated in a neutral way, in fact affected a significantly larger percentage of women than men, it is up to the respondent State to dem-

36 Hoogendijk vs. Netherlands No. 58641/00, 06.01.2005.

onstrate that this comes as a result of the objective factors which are not related in any way with discrimination based on gender."

10.2.7.1.4. Volunteer discrimination examiner (tester)

Proving the discrimination by using standard evidences in litigation often doesn't produce a satisfactory result for the person who asked for the judicial protection. Therefore, the mechanisms are being established which are supposed to improve the plaintiffs position in a concrete lawsuit, but also to use the lawsuits of other persons to point out to the existence of discrimination in a society.

One of the mechanisms that primarily serve to prove direct discrimination is a situational testing, where the persons who are named as volunteer discrimination examiners or testers participate, and their goal is to examine whether the information regarding the existence of discrimination of persons who have certain personal characteristic is accurate.

Situational testing is a method whose goal is to determine the potential existence of discrimination "on the spot" and to uncover the practices that in a comparable situation treat the person possessing a certain personal characteristic (personal attribute) in an unfavorable manner compared to another person which doesn't possess that characteristic. In other words, this method implies establishment of a situation and in a sense casting of roles, where the person (potential discriminator) is placed in a position to perpetrate discrimination without the fear of being observed. This person is faced with a fictional "candidates" and some of them possess the characteristics that can serve as grounds for discriminatory treatment. Observes have the goal to measure the behavior of such person towards the persons with a personal characteristic, compared to persons who don't have it. (Rorive, 2012: 44).

According to the Law on Prohibition of Discrimination (Article 46, paragraph 3, 4, 5 and 6) a tester is a person who has deliberately exposed himself/herself to discriminatory treatment intending to directly verify the application of the legal provisions regarding the prevention of discrimination, in a concrete case. This person has the right to initiate a lawsuit in a capacity of a plaintiff, on his or her behalf, except for the awarding of damages (more about this in 11.2.2.). If the tester initiates a lawsuit, he/she may be heard in court as a party, and if he/she didn't initiate a lawsuit, a court may hear him/her as a witness. This person may not be subjected to the claim of shared responsibility for the damage resulting from the discriminatory acts. This person is obliged to inform the Commissioner for the Protection of Equality about the intended testing, unless he/she is prevented to do so due to some circumstances, and he/she is also obliged to inform the Commissioner about the performed actions in writing.

The stipulated legal provisions regarding the person who is consciously exposing himself/herself to discrimination are incomplete: who is this person, is he/she in a special relation with the person who reported the discrimination, was he/she discriminated before, does this person have the basic knowledge about the process of testing, is this person acting independently, is the primary goal of this person to collect evidence for someone else or for the purpose of lodging a lawsuit, what is the content of notification and the report sent to the Commissioner, what is the pertinent role of the Commissioner, and finally it is especially unclear what is this shared responsibility claim for the damage resulting from the discrimination which can be submitted against this person and which this person can't submit.

However, regardless of the incompleteness of the regulations related to the status and actions of the person who is deliberately being exposed to the discriminatory treatment, the application of the existing legal provisions is effective, and to support this and to bring closer the process of the situational testing, a whole segment from the Practicum for the Protection against Discrimination is quoted here (Petrušić, Beker, 2012:53):

> *Private security at the entrance to a nightclub did not allow two people to enter the club, providing them with an explanation that reservations are mandatory. There were reasons to believe that these persons were denied entry because they are Roma, since some Roma were denied entry to that nightclub already before. They informed a president of a non-governmental organization for protection of human rights about this, and she proposed them to conduct a discrimination test (situational testing). The Commissioner for Protection of Equality was informed about the intended test, in accordance with the legal provisions. Two groups consisting of two persons were formed, and went to the club one night. In one group both persons were Roma, and in the second group, there were no Roma. They were all decently dressed and behaved properly. The only difference between them was their skin color. The Roma were the first who tried to enter the club. The private security guards asked them whether they had reservations, and when the Roma explained that they did not have reservations, they were told they could not enter. They left quietly. Then another group tried to enter the club. The guards allowed them to enter without asking them whether they had a reservation. Due to this discrimination, the non-governmental organization filed a lawsuit in court and suggested as evidence, the experience of the persons who participated in the voluntary testing of discrimination. All volunteer discrimination examiners testified in the court proceedings, and their statements provided crucial evidence of discrimination.*

10.2.7.1.5. Opinion of the Commissioner for Protection of Equality

It is possible for the court dealing with the litigation for the protection against discrimination to be faced with one specific issue. Namely, it is possible for the person who is discriminated against to use another legal venue and seek protection in a process before the Commissioner for Protection of Equality, it is possible for this person to obtain an opinion of the Commissioner on whether the discrimination did occur or not, and it is possible that this person, encouraged by it, lodges a lawsuit for the protection against discrimination and submits this opinion to the court. Should the court adjudicate that the discrimination was committed, there would be no need for a special deliberation of the court in the judgment regarding the stance Commissioner expressed it the opinion submitted to the court. However, if based on the presented evidence and the results of the entire proceedings a court makes a final stance regarding the discrimination which is contrary to the stance of the Commissioner, then a question emerges on whether or not and up to what degree the court in the deliberation of the ruling should oppose its findings to the conclusions of the Commissioner.

Baring in mind the status, role, authority and significance of the Commissioner for Protection of the Equality, solemn and responsible conduct of the court would entail an effort to dedicate substantial attention to the reasons (facts and interpretation of the rights) which have led to the discrepancy of the court findings and the opinion of the Commissioner, for the purpose of preservation of the integrity and credibility of both institutions, not only related to the parties in the litigation proceedings, but in a broader sense. One of the examples that speaks in favor of this is the ruling of the European Court of Human Rights in the case of Vučković and others vs. Serbia[37] in which the court made a judgment and adjudicated that there was a discrimination of the applicants – army reservists based on their registered place of residence in enjoying their right to receive payment of their per-diems (wartime), which was the same reasoning the Commissioner expressed in her Opinion[38] and which was found to be relevant by the European Court of Human Rights.

37 Ruling on the motion No. 17153/11 dated 28.08.2012, published in „Official Gazette of RS" No. 91 dated 21.09.2012.
38 Opinion No. 802/2011 dated 26.07.2011.

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10.2.8. Burden of proof

* Author of this section is Nevena Petrušić, PhD, professor of the Law Faculty in Niš and Commissioner for the Protection of Equality.

The key issue in a process of reaching a ruling on whether the claim for the protection against discrimination is founded or not is to establish whether the behavior of the responded presents an act of discrimination. The experience suggests that in most cases the discrimination is not committed in an open fashion but rather it is covert and being justified with various pretexts. On the other hand, the basis for unequal treatment is connected with other factors while the discriminators rarely admit that they are treating someone in a less favorable way, nor they are presenting the genuine reasons for such treatment. When, for instance, an employer announces a job vacancy and a Roma person applies for this position and someone else who is not a Roma gets the job, although the Roma person is better qualified, Roma can hardly prove that he/she was not selected based on the ethnicity, because the employer would justify its selection and state that the Roma didn't demonstrate the ability to perform the job or would use similar reasons. When an employer decides to downgrade (less paid position) a female employee upon her return from maternity leave, she will have a hard time proving that the downgrade is based on her gender or rather on a stereotype based on her gender role. The employer would justify the transfer of the female employee to a less paid position by work requirements and reorganization, thus refusing to acknowledge the real reasons behind the decision. When an employer advertises a vacancy for the position of a stoker and states in the terms of reference excellent reading and writing of the Serbian language as a requirement, the employer is denying the chances for all those individuals whose native language is not Serbian, although the nature of the job is such that it can be successfully done even without the excellent command of the Serbian language.

In a potential litigation for the protection against discrimination that would be filed in cases like these or similar, it would be very hard to prove that the discriminatory treatment of the employer if we were to apply the general (standard) provisions regarding the burden of evidence. Namely, according to the general provisions regarding the burden of evidence, the side which benefits from proving a certain claim, carries the burden of proving such a claim[1] (*onus probandi*). Therefore the plaintiff is obligated to offer the evidences that would convince the court regarding the truthfulness of the facts that serve as the basis of its claim. If the court is not convinced that the presented facts aren't accurate and truthful, the plaintiff falls under the risk of unproven claim and therefore the court shall, by applying the rules regarding the burden of evidence adjudicate that the fact which is not proven doesn't exist,[2] which would have as a consequence a loss of lawsuit.[3]

1 Affirmanti incubit probatio – A person making a claim must prove it.

2 Idem est non probari et non esse, idem est non esse aut non probari – What is not proven, it's like it doesn't exist

3 Actore non probante, reus absolvitur – If the plaintiff doesn't prove the truthfulness of his claims, the respondent is acquitted.

If in the above mentioned examples general provisions on the burden of evidence are to be applied, in order for Roma to succeed in the litigation, he/she would have to prove beyond any doubt that the reason he/she didn't get the job is because of the ethnicity, while the woman would have to prove that the reason for her downgrading upon the return from maternity leave is because of her gender. The person making a claim that he/she was denied the employment opportunity for the position of stoker would have to prove that the employer's goal in making the knowledge of the language as a precondition wanted to prevent the employment of those individuals whose native language isn't Serbian. All of them would have a hard time proving that the reason why they were exposed to a less favorable treatment was based on a personal characteristic.

As an answer to the difficulties in proving the discrimination, special rules regarding the reversal (transfer) of the burden of evidence were designed. These rules are contained in the European Directives (see Article 8, Paragraph 1 of Directive No. 2000/43/EC[4], Article 19, para 1 of Directive 2006/54/EC[5], Article 9 of Directive 2004/113/EC[6] and Article 10 of Directive 2000/78/EC[7]) and are being implemented by the European Court of Human Rights.[8]

Reasoning behind the rules regarding the reversal/transfer of the burden of evidence is to provide efficient protection against discrimination. In the item 22 of the preamble of Directive 2004/113/EC it is stated: "*The rules on the burden of evidence should be adapted when there is a prima facie case of discrimination and for the principle of equal treatment to be applied effectively, the burden of evidence should shift back to the defendant when evidence of such discrimination is brought".* Essentially, there are two basic reasons why the rule on the reversal of the burden of proof is being prescribed: to protect the weaker side and to secure the access

4 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 p. 0022 – 0026..
5 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204, 26/07/2006 P. 23–36.
6 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204 , 26/07/2006 P. 0023 – 0036.
7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 – 0022.
8 In the practice of the European Court of Human Rights the rule on the reversal of the burden of proof is a general rule which is applied in cases related to potential infringements of all of the rights stipulated in the Convention. The court assumes that the respondent state has the majority of the information needed to prove the merit of a claim. In accordance with this, if the facts presented by a plaintiff are credible and in concurrence with the available evidences, the Court would consider them as proven, unless the state offers a compelling alternative explanation. (See: Handbook on European anti-discrimination law (2011), European Union Agency for Fundamental Freedoms, Council of Europe, page 117).

to information, as an expression of the principle of procedural equality of parties and a fair trial. (Rodin, 2009:108). It is therefore necessary to acknowledge the specific situation of the victim of the discrimination, because the victim, as a rule, has no access to all of the crucial information relevant for proving that the reason for unequal treatment of the victim was precisely his/her personal characteristic.

The essence of the rule on reversal/transfer of the burden of evidence is reflected in the fact that the party claiming to be discriminated against is obliged to *make it probable*[9] that the discrimination was perpetrated, and if the plaintiff succeeds, the alleged discriminator is obliged to prove beyond any doubt that there is no discrimination. If the respondent fails the court shall adjudicate that the principle of equality has been violated.

Here is an example that illustrates the logic of the rule on the reversal/transfer of the burden of evidence:

> *A Muslim individual employed in a local public utility company is applying for every internally advertised vacancy which this company is posting from time to time. However, this individual is rejected every time while the non-Muslim individuals are being employed. If the persons who were hired are not better qualified than the Muslim person, than it is a likely case of religious discrimination. If by any chance, there are other objective reasons for the selection of the non-Muslim persons, they are only known to the employer which made the selection. Therefore, it is up to the employer to prove that the discrimination was not perpetrated, which means employer has to present the facts based on which it can be established with certainty that the employer selected the employees based on the criteria and reasons which are not related to his religious conviction.*

The rules regarding the redistribution of the burden of evidence were also adopted by the domestic anti-discrimination legislation. Special rules regarding the burden of evidence are prescribed in Article 45 of the Law on the Prohibition of Discrimination and Article 49 of the Law on Gender Equality. Namely, according to Article 45 of the Law on Prohibition of Discrimination, if the plaintiff proves the *likelihood* of the defendant's having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred falls on the defendant. The identical rule is prescribed in Article 49 of the Law on Gender Equality.

According to Article 45 of the Law on prohibition of discrimination and Article 49 of the Law on Gender Equality, the plaintiff is obliged to prove the facts per-

9 In the literature the expression "proving the reasonable doubt" is being used. Vehabović F. and others, (2010), Comment on the Law on the Prohibition of Discrimination, with explanations and overview of practice in the comparative law, Center for Human Rights of the Sarajevo University, page 111.

tinent to the existence of the right to an equal treatment and violations of this right. Therefore, it is not enough to merely make a claim, it is necessary to prove the existence of the facts based on which it can be justifiably assumed that the respondent perpetrated discrimination. If the plaintiff proves the facts based on which an assumption is created regarding *the probable discrimination*, the burden of evidence is transferred to the respondent. In other words, the plaintiff should prove he/she was placed in an unequal position and that under the circumstances of the concrete case it is possible, by taking into account the usual sequence of the events and rules of experience, that being placed in a less favorable position is the result of (direct or indirect) discrimination.

The very term "likelihood" should be interpreted in the sense of the so-called evidence *prima facie* (Dika, 2011: 86; Uzelac, 2009: 101), as the European Court of Human Rights is doing it. In cases of direct discrimination, if the plaintiff presents enough facts and evidences based on which it can be concluded that the respondent treated the plaintiff in a less favorable fashion compared with someone else under comparable circumstances, the claims of the plaintiff that he was discriminated against have been made probable or rather there is a *prima facie* evidence regarding discrimination. In cases of the indirect discrimination, in order to prove *prima facie* discrimination, the plaintiff must present the facts and offer evidences based on which it can be deduced that a certain neutral rule (practice), due to a personal characteristic is placing the plaintiff in an unequal position compared to others.

Whether there is a *prima facie* evidence in the concrete case that the discrimination was perpetrated, depends on the evaluation of the presented evidences. According to the understanding of the European court of human Rights, *prima facie* evidence can emerge as a result of sufficiently strong, clear and non-contradictory indications or from such factual assumptions. The court would accept that the accurate factual claims are those which are: "*corroborated by free evaluation of all of the evidences, including the conclusions stemming from the facts and documents of the parties' [&]. Evidence may come from the existence of sufficient amount of sound, clear and non-contradictory indications or from similar uncontested factual assumptions*..."[10]

Example:

> *In the case of Timishev vs. Russia,*[11] *the applicant stated that he was prevented from passing through the check-point because of his Chechen ethnicity. The Eu-*

10 Nachova and others vs. Bulgaria [GC], application No. 43577/98 and 43579/98, 6. 06. 2005, page 147; Timishev vs. Russia (No. 55762/00 and 55974/00), 13. 12. 2005., page 39 and D. H. and others vs. Czech [GC] (application No. 57325/00), 13. 11. 2007., page 178

11 Timishev V. Russia, application 55762/00, 55974/00, 13. 12. 2005 pages 40-44

ropean Court of Human Rights reasoned that the claim is supported by the official documents in which the policy to limit the movement of ethnic Chechens was recorded. The explanation of this state was found to be unsatisfactory due to the inconsistent claims that the victim left voluntarily after it was denied the right to have a priority while waiting in line.

Example:

In the case of DO v. Municipality of Norrkoping,[12] the plaintiff was a man from the ex-Yugoslavia who applied for the advertised vacancy for the position of the municipal architect. He didn't get the job due to his allegedly poor knowledge of the Swedish language. In a lawsuit before the Swedish labor court, the issue was raised on whether the "linguistic conditions" present an indirect discrimination based on national identity. According to the claims made by the employer, the position of the municipal architect demanded a fulfillment of the official duties, and therefore a good written and oral knowledge of Swedish is an objective and necessary precondition. However, the Swedish Ombudsperson against discrimination based on ethnicity who participated in the proceedings, claimed that in this case in order to derive a conclusion regarding prima facie indirect discrimination, it is sufficient to establish a fact that "linguistic condition" is harmful for the persons of the same ethnic background as the plaintiff and those individuals whose native language is not Swedish. The Labor Court accepted the Ombudsperson's stance.

As it was stated before, if the plaintiff establishes the likelihood of the discrimination, the burden of evidence is transferred to the respondent who must prove that the placement of the plaintiff in a less favorable position is legitimate, meaning it is based on other objective reasons. If the responded fails to do so, the discrimination is proven.

However, one should bear in mind that the respondent can avoid the burden of evidence in two ways: if he/she subsequently manages to question the likelihood of what the plaintiff was supposed to prove and if the respondent manages to prove the likelihood of the exact opposite. It is unacceptable to consider that the responded, after the plaintiff in one phase of the proceedings made his/her claim probable, has to prove, beyond any doubt, that the violation did not take place, (for instance, that the action confirming this right didn't take place). The respondent must be given an opportunity to subsequently question the likelihood of what the plaintiff has made probable, or more specifically to make the opposite more probable. (Dika, 2011:85).

12 Taken from the book: Rorive, Isabelle, (2012) Proving Discrimination Cases, The role of situation testing, Regional Centre for Minorities, Belgrade, page 34..

The rule on the reversal of the burden of evidence initially creates an impression that the respondent must prove the so-called negative facts. Careful interpretation of this rule shows that essentially the respondent isn't proving the non-existence of the causal relationship between unequal treatment and personal characteristic, but rather he is obliged to convince the court that his/her actions is based on other objective reasons, which are not related in any way with the personal characteristics of the person claiming to be discriminated against.

For instance, an employer which established a rule for the employees and prohibited them to wear jewelry at the workplace and a plaintiff who claims that this rule is disproportionately affecting the believers who are wearing religious symbols. The respondent may offer the facts and evidences to convince the court that the establishment of this rule was necessary for the protection of the employees at their workplaces and that this is the reasons as to why the principle of equality was not confirmed pertaining to the employees who are wearing religious symbols.

The rules on transfer of the burden of evidence are applied in cases of direct and indirect discrimination. However, there are certain differences.

If the plaintiff claims to be a victim of direct discrimination, he/she should prove that the respondent did something or failed to do something, which places the respondent (or it did place the respondent or it might place the respondent) in an disadvantageous position (for instance the plaintiff was denied an opportunity to do the testing for a job or was denied a social service, or he/she was less paid) compared to another person in a comparable situation. ("Parallel").[13] If the plaintiff succeeds in doing this, than a contestable assumption is made that the behavior of the respondent was discriminatory. Respondent can contest this assumption by proving that the plaintiff is not in the same or similar situation as the "Parallel" or by proving that the reason for the unequal treatment of the plaintiff is not related to his/her personal characteristic but rather some objective factors which are not connected to his/her personal characteristic and therefore the respondent cannot be linked to such reasons. (Uzelac, 2009: 110). Should he fail to do so, the discrimination shall be proven.

13 Adequate choice of the model for comparison enables the deliberation related to the existence or lack of thereof related to the causal relation between disadvantageous treatment and personal characteristic, which according to the plaintiff is the basis of discrimination. However, sometimes a „Parallel" can't be found and therefore a "hypothetical parallel" is being used, and at other times "parallel" is not needed. For example, if a pregnant woman isn't hired, there is no "comparator" because a man can't be pregnant. Petrušić, N., Beker, K. (2012) Practicum for the Protection against discrimination, Partners for Democratic Change Serbia, Alternative Dispute Resolution Centre, Belgrade, page. 31..

If the plaintiff claims to be a victim of an indirect discrimination, that he/she should prove the existence of a seemingly neutral rule (practice) which is placing (or would place) the plaintiff due to his/her personal characteristic in a disadvantageous position compared with other persons in a similar situation (comparable situation). Therefore, the plaintiff should prove the existence of a neutral rule or a practice (the employer introduced a rule which stipulates that the advancement in the workplace is based on the evaluation of his or her work results, but the evaluation is performed for the previous year and only those who are working for more than six months are evaluated. Apart from that, the plaintiff should also prove the fact that this rule (practice), which is applied for all employees, is producing a disproportionately adverse effect compared with those persons with certain personal characteristic in regards to the persons who don't posses that personal characteristic (e.g. in the above mentioned example the rule introduced by the employer is affecting employed women much more than men because women use maternity leave). Then a rebuttable presumption regarding indirect discrimination is made. The respondent may refute this presumption by proving that the rule (practice) has a legal and legitimate goal,[14] that there is a proportion between the goal he wanted to accomplish and means which were used for accomplishment of the goal; that the used means were adequate and necessary – there wasn't a less restrictive mean for the accomplishment of the goal. If he fails to prove so, the discrimination shall be established.

The rule regarding the assumption of guilt in the case of indirect discrimination should be highlighted. Namely, according to Article 45. Of the Law on the Prohibition of Discrimination and Article 49. of the Gender Equality Act, if the court establishes that a direct act of discrimination was committed, or if that fact is undisputed among parties in the litigation, the respondent may not be relieved of responsibility by supplying the evidence that he/she is not guilty.

It is important to know that during the establishment of discrimination there is no need to prove that the respondent was motivated by prejudices in his actions (for instance that he/she possesses "racist" stances) because such a fact is irrelevant from a legal standpoint.

It is likewise irrelevant whether the respondent had the intention to discriminate, because discrimination can be committed even when the discriminator acted in good faith.

14 In the literature it is said that the establishing of the legitimacy of the goal is the most challenging element for the courts because the notion of the legitimacy is in fact a value judgment. Whether an interest which is to be achieved by a measure is going to be legitimate depends on how the interest would be valued. More on this topic: Selanec, G. (2008), Analysis of the Law on Gender Equality, CESI, Zagreb, page. 82. and etc.

In a lawsuit for protection against discrimination, a concrete act of discrimination is always examined, that is the actions of the respondent in a concrete factual situation, and therefore his behavior and actions in some other situations are irrelevant.

A respondent, who refused to provide a service to a Roma, can't successfully refute the presumption that he discriminated a Roma person because of his/her ethnicity, by stating that he has Roma employees. The veracity of this fact doesn't refute the presumption that in a concrete case, discrimination was committed

In some cases of discrimination it is not necessary to prove that there is a real victim of discrimination. For instance, if an employer, in a job advertisement is looking for female employees only, than there is no need to prove that if a man answered the add he would be refused or that he gave up applying, because men knew in advance from the advertisement that they won't be hired.[15] When it comes to certain form of discrimination, there are specificities in regard to the ways of proving the subject matter. Thus in the cases related to disturbing, belittling, blackmailing and harassment on the grounds of gender, as forms of discrimination, (Article 20 of the Law on the Prohibition of Discrimination), there is no need to make a comparison with another person. From the very definition of disturbing it is clear that for the proving of disturbing, it is sufficient to establish whether the behavior of the discriminator was aiming to accomplish or that it objectively presents a violation of person's dignity based on his/her gender. However, one should bear in mind that in regard to this form of discrimination the rule on the transfer of the burden of proof applies. For instance, in case of the sexual harassment of a female employee at her workplace, if a plaintiff succeeds to make it probable that the behavior was sexual in its nature, the court should make a presumption that a violation of her dignity occurred. In order to refute this presumption, an employer would have to prove that no sexual behavior occurred, or that it was so harmless that a person would not have understood it as a violation of her dignity. (Selanec, 2008: 42).

15 In the case adjudicated by the European Court of Human Rights Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, Case C-54/07, [2008] ECR I-5187, 10. 07. 2008. (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0054:EN:NOT) the owner of a Belgium company stated several times, in his ads and orally that he will hire "no immigrants". It was not possible to prove that an immigrant tried to apply for a position in his company and was refused, nor it was possible to find someone who would testify he decided not to apply based on such statements. Therefore there was no "identifiable victim". The European Court however, stated that it is not necessary to identify the discriminated person because the very nature of the announcement made it clear that no immigrant would apply because they knew in advance they won't be hired. Therefore, the existence of a real victim is not needed for proving the discrimination in certain cases.

In judicial practice it is common that the courts are giving their opinion regarding the transfer of the burden of proof only in the reasoning of a judgment, which is problematic because during the proceedings, the parties are left with uncertainty: the plaintiff doesn't know whether the submitted evidence is sufficient to make the discrimination probable, while the respondent is in an even more disadvantaged position, because he doesn't know whether the plaintiff has proven the likelihood of discrimination and whether consequently the burden of proof has been transferred to him. Because of this, in accordance with the principles of the so-called open judiciary, the court should inform the parties regarding its stance about the burden of proof, after, based on the presented evidences, it form a presumption that discrimination most likely occurred.

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10.2.9. Temporary measures

The authors of this section are Lidija Đukić, Judge of the Supreme Court of Cassation and Snežana Andrejević, Judge of the Supreme Court of Cassation.

According to the provisions of Article 44 of the Law on the Prohibition of Discrimination, the plaintiff may demand, when initiating a litigation or during the proceedings and upon the termination of the proceedings, until the court decision is enforced, that the court passes a temporary measure in order to prevent discriminatory treatment with a view to eliminate the danger of violence or major irreparable damage. In the motion for a temporary measure the likelihood of the necessity of such measure must be proven, in order to prevent the danger of violence stemming from the discriminatory treatment and to prevent the use of force and occurrence of irreparable damage.

The court is obligated to deliberate the motion for a temporary measure forthwith or at the latest, within three days of the day of receiving the motion. According to the stipulations of the Law on the Prevention of Discrimination against Persons with Disabilities Law (Article 45, Paragraph 3 of the Law on the Prevention of Discrimination against Persons with Disabilities), the court is obliged to deliberate the motion for a temporary measure within 48 hours of the day the motion was received.

The decision on the temporary measure has *the legal effect of an enforcement decision* (Article 285, Paragraph 2 of the Law on Enforcement and Security), which means that, based on the motion of the party which is asserting its rights through the temporary measure, *the enforcement decision becomes enforceable even without the prior permission of enforcement.*

An appeal on the temporary measure decision is permitted and such an appeal shall be deliberated by a higher court.

Regulations on the judicial protection against discrimination stipulate that temporary measures can be sought when initiating a lawsuit until the enforcement takes place, but it does not exclude the application of the Law on Enforcement and Security[1] which stipulates that certain temporary measures can be requested even before filing of a lawsuit. That would eliminate the prohibition of access to the court for the peaceful settlement of a dispute if the respondent is the Republic of Serbia, autonomous province authorities or local authorities, but in such instances the court would have to align the timeframe for submission of the claim for justification of the temporary measure with the timeframe stipulated in Article 193 of CPL.

1 "Official Gazette of the Republic of Serbia", No. 31/2011 and 99/2011 – other laws

Temporary measure is not permitted if the enforcement can be obtained through some other means of security that could reach the same purpose.

Procedural rules stipulated in Article 260 of the Law on Enforcement and Security, which are being applied in subsidiary manner, are related to the authority of the court to make an enforcement decision before the motion was delivered to the respondent and prior of the pleading of the respondent regarding the motion.[2]

In a security procedure the court shall take into consideration only the facts and evidences presented by the parties, except when the implementation of the enforcement rule states otherwise. For the deliberation on the legal grounds for the security *it is sufficient to prove the likelihood that the facts pertinent for the deliberation exist.* .

When awarding a temporary measure the court must pay due attention to the human and minority rights guaranteed by the constitution, which are directly applicable. Apart from that, they court must honor the constitutional regulations which impose to all state authorities, especially to the courts, the duty to interpret the stipulations related to human and minority rights in favor of promotion of democratic society values, in accordance with the applicable international standards of human and minority rights, as well as with the practice of the international institutions which are supervising their implementation (Article 18, Paragraph 3 of the Constitution of the Republic of Serbia). When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means. (Article 20, Paragraph 3 of the Constitution of RS). When it comes to the standards stipulated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms related to the right on a fair trial, they must be an integral part of the judicial practice for the purpose of enjoying equal, lawful and just protection before the courts within reasonable timeframe, and therefore the rules of domestic procedures must be applied in accordance with these standards. Therefore, if the courts must deliberate the restriction of rights based on a temporary measure of security from the viewpoint of the standards on a fair trial, this restriction has to be legal, legitimate, proportional (commensurate) to the nature and extent of the restriction, and the court must examine the relation of the restriction and its purpose and whether there is a possibility to achieve the purpose of the restriction with less restrictive means, while the decision on

2 The court may reach such a decision only if the enforcement creditor due to the postponement 1) could sufferer irreparable or hardly compensable damage, 2) for the purpose of eliminating the direct danger of illegal damaging of the assets or loss or a major violation of rights и 3) for the prevention of violence (Article 260. Paragraph 1. items. 1-3. Law on Enforcement and Security).

the measure of security restricting the rights of parties must contain detailed reasoning so that the legality and regularity of such measure can be examined in a higher instance proceedings.

When the temporary measure is being rendered, due attention must be paid to the *general prohibition of* discrimination, as a constitutional and conventional right by applying the so-called *test of* discrimination based on which it can be determined whether an individual was discriminated against.

10.2.10. Judgment*

The authors of sub-section 11.2.10. and 11.2.11. are Lidija Đukić, Judge of the Supreme Court of Cassation and Snežana Andrejević Judge of the Supreme Court of Cassation.

The court adjudicates on the merits of the claim and ancillary claims by a judgment. If several claims exist, the court shall, as a rule, adjudicate all those claims in a single judgment. If several litigations are concurrently tried for the purpose of common argument, and only one of those is prepared for final adjudication, the judgment may be rendered only in respect of such action[3].

The court is authorized to adjudicate on the merits of the claim by reaching all meritory decisions stipulated in the Civil Procedure Law: judgment (Article 342 of CPL), partial judgment (Article 346 of CPL), interim judgment (Article 347 of CPL), judgment on the grounds of admissions plea (Article 348 of CPL), judgment on the grounds of waiver (Article 349 of CPL), default judgment (Article 350, Paragraph 1 and 2 of CPL), judgment on the grounds of absence (Article 351 of CPL), judgment without a debate (Article 291, Paragraph 2 of CPL).

The procedures on rendering and announcing a judgment made in litigation for the protection against discrimination are conducted in accordance with general provisions of the Civil Procedure Law. [4]

3 Article 342 of CPL

4 In accordance with Article 252 of CPL, a judgment must be announced immediately following the conclusion of the trial hearing. In more complex cases, the court may defer rendering of judgment for eight days from the day of conclusion of a trial hearing. In such cases, the judgment shall not be announced and the court shall duly serve the transcript of the judgment on the parties. If the hearing was concluded as it is stipulated in Article 319 of the CPL, the judgment shall be announced within eight days from the day the transcript or records are received. If a judgment is announced, the president of the chamber shall publicly read the order of a judgment and if it is possible briefly announce the reasons thereof (Article 353 of CPL). Since the application of these provisions cannot be amended or substituted with a written notice, the imperative provisions about the mandatory announcement of the judgments must be applied. The judgment which was not publicly announced doesn't exist legally, regardless of the written formulation in the transcript and the documents sent to the parties. This deficiency therefore cannot be remedied as a substantive violation of the civil procedure rules-in first instance proceedings. In order for a judgment to exist, the announcement of the ruling must be publicly stated and later elaborated in a written form. Since the introduction of the judgment in a written form must contain the date of the announcement, when a ruling is not announced, the written judgment has no legal merit and has no legal implications.

A judgment must be produced in writing within the time limit of eight days from the day of its rendering. In more complex cases, the court is entitled to delay writing of a judgment be for another 15 days. The court is obliged to send a day after the rendering a certified transcript of a judgment. A certified transcript of a judgment is send to the parties containing the instructions on the right to file a motion for legal remedy against the judgment and a judgment produced in writing must contain an introduction, order of the judgment and statement of reasons.

Just like any other judgment, the judgment in a litigation for the protection against discrimination, contains *introduction*, *order of the judgment* (a deliberation of the court on granting or dismissing particular claims pertaining to the merits of a claim and to the ancillary claims,) and *statement of reasons*, in which the court presents the claims of the parties and their allegations pertaining to the facts in support of such claims, evidence and regulations in respect of which the court founded its judgment, unless otherwise stipulated by the law. In a statement of reasons within a judgment related to the litigation for failure to act accordingly, on the grounds of admission plea, judgment on the grounds of waiver, within a default judgment or a judgment based on Article 291, Paragraph 2 of the CPL, solely the reasons that justify rendering such judgments are declared.

The *judgment doesn't contain the reasoning* if the parties have waived their right to a legal remedy, if it's not prescribed otherwise by a separate law (Article 355, Paragraph 6 of CPL).

If the court failed to adjudicate all claims which should have been adjudicated by a judgment, or failed to adjudicate on a part of the claim, a party may, within a time limit of fifteen days of receiving the judgment, submit a motion to supplement the judgment. The court shall dismiss an untimely or ill founded motion to supplement the judgment without holding a hearing. If a party fails to submit a motion for rendering of a supplementary judgment within the time limit prescribed by the law, *it shall be deemed that the complaint has been withdrawn in that part.*

The court adjudicates on the merits of the claim, and therefore the character of the judgment depends on the character of the claim.

Condemnatory judgment corresponds with the condemnatory claim (or a request for a condemnation of actions). In this type of judgment, the respondent, for instance, may be ordered to compensate the damage to the plaintiff and the court may also order the announcement of the judgment made in a litigation for the protection against discrimination, or the court may order the respondent to

perform certain acts in order to eliminate the consequences of the discriminatory actions (litigation for rectifying), when the discrimination is ongoing.

In cases of claims based on a failure of a respondent to act accordingly there is a corresponding judgment in which the court may order the respondent to refrain from potentially discriminatory actions, he may be prohibited from continuing the discriminatory actions-ordered the cessation of discrimination (for instance not to put up a sign which is discriminating the individuals based on a personal characteristic; not to continue to boycott someone because of his/her personal characteristic in cases of ongoing boycotting; not to repeat the refusal to provide services after the respondent once already refused).

The declaratory judgment corresponds to the declaratory lawsuit (litigation for the establishment), in which the court deliberates whether the respondent acted in the discriminatory manner towards the plaintiff or anyone else, or more specifically whet ether the violation of a personal right was performed – regardless of the motion for the award of equitable damages.

The judgment containing reasoning related to several claims corresponds to a single complaint comprising several claims – judgment with a combined reasoning**.** In this type of judgment the court may for instance adjudicate that the respondent treated the plaintiff in a discriminatory manner and the respondent may be ordered to cease and desist the discrimination and to make the verdict public.

In a judgment awarding pecuniary and non-material damage, the court determines whether the discrimination was committed and whether there is a causal relationship between the discrimination and the subsequent consequences. The guilt of the discriminator is assumed and if the subject of the claim is direct discrimination the assumption of guilt cannot be contested. The request for announcement of the judgment is pertinent to all of the judgments adjudicated in the lawsuits for the protection against discrimination. Since this request in a lawsuit is not independent, it is not possible to make this as a singular request. This judgment is always combined and it is preceded by a deliberation on some of the claims for establishment, elimination, rectifying of the committed actions or awarding of pecuniary damages.

10.2.11. Appeals*

* The authors of sub-section 11.2.10. and 11.2.11. are Lidija Đukić, Judge of the Supreme Court of Cassation and Snežana Andrejević Judge of the Supreme Court of Cassation.

The general provisions of the law regulating litigation proceedings shall apply in the appeals processes against court decisions made in civil trial cases related to the protection against discrimination. The Law on Prohibition of Discrimination stipulates only one single procedural rule – revision is always permitted (Article 41, Paragraph 4 of the Law on Prohibition of Discrimination). The same rule is also contained in Article 44 of the Law on the Prevention of Discrimination against Persons with Disabilities.

Right to an appeal[1] against the ruling of the first instance court, as the constitutional right is not limited by the general provisions of the Civil Procedure Law, while the timeframe is regulated by general legal provisions.

Content of an appeal is stipulated in Article 370 through 372 of the Civil Procedure Law. The Court of second instance shall reject an appeal only when it cannot determine which judgment is being contested or when it is not signed (incomplete appeal - Article 358, Paragraph 1 of the Civil Procedure Law).[2]

If a submission is sent to the court by telegraph, it shall be considered to be timely only if a proper submission is enclosed with the court, or if it is sent to the court by registered mail, within 3 days of the day when the telegram was delivered to the post office. (Article 107, Paragraph 3 of the Civil Procedure Law). If there is no submission, then there is no timely and proper appeal.

Complaints that the applicant can use in the first instance litigation, such as statute of limitations cannot be pointed out in an appeal, since it is stipulated in Article 372 of the Civil Procedure Law that an appeal cannot contain substantive legal objections.

In an appeal as it is stipulated in Article 372, Paragraph 1 of the Civil Procedure Law new *facts* cannot be presented nor can *new evidence* be submitted, unless the applicant presents a convincing argument that through no fault of his/her own, he/she was unable to present them or propose them before the main hearing was concluded.

A first instance ruling can be contested on the grounds of all three reasons, except a ruling based on the failure to act accordingly and a ruling based on the a failure to appear before the court which cannot be contested since a default

1 Article 367 of CPL
2 Article 371 of CPL

judgment cannot be contested on the grounds of an incorrect or incomplete establishment of facts. A judgment on the grounds of admission plea or waiver of a claim may be contested in relation to substantial violation of civil procedure rules, or if declarations pertaining to admission or waiver of a claim were afforded under misapprehension, coercion or deception.

The appeal proceedings against a ruling made in litigation for the protection against discrimination are conducted in accordance with general provisions of the Civil Procedure Law.

In litigation for the protection against discrimination revision is always permitted, regardless of the basis for discrimination, its form and type.

In respect of the information declared in an appeal and the proceedings in a revision of the ruling and revision of the decision, general provisions for the civil litigation procedure are applicable.

Against an effective ruling of a *court of second instance* the Public Prosecutor can file a motion to the Supreme Court of Cassation for a writ of certiorari. [3] The motion can be submitted against an effective decision which constitutes an *infringement of the law at the expense of public interest,* within three months from the day the ruling became fully effective.

In respect of the information declared in an appeal and the proceedings in a revision of the ruling and revision of the decision, general provisions for the civil litigation procedure are applicable.

It should be highlighted that the provisions of the Civil Procedure Law don't determine the categories of violations of the law at the expense of public interest nor the term "public interest" has been determined, which in dispositive cases such are the civil litigation cases is necessary. Such deficiencies ought to be rectified since according to the numerous rulings of the European court of Human Rights,[4] interference of the state in dispositive cases in which the right of a party to an outright appeal against the court decision – is considered to be a violation of the right to access to court and as a violation of the Convention. It should be borne in mind that the courts are obliged, as it is stipulated in Article 18, Paragraph 3, to interpret the provisions concerning human and minority rights in favor of the advancement of the values of a democratic society, in accordance with the current international standards for human and minority rights, as well as with the practices of the international institutions that are monitoring their implementation. The European Court of Human Rights respects the evaluation

3 See Article 421-425. of the Civil Procedure Law
4 Brumarescu vs. Romania, and other.

of the legislators about the public interest unless it is obviously determined *without reasonable cause* or the term "public interest" is defined too broadly.[5]

A trial effectively concluded by a decision of a court may be opened for a retrial upon the motion of a party [6] under the provisions of the Civil Procedure Law which is also defining the procedure in such instances.

It should be noted that the new Civil Procedure Law stipulates special grounds for retrial: if the party has the possibility to use a decision of the European Court on Human Rights affirming the violation of a human right, which could have influenced a more favorable decision; if in the proceedings upon a constitutional appeal the Constitutional court established a violation or denial of a human right, minority right or a freedom, pertaining to the civil action, guaranteed by the Constitution, which could have influenced a more favorable decision (Article 426, Paragraph 1, item 11 and 12 of the Civil Procedure Law).[7]

According to Article 87 of the Law on Constitutional Court, where a Constitutionally guaranteed human or a minority right or freedom of several persons was violated or denied by an individual act or action, and only some of them filed the constitutional appeal, the decision of the Constitutional Court also relates to persons who did not file the constitutional appeal, if they are in the same legal situation. This means that *the persons who didn't submit a constitutional appeal have the legal right to submit a motion for the retrial of an effectively concluded trial if they are found to be in a same factual and legal situation, regardless if this is based on a decision of the Constitutional Court regarding the elimination of the consequences resulting from the violation or a denial of the guaranteed rights.* The Supreme Court of Cassation has already declared this in its decisions and it was also confirmed in the Conclusion of the Civil Department of the Supreme Court of Cassation on 2.4.2012.[8]

5 Hentrich vs. France, No 13616/88.

6 See Article 426 through 433 of the Civil Procedure Law

7 Implementation of recommendations of the Council of Europe were implemented with these amendments: CoE R (2000)2, R (2002) 13, R (2004) 4, 5. and 6. and also the Declaration adopted at the Ministerial Meeting on 12.5.2004., to secure complete restitution for the adjudicated violations of human rights declared in the decision of the European Court of Human Rights.

8 At the session of the High Judicial Council the following conclusion was made: "The legal understanding of higher appellate courts adopted in joint meeting that was held on 17.02.2011 is not acceptable: In accordance with the provisions of the Article 422. Paragraph 1. item 11. CPL which stipulates that the retrial can take place only if such a decision has been made for a concrete lawsuit and if in the proceedings upon a constitutional appeal the Constitutional court established a violation or denial of a human right, minority right or a freedom, pertaining to the civil action, guaranteed by the Constitution.

11

Legal protection from discrimination performed by the general act*

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Discrimination could be executed by the fact that the public authority or legal entity adopted a general act which contains discriminatory regulation. Referring to that, the question occurs of which legal means may be used and which forms of legal protection may be claimed.

Relevant constitutional and statutory regulations that set the legal framework for the answer to the problem are:

a) *The Constitution of the Republic of Serbia*[1] which

- proclaims the equality of all before the law and the Constitution, the right to equal protection of the law without discrimination and prohibits any discrimination based on any ground with explicit allegation of some personal characteristics that may be the basis for discrimination[2];
- guarantees to everyone equal protection of rights before courts and other state authorities, holders of public powers and authorities of autonomous provinces or local governments,[3]
- explicitly prohibits and declares as punishable any provocation or incitement to racial, ethnic, religious or other inequality, hatred and intolerance[4]
- specifically guarantees equality before the law and equal legal protection and specifically prohibits any discrimination based on belonging to a national minority,[5]
- generally regulates the possibility of taking special measures to eliminate discrimination and explicitly prescribes that these measures are not considered as discrimination[6] and in this context, within its basic principles guarantees equality between women and men, and obliges the state to conduct a policy of equal opportunities in order to ensure gender equality [7] , and in the section on rights of persons belonging to national minorities, specifically prescribes the possibility of making special regulations and temporary measures in economic, social, cultural and political life in order to achieve full equality between national minority members and citizens who belong to the majority, if such regulations and measures are aimed to eliminating extremely unfavorable living conditions which particularly affect the minority members[8]

1 Official Gazette of the Republic of Serbia, br.98/2006.
2 Article 21st of the Constitution of the Republic of Serbia.
3 Article 36th , paragraph 1st of the Constitution of the Republic of Serbia.
4 Article 4th and Article 49th of the Constitution of the Republic of Serbia.
5 Article 76th, paragraphs 1st and 2nd of the Constitution of the Republic of Serbia.
6 Article 21, paragraph 4 of the Constitution of the Republic of Serbia
7 Article 15 of the Constitution of the Republic of Serbia.
8 Article 76, paragraph 3 of the Constitution of the Republic of Serbia.

• guarantees to ethnic minorities the right to participate in public affairs under the same conditions as other citizens, to enter public functions and to be represented in government agencies, public utilities, provincial and local governments, in proportion to the composition of population in a certain territory[9];
• establishes the Constitutional Court as an autonomous and independent state authority and gives it a task to protect constitutionality and legality, and human and minority rights;[10]
• prescribes the jurisdiction of the Constitutional Court, and among jurisdictions, its right to, among other things, decide on the accordance of other general acts with the law,[11] and the accordance of general acts of organizations entrusted with public authority,[12]
• regulates the proceedings before the Constitutional Court and determines which subjects have the right to initiate proceedings on evaluation of the constitutionality guaranteeing this right to all state authorities,[13]
• prescribes that the courts are independent[14] and determines the courts as independent and autonomous authorities which are bound by the Constitution, the law and other general acts if required by law, rules of international law and ratified international treaties.[15]

b) *The Law on Prohibition of Discrimination*[16]

The Law on Prohibition of Discrimination , among other things:
• Regulates proceedings for protection against discrimination,[17]
• establishes the Commissioner for Protection of Equality as a separate individual and independent state authority whose basic jurisdiction is related to the protection of equality,[18]
• establishes the right of the Commissioner to initiate court proceedings,[19]
• regulates which requirements may be presented to the court in lawsuit for the protection against discrimination, which include: the prohibition of performing an activity that threatens by discrimination, prohibition of further

9 Article 77 of the Constitution of the Republic of Serbia.
10 Article 166 of the Constitution of the Republic of Serbia.
11 Article 167, Paragraph 1, Item 3 of the Constitution of the Republic of Serbia.
12 Article 167, Paragraph 1, Item 5 of the Constitution of the Republic of Serbia.
13 Article 168, paragraph 1 of the Constitution of the Republic of Serbia.
14 Article 4, paragraph 4 of the Constitution of the Republic of Serbia
15 Article 142, paragraph 2 of the Constitution of the Republic of Serbia.
16 Official Gazette of the Republic of Serbia, no. 22/2009.
17 Article 1[s] of the Anti-discrimination law.
18 Article 1 of the Anti-discrimination law.
19 Article 41, paragraph 1 of the Law on Protection of Discrimination.

discrimination or prohibition of repetition of of discrimination, determination if the defendant treated the plaintiff or another person in a discriminatory way, taking steps to remove the consequences of discriminatory treatment; recompense of pecuniary and non-pecuniary damage, pronounce of a judgment on any of the charges from the item 1 to 4 of the Article 41st,[20]

• Defines the concept of the state government, which implies state authority, an autonomous province, local government authority, public company, institution, public agency or other organization which is entrusted with public authority, or a legal entity established or funded entirely or predominantly of the Republic, autonomous province or local government,[21]

• establishes the right of the Commissioner or the prosecutor to, along with the lawsuit, during the procedure and after the termination of procedure, until the judgment is executed, request from the court to prevent discriminatory treatment by temporary measure to eliminate the threat of violence or major irreparable harm,[22]

• refers to appropriate application of the Law on non-contentious procedure in court procedure for protection from discrimination.[23]

c) *The Constitutional Court Law*[24] which

• regulates the organization of the Constitutional Court, the proceedings before the Constitutional Court and legal effect of its decisions,[25]

• regulates the procedure on evaluation of the constitutionality and legality of general acts,[26]

• determines the type of legal act by which the Constitutional Court decides on the mismatch of general act and the Law, and prescribes that the court decides in the form of decision deterring that the general act is not in accordance with the Law,[27]

• determines the type of legal act by which the Constitutional Court decides on the removal of consequences of an unlawful regulation, and prescribes that the Constitutional Court decides in the form of a decision deterring the elimination of the consequences occurred as a result of application of general act non-according with the Constitution or the Law,[28]

20 Article 41, paragraph 1 of the Anti-discrimination law.
21 Article 2, paragraph 1, item 4 of the Law on Protection of Discrimination..
22 Article 44 of the Anti-discrimination law.
23Article 41, paragraph 2 of the Anti-discrimination law .
24 Official Gazette of the Republic of Serbia, no. 109/2007.
25 Article 1 of the Law on the Constitutional Court.
26 Article 50 and 65 of the Law on the Constitutional Court.
27 Article 45, paragraph 1, item 4 of the Law on the Constitutional Court.
28 Article 45, paragraph 1 of the Law on the Constitutional Court.

• regulates temporary measures which the Constitutional Court may take and its right to, during the proceedings until a final decision, suspend the execution of individual act or action taken on the bases of the general act whose constitutionality or legality is evaluated, if by their execution could occur irreversible harmful effects,[29]
• regulates the actual litigation about the constitutionality before the Constitutional Court, which is run
by Court and prescribes that if in the proceedings before a court of general or specific jurisdiction the issue is brought up of accordance of a general act with the Constitution, generally accepted rules of international law, affirmed by international agreement or by law, the court is going to stop the procedure and initiate the proceedings on evaluation of the constitutionality and legality before the Constitutional Court[30]
• determines the effect of the Constitutional Court decision and prescribes that a general act ceases to be valid on the day of publication of the decision in the Official Gazette of the Republic Serbia,[31]
• establishes the Constitutional Court jurisdiction over resolving the conflict of jurisdiction between courts and other state authorities, including the conflict of jurisdiction between the Court and the Constitutional court as a state authority.[32]

d) *The Law on Organization of the Courts*[33], which contains:
• regulations on organizing independent and autonomous state authorities protecting the freedoms and rights of citizens, legally determined rights and interests of legal subjects and ensure constitutionality and legality;[34]
• determines the jurisdiction of the Basic court to conduct enforcement and non-contentious proceedings that are not under the jurisdiction of another court,[35]
• establishes the High court jurisdiction to decide in the second stage on the appeals on the decisions of the basic courts in the enforcement and non-contentious proceedings.[36]

29 Article 56, paragraph 1 of the Constitutional Court.
30 Article 63 of the Law on the Constitutional Court.
31 Article 58, paragraph 1 of the Law on the Constitutional Court.
32 Article 167, Paragraph 2, Item 1 of the Law on the Constitutional Court.
33 Official Gazette of the Republic of Serbia no. 116/208.
34 Article 1 of the Law on organization of Courts
35 Article 22, paragraph 2 of the Law on organization of Courts.
36 Article 23, paragraph 2 item 2 of the Law on organization of Courts.a

e) *The Law on non-contentious procedure*[37], which, among other things, regulates:

• the rules by which the courts of general jurisdiction act and decide on personal, family, financial, and other legal matters which are, by this or other law resolved in non-contentious proceedings.[38]

f) *The Criminal Code*[39] which:

• regulates and defines the being of the offense as "violation of equality"[40] which is: (1) who, due to national or ethnic origin, race or religion or because of absence of such affiliation or because of differences in political or other beliefs, sex, language, education, social status, social origin, financial status or other personal characteristic, denies or limits human and civil rights determined by the Constitution, laws or other regulations or general acts or determined by international treaties or on the basis of these differences grants privileges or benefits, shall be punished by imprisonment up to three years. (2) If the offense specified in paragraph 1st of this article is committed by an official in the performance of duty, shall be punished by imprisonment of three months to five years.

g) *The Misdemeanor Law*[41] which:

• prescribes that the Republic of Serbia, the state authorities, authorities of territorial autonomy, city and local governments can not be responsible for offense.[42]

From the analysis of the above regulations of relevant laws a few basic observations follow:

First, only the Constitutional Court is competent to evaluate whether by the general legal act of the state authority that contains the discriminatory regulation the Constitution or Law is violated, or the regulation of the general act is discriminatory and therefore it is not in accordance with the Constitution or the Law.

37 Official Gazette of the Republic of Serbia, no. 25/82. and 48/88. and Official Gazette Republic of Serbia, no. 46/95. and 18/2005

38 Article 1 of the Law on non-contentious procedure

39 Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005 - corr., 107/2005 - Corr. and 72/2009.

40 Article 128 of the Criminal Code.

41 Official Gazette of the Republic of Serbia, no. 101/2005, 116/2008 and 111/2009.

42 Article 17 , paragraph 6 of the Misdemeanor Law.

Second, Equality Commissioner has the option to, before the Constitutional Court challenge the constitutionality and legality of the general act, the general act issued by a public authority, as well as general act by legal entity, and this right should be used when in court is initiated the proceeding for protection from discrimination, therefore, both legal instruments and both ways the legal protection may be used. (judicial and constitutional).

Third, if initiates proceedings before the Constitutional Court, the Commissioner could use the right to ask the Constitutional Court to, until the termination of the proceeding before this court, suspend the execution of an individual act or action taken based on general act whose constitutionality or legality and would is evaluated, so, according to our opinion, this instrument should be also used when starting the procedure before the Constitutional Court. In this way could be achieved temporarily suspending of effects of discriminatory regulation contained in the general legal acts.

Fourth, the decision of the Constitutional Court on disharmony of discriminatory norm contained in general legal act whose constitutionality and legality is challenged before the Constitutional Court removes disputed (discriminatory) legal norm out of legal order. Discriminatory regulation of the general act shall cease to be valid on the day of publication of the decision in the Official Gazette of the Republic of Serbia. In this way, the very initiating the procedure before the Constitutional Court achieves general effect pro futuro, because discriminatory legal norm ceases to be valid.

Fifth, evaluation of the regulation of general act, violating a constitutional prohibition of discrimination, could not be given by the court of general jurisdiction, which is, by the Law on Prohibition of Discrimination in charge only to, by its act of the declaratory nature, "establish that the defendant discriminatory treated the plaintiff or other person ", and that in this act is stated that discrimination is committed by general act of public authority or legal entity. From the court of general jurisdiction can not be required to order the discriminator to remove discriminatory regulation from the general act, or to remove the discriminatory act from the legal system, because such an order of the Court would not oblige the legislator. Court could act only referring some specific case on which the discriminatory regulation is applied. Decision of the Court would have effect only in the particular case, but its effect would not extended to other cases, nor would the challenged discriminatory regulation of the general legal document be removed from the legal system.

Sixth, the effect of the court's decision, stating that by the general act discrimination is committed, could not have as a result the removal of discriminatory regulation out of general legal act, nor finding of invalidity of such regulation, because in that case the court would act outside the field of its authority extent and the legal framework of its jurisdiction. Seventh, when the discrimination is committed by general legal act of public authority or legal entity, the authorized person might to make initiate proceedings before the court and ask the court to determine whether by the regulation of the general act discrimination is committed in particular case. Court protection may be required also if discrimination is committed when a public authority or legal entity adopts general act containing discriminatory regulation. The Law on Prohibition of Discrimination does not anticipate in this regard any exceptions. This Law defines "discrimination" and "discriminatory treatment" as "any unjustified distinction or unequal treatment, "regardless the type and form of used actions or omissions.

Besides, the Law on Prohibition of Discrimination explicitly grants to anyone the right to judicial protection "from all forms of discrimination," and that is from the one that is made in the general legal act of a public authority or legal entity, and discrimination by public authorities is treated as a severe form of discrimination regardless of the type and form of used activity. Eighth, the authorized person has the right to ask the court to, by temporary measure, prevent discriminatory treatment to eliminate the threat from violence or from major irreparable damage. The court could be asked to order the suspension of further application of discriminatory regulation, or discriminatory act. The basis for such a claim is contained in the Law on Prohibition of Discrimination, which prescribes that a court of general jurisdiction may be sought to prohibit the continuation of such discriminatory action, or prohibit the repetition of such action. The court order would have the character of temporary measure that would last until the decision of the Constitutional Court.

Ninth, the Commissioner could initiate the proceeding before the Constitutional Court on evaluation of the constitutionality and legality of the discriminatory regulations of the general legal act of public authorities, as well as a of legal entity. The same could be done, by the court of general jurisdiction in particular dispute about the constitutionality as well as state authority authorized to, before the Constitutional Court, to imitate proceedings on evaluation of constitutionality and legality.

Tenth, the Commissioner might address the Constitutional Court regarding this

issue and the particular case initiated before the Court in order to have Constitutional Court resolve the conflict of jurisdiction between the courts of general jurisdiction and the Constitutional Court in this matter. Eleventh, the Commissioner might request from the Constitutional Court to determine its opinion on these issues, but this could be done if the proceeding is initiated on evaluation of the constitutionality of general act containing discriminatory regulation, in which case the questions may be posed as disputable regarding court jurisdiction in this case.

12

The Commissioner for Protection of Equality – role, jurisdiction and action*

* The author of this passage is Nevena Petrusic PhD, professor of law at the Faculty of Law in Niš, and the Commissioner for Protection of Equality.

In the national system of legal protection from discrimination, a significant position belongs to the Commissioner for Protection of Equality,[1] an independent and autonomous state authority, established by ZZD, with a wide range of legal powers that make it the central national institution specialized in preventing and repressing all forms and aspects of discrimination.[2] The establishment of such an institution is an expression of the state's choice to respect recommendations of international institutions on the establishment of independent national authorities for the fight against discrimination, such as, for example, General Recommendation no.2 from 1997 of the European Commission against Racism and Intolerance of the Council of Europe (ECRI), which suggest to the members of the Council of Europe to institutionalize specialized agencies in order to combat discrimination and racism on the state level. Besides that, several EU directives contain regulations for the creation of independent agencies for equality (so-called equality bodies).[3]/[4] Although the directives do not include formally binding regulations for Serbia, they are relevant for the area of protection from discrimination, since the Republic of Serbia signed in 2008 the Stabilization and Association Agreement with the EU[5] and that with the decision of the European

1 Further: Commissioner

2The Commissioner for Protection of Equality is only one among the independent institutions for the protection of human rights established during the legal transition in the domestic legal system. Although their roles, tasks, responsibilities, the way of election and funding vary widely, for all of these bodies is used in literature a collective expression: "Fourth branch of government." More: Orlović, S. (2010), An independent body, the fourth branch of government or the controller, in: Contemporary State: structure and social functions (e.g., Vukašin Pavlović, Zoran Stojiljković) Konrad Adenauer Stiftung, Faculty of Political Science, University of Belgrade, Center for Democracy, Belgrade, p. 231-269; rule of law - and responsibility Power Control, Proceedings and presentations, (2009) (ed. Ljubica Djordjević, Aleksandar Popović), Konrad Adenauer Stiftung, Belgrade.

3 See: Council Directive EU 2000/43 / for the implementation of the principle of equal treatment regardless racial or ethnic origin (Council Directive 2000/43/EC of June 29th,2000 implementing the principle of equal treatment between persons regardless racial or ethnic origin, Official Journal L 180, 07.19.2000) Council Directive EU 2000/78 o establishing a general framework for equal treatment in employment and occupation (Directive 2006/54/EC of July 5th on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation (recast), Official Journal L 204, 26.7.2006. Council Directive of the European Union C 2002/73/E enforcement principles equal treatment of women and men in employment, professional training and promotion and working conditions (Directive 2006/54/EC of July 5th on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation (recast), Official Journal L 204, 26.7.2006

4 The establishment of equality bodies is also envisaged by Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426 final), http://eur-lex.europa. eu / LexUriServ / LexUriServ.do? uri = CELEX: 52008PC0426: EN: NOT (accessed 6 08th 2012).

5 Law on ratification of the Stabilization and Association Agreement between European Communities and their Member States, on one side, and the Republic Of Serbia, on the other ("Off. Gazette of RS", no. 83/08).

Council from March 1, 2012, it gained the status of the candidate for membership of the EU,[6] which includes the need to harmonize national legislation with EU standards and regulations.

During the legal profiling of the institution of the Commissioner for Protection of Equality and the regulation of its status and jurisdiction,[7] various conceptual models of equality bodies in comparative legal systems were considered .[8] The experience of similar institutions in countries in the region and in the EU, whose functions and responsibilities are very much different was also used.

6 European Council, march 2012, Conclusions, EUCO 04/03/12, Rev. 3, http://consilium.europa.eu/uedocs/cms data/docs/pressdata/en/ec/128520.pdf (First access to 06th 2012).

7 More on legal status, the guarantees of independence, organization and the Commissioner for Protection of Equality: Petrusić, N. (2011) Organization and jurisdiction of the Commissioner for Protection of Equality in Development as life-process needs, concerns and support for the elders, Proceedings, Center for social work "Saint Sava" in Niš, Center for publication in a law school Niš, p. 45-53.

8 In some states commissions are established, in some one or more Parliamentary Commissioners, somewhere there is a special Ombudsman for Equality and somewhere Deputy Ombudsman has jurisdiction for the protection from discrimination; some states have established special parliamentary committees, and some quasi-judicial bodies .Neither the status of equality bodies is the same. More: Equality Bodies and National Human Rights Institutions - Making the Link to Maximise Impact, Equinet, the European Network of Equality Bodies, (2012), Bruxella; Ammer, M., Crowley, N, Liegl, B., Holzleithner, E., Wladasch, K., Yesilkagit, K., (2010) Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, Human European Consultancy, Ludwig Boltzmann Institute of Human Rights, Utrecht, Vienna, Krusaa, NM, t he role of equality bodies, http://www.era-comm.eu/oldoku/Adiskri/13_Stakeholders/ 2011_02_Krusaa_DE.pdf (First rejoin 08th 2012), Brooks, J., Milatovic, S., (2010) Development Report capacity building and institutional strengthening of the Commissioner for the Protection of equality, UNDP, Belgrade.

12.1. ORGANIZATION AND JURISDICTION OF THE COMMISSIONER FOR PROTECTION OF EQUALITY

12.1.1. Normative framework

The establishment, selection and treatment of the Commissioner for Protection of Equality are regulated by the Anti-discrimination Law[9] (Articles 28 - 40), except that the way of acting is regulated in more detail by the Rule Book[10], that the Commissioner issued in accordance with Art. 34 ZZD.

12.1.2. Legal status, the election and dismissal

Under the provisions of ZZD, the Commissioner for Protection of Equality is an independent, autonomous and specialized state agency. It is a singular body established by the very ZZD, with a broad range of legal powers that make it a central government body for the fight against all forms and types of discrimination. The Commissioner's headquarters is in Belgrade.

In accordance with Art. 28 of ZZD, for position of the Commissioner may be appointed a lawyer, citizen of the Republic of Serbia, with at least ten years of working experience in the field of human rights, with high moral and professional qualities. The Commissioner may not perform any other public or political office, nor professional activity, in accordance with the law.

The Commissioner is elected in National Assembly by a majority vote of all deputies, at the suggestion of the National Assembly committee in charge of constitutional matters. The Committee determines the suggestion by majority vote of all the members of the Committee, and each parliamentary group in the National Assembly has the right to suggest a candidate for the Commissioner. The mandate of the Commissioner lasts five years, and the same person may be appointed for Commissioner twice at the most.

Guarantees on independence are provided by regulations prescribing that the Commissioner has the immunity enjoyed by parliament members, has the right to same salary as a judge of the Supreme Court of Cassation, and the right to compensation for expenses occurring related to the performance of his/her function (Article 31 of ZZD). Also, to guarantee the independence of the Commissioner, the way in which the function can be terminated and the reasons for his/her dismissal and dismissal procedure are regulated with precision.[11]

9 "Off. Gazette of RS ", no. 22/2009. (Hereinafter ZZD).

10 "Off. Gazette of RS ", no. 34/2011.

11 According to Art. 30 of ZZD, the Commissioner's function ends: when the mandate ends; with the resignation in writing to the National Assembly, meeting requirements for retirement, in accordance

12.1.3. Professional Staff of the Commissioner

Art. 32 of ZZD anticipates that the Commissioner has Professional Staff that helps him/her perform his/her jurisdiction. Organization and the work of the Professional Staff is regulated by the Commissioner him/herself, with the act on organization and job classification, which is approved by the National Assembly. Regarding the organization of the Professional Staff, the Commissioner is independent; it is only prescribed that the Commissioner has three assistants, each of them managing a separate sphere of work, and they are appointed by the Commissioner.[12] The Commissioner independently decides on the employment of persons, guided by the necessity of professional and effective performance of their duties, and regulations on working relations in government agencies apply to the employees in the Professional Staff

12.1.4. The jurisdictions of the Commissioner for protection of equality

Jurisdictions of the Commissioner are set widely, in accordance with international standards, in order to enable efficient and effective suppression and protection from discrimination and contribution to promotion of equality.

One of the primary responsibilities of the Commissioner is to act on complaints in cases of discrimination against individuals or groups of individuals connected by the same personal characteristics. According to Art. 33 of ZZD, the Commissioner is authorized to receive and consider complaints about discrimination, give opinions and recommendations in specific discrimination cases and to impose measures determined by law. Besides, the Commissioner is obliged to provide information to the complainant about his/her rights and opportunities to initiate court proceedings or to other action of protection, or recommends conciliation, as well as to file complaint for protection from discrimination, as a party under functional terms, and with the consent of the discriminated person, under the condition that proceedings before a court regarding the same matter

with the law; dismissal and death. The reasons for dismissal are: acting with negligence and unprofessional work, the coming into effect of the decision convicting him/her of crime with a sentence of imprisonment which renders him/her unfit or unsuitable to perform this function, loss of citizenship, other public services or professional services, duties or other work that could affect the autonomy and independence, as well as acting contrary to the law regulating conflict of interest in the performance of public functions. The procedure for dismissal shall be initiated by one-third of the representatives. The Committee on Constitutional Affairs has jurisdiction to determine the existence of cause for dismissal and to inform the National Assembly, which decides on the dismissal by a majority of all representatives.

12 Organization of the Professional Staff is regulated by the Regulation on the internal organization and job classification of the Proffesional Staff of the Commissioner for Protection of Equality.

have not already been initiated or legally terminated. The Commissioner is also authorized to submit misdemeanor charges for acts of discrimination incriminated by the part of ZZD regulating offenses. The jurisdiction set refers to the promotion of equality. Within this activity, the Commissioner has the authority to warn the public of the most common, typical and severe cases of discrimination, to monitor the implementation of laws and regulations, initiate the adoption or amendment of regulations for the implementation and improvement of protection from discrimination and give an opinion on the provisions of the draft laws and other regulations referring to the prohibition of discrimination and recommends to public authorities and other persons the measures to ensure equality (Article 33 ZZD).

One of the Commissioner's jurisdictions is to monitor the protection of equality, on which the Commissioner submits an annual report about the state in the area of protection of equality to National Assembly. When necessary, the Commissioner, at his/her own initiative or at the request of the National Assembly submits a special report, particularly in cases of frequent multiple discrimination, discrimination that comes from the public
authorities and cases of severe forms of discrimination. In his/her action the Commissioner is required to establish and maintain cooperation with authorities responsible for the achievement of equality and the protection of human rights in the territory of autonomous provinces and local self-government.

12.1.5. Financial resources

The financial resources for the work of the Commissioner's office are provided in the budget of the Republic of Serbia, at the proposal of the Commissioner. Financial resources must be sufficient for high-quality and efficient work of the Commissioner, which is one of the international standards.[13]

13 The Paris Principles of 1992 adopted by the United Nations of Human Rights, which relates to the independence and role of government independent institutions that protect human rights, under Section 5 it is stated that "national institution must have adequate funding, facilities and sufficient staff so that they can be independent of the government in its work. " ECRI in its Recommendation no. 2 from 1997, in principle no. 5, which defines the independence Of institutions for the protection of equality of citizens, states that "these institutions must provide sufficient resources to discharge their duties effectively. "

12.2. COMMISSIONER ACTING ON COMPLAINTS

The procedure on complaints for discrimination has the character of a special administrative procedure, which is generally regulated by ZZD, except that the way of acting is regulated in more detail by the Rule Book. The proceedings before the Commissioner are regulated by the Law on General Administrative Procedure (Article 40, paragraph 4 of ZZD). In terms of procedure, ZZD and the Rule Book regulate: the method of initiating process, active legitimation, the content and form of the complaint, investigation and course of procedure, as well as decisions and measures taken in procedure on the complaints.

12.2.1. **Authorization to file a complaint**

Proceedings before the Commissioner are initiated by filing a complaint. In proceedings before the Commissioner active legitimacy belongs to every physical or legal entity or a group of people who consider themselves to be by any act, action or omission discriminated on any grounds. If it is about the violation of rights of a group a complaint may be filed by any person from the group. Besides, active legitimation also belongs to organizations dedicated to the protection of human rights and other persons. If proceedings are initiated for the protection of specific individual, it can be done only in the nameand with the consent of that person (Article 35 of ZZD).

12.2.2. The content and form of complaints

A complaint should contain information about who was discriminated, how and by whom, and allegations of means of evidence that could be used to prove the verity of the facts related to the act of discrimination. The complaint has a written form, and may be submitted by mail, fax or electronically. The complaint may be filed verbally on the record, in the receiving office of the Commissioner. The Office of the Commissioner ensures that when submitting complaints verbally on the record the service of interpreters and translators is provided, in order to enable persons with disabilities and persons who do not speak the official language to submit a complaint.

The Commissioner does not act on anonymous complaints. No fees or other compensation is required for the filing of a complaint, and each party bears its own costs, regardless of the outcome of the proceedings.

12.2.3. Procedure of acting upon complaint

The proceeding before the Commissioner is simple and devoid of excessive formality, which contributes to its effectiveness.

After receiving the complaint, the authorized person in the Professional Staff examines whether the complaint contains all the necessary elements. If the complaint is incomplete, incomprehensible or contains deficiencies which disable processing, a request is referred to the complainant without delay to remove defects within 15 days, indicating the shortcomings and the ways in which they can be removed. The Commissioner dismisses the complaint: 1) if the complainant fails to correct the deficiencies, 2) when the Commissioner determines he/she is not competent to decide on the violation of rights to which the complainant refers to, in which case the Commissioner is required to notify the complainant who the competent authority for providing the legal protection is.(Petrusić, Becker (2011:68).

The Commissioner does not carry out the procedure if it finds: 1. that the proceeding on the same matter has been initiated before a court or the proceedings before the court have been legally terminated, 2. that it is obvious that there is no discrimination on which the complainant refers, 3. when he/she acted on the same matter but no new evidence has been submitted, and 4. when it is impossible to achieve the purpose of treatment because of the passage of time from the violation of rights - Art. 36 of ZZD. (Petrusic, Becker (2011:69).

Upon receiving the complaint and the possible elimination of defects, the complaint is submitted to the person who allegedly committed an act of discrimination within 15 days from receiving the complaint. This person is left a deadline of 15 days from the date of receipt of the complaints to comment on the allegations in the complaint.

In order to provide effective and efficient protection, the cases are classified into two categories according to the degree of urgency,: 1. "Immediate" - when the collected data indicate that the person because of discrimination is at high risk, for adverse effects, possibility of repeated discrimination, continuing or stopping the act of discrimination. The procedure on the case begins immediately and opinions and recommendations are given in the shortest possible term; 2. "Regular" - when the collected data does not indicate that the person because of discrimination is at risk, opinion or recommendation is given within 90 days from filing a complaint (Petrusić, Becker, 2011:69).

12.2.4. Mediation

In every case it is tested whether there is a possibility to conduct the mediation. If it is estimated that the case is suitable for mediation, conducting mediation is proposed to the parties, in accordance with the law governing mediation.

Mediation is a specific method for the peaceful resolution of the situation that was the occasion for filing a complaint, whose application may prevent further manifestation or repetition of harmful behavior.[14] The process of mediation is not carried out in order to determine whether certain conduct constitutes discrimination, but in order to have parties, by themselves, with the help of the mediator, as a neutral third party, discuss the problem, to view it from a different perspective and find a mutually acceptable solution to the situation in question (Ćuk Milankov, 2012: 78).

Mediation is suitable for use if the complaint indicates discrimination committed by certain act or omission or by making individual act, but not by adopting general acts. On the other hand, mediation is applicable if the person against whom the complaint is filed agrees with the allegations of complaint, that he/she recognizes occurrence of a violation of the complainant and accepts responsibility for the resulting violation. Mediation cannot be used if the goals of one or both parties are at odds with what mediation is able to achieve (Ćuk Milankov, 2012: 79).

When an employee who works on the case evaluates that the case is suitable for mediation, a letter is sent to the person against whom the complaint is filed, in which the implementation of mediation is recommended and the recipient is also left a deadline to declare whether he/she accepts mediation. Mediation is offered to the complainant only if the other party accepted the implementation of the mediation process. In this way the secondary victimization of the complainant is avoided, that is, the possibility that he/she be the first one to accept the mediation, and that the person against whom the complaint was filed refuses it (Ćuk Milankov, 2012: 80).

If there is a consent of both parties to have the mediation process conducted,

14 In an effort to create the conditions for wider use of mediation, the Commissioner formed a working group which, in cooperation with the Commissioner for Protection of Equality, created a specific mediation model adapted to cases of discrimination. The working group comprised of professionals and experts engaged in the associations Partners for Democratic Change and the Center for Alternative Cconflict Resolution from Belgrade and representatives.

separate (preparatory) meetings are firstly are organized . After completion of preparatory talks the mediation itself is conducted through a joint meeting, separate meetings, or a combination of the two modes (Ćuk Milankov, 2012:80).

The mediation whose implementation is organized within the Office of the Commissioner may be conducted only by a person from the List of Mediators of the Commissioner for Protection of Equality. The List of Mediators are experts from different fields who are specially trained to conduct the mediation in cases of discrimination. Training and qualification requirements that are necessary for inclusion to the List of Mediators are prescribed by the Commissioner for Protection of Equality. If the parties have agreed on implementing mediation, the authorized person in the service of the Commissioner engages a mediator from the list as a temporary mediator to organize and conduct the preparatory meetings. At these meetings, among other things, a mediator from the list to continue the mediation is selected. If the parties cannot agree on a mediator›s personality, the mediator is determined by the Commissioner.

The mediation procedure is conducted in the permanent or temporary residence of the persons who participate in it, or where the parties have agreed for mediation to take place. All costs of implementing mediation, as well as costs of other actions to be taken, are borne by the Commissioner for Protection of Equality so it is free for the mediation parties.

If the parties fail to agree on the implementation of mediation, as well as when mediation does not result in closing an agreement, the proceedings before the Commissionercontinues.

12.2.5. Opinions, recommendations and measures

Based on the survey results, the Commissioner for Protection of Equality makes a decision, in the form of an opinion, as to whether discrimination has been committed (Article 39, para. 1 of ZZD).[15] This opinion is delivered to the complainant and to the person against whom the complaint was filed. With an opinion that the discrimination has been committed the Commissioner issues a recommendation to the person against whom the complaint was filed on the way to re-

15 In 2011, the Commissioner received 335 complaints. Based on 134 complaints procedure was initiated, of which 79 complaints were rejected, and in 36 procedures has passed the opinion that there was no discrimination, while in 19 cases discrimination is indentified. See: Regular annual report of the Commissioner for the Protection of Equality for 2011 (2012) the Commissioner for Protection of Equality Belgrade, available on the website of the Commissioner http://www.ravnopravnost.gov.rs/

move the violation of rights (Article 39, paragraph 2 of ZZD), leaving a deadline of 30 days to act upon it and to remove the violation of rights. The person to whom the recommendation is addressed is obliged to act upon it and remove the violation, or the consequences of rights violation within 30 days of receiving the recommendation, and to notify the Commissioner about it. If that does not happen, the Commissioner is authorized to issue a decision imposing a warning to discriminator and giving him/her a new deadline of 30 days for removing the violation or the rights violations result.[16] The decision is final and the complaint against it is not allowed. If within the new deadline of 30 days the discriminator does not remove the violation, the Commissioner is authorized to inform the public (Art. 40 of ZZD).

16 It is not a "public warning" but a warning that the Commissioner address to perpetrator of discrimination with the aim to challenges moral and produce psychological impact on discriminator and further encourage him to act upon it (Djordjević, S., Palević, M., (No year of publication) anti-discrimination law, legal analysis, Kragujevac, p. 129th

12.3. OTHER POWERS OF THE COMMISSIONER

According to Art. 33 of ZZD, the Commissioner is authorized to initiate a litigation for protection from discrimination. Besides that, according to Art. 33, item 4 of ZZD, the Commissioner is authorized to press the misdemeanor charges for violation of rights of ZZD, due to acts of discrimination which are incriminated as offenses in all anti-discrimination laws: ZZD, Law on Prevention of Discrimination against Persons with Disabilities[17] and the Law on Gender Equality.[18] In accordance with Art. 33, item 6 of ZZD, the Commissioner is authorized to warn the public of the most common, typical and severe discrimination cases. The Commissioner does so on the basis of the complaints submitted, through information from the public media and other sources of information. In the warning, the Commissioner points to the ways in which discrimination was committed, to executors of discrimination, to individuals and groups that were subjected to the most common, typical and severe forms of discrimination, with the obligatory protection of personal data, to the violated regulations on prohibition of discrimination and the possible consequences or consequences of the most common, typical, and severe forms of discrimination (Petrusić, Becker, 2012: 61).

As part of its preventive functions, the Commissioner is authorized to recommend to the bodies of public authorities and to other persons the measures to ensure equality and improvement of protection from discrimination.[19] He/she is required to monitor the implementation of laws and other regulations in the field of equality and non-discrimination, to give opinions on draft laws and other regulations, initiate the adoption of new and change of current regulations, and to submit to the National Assembly the annual and special reports on the situation in the field of equality (Article 33 of ZZD). In his/her work, the Commissioner cooperates with the National Assembly, agencies and bodies which perform similar tasks or deal with human rights and freedoms, that is, with the protection of equality; government agencies; autonomous provincial agencies and local self-governments and public agencies; associations; research and educational institutions in the country and abroad.

17 "Off. Gazette of RS ", no. 33/06.

18 "Off. Gazette of RS ", no. 104/09.

19 See: Book reviews, recommendations, and warnings of the Commissioner for Protection of Equality, July 1st, 2010-30. , 2011 (2011), the Commissioner for the protection of Gender, Belgrade, Commissioner http://www.ravnopravnost.gov.rs/ website.

12.4. PROCEDURAL POSITION OF THE COMMISSIONER IN LITIGATION ON PROTECTION FROM DISCRIMINATION

One of the most important powers of the Commissioner is the authorization to initiate litigation on protection from discrimination (Article 35 item 3 of ZZD). In these cases the Commissioner has the status of the prosecutor, but may also acquire the status of intervener.

12.4.1. Commissioner for Protection from Discrimination in procedural position of prosecutor

By ZZD regulations, the Commissioner for Protection of Equality is recognized active procedural legitimacy in all litigations for the protection against discrimination, regardless of the form and case of discrimination in question, and whether the victim of discrimination is an individual or group of persons. The legal authority of the Commissioner to seek judicial protection from discrimination is a manifestation of the legislator's attitude that preventing and combating discrimination is a general (public) interest of society, and that this independent authority should be enabled to initiate and conduct litigations for protection from discrimination so that it could, by its procedural activity, secure adoption of favorable court judgments. The significance of these judgments is not only reflected in the fact that they provide legal protection to discriminated persons (group of persons), but also in the fact that they, by their legal power and authority having in the legal system, send a message to the public that discrimination is a prohibited unlawful behavior that is not tolerated, but effectively sanctioned.

The Commissioner may initiate anti-discrimination litigation with a complaint regarding specific act of discrimination only if the discriminated person, or other authorized person, has already filed a complaint regarding this same act is filed. Such a conclusion results from the fact that the Commissioner has no authority to conducts proceedings and determines discrimination at his/her own initiative, ex officio, , but he/she may only do so if he/she has been addressed a complaint on that matter(argument from Article 35 of ZZD and Art. 15 of the Rule Book). However, the Commissioner him/herself decides on which cases of discrimination he/she is going to bring before the court, i.e. regarding which acts of discrimination he/she is going to seek court protection having in mind that the purpose and meaning of initiated litigations are overcome by the significance that they have in protection aspects of the rights of discriminated persons or group of persons.

It is, in fact, about the so-called strategic litigation,[20] litigation which The Commissioner initiates and conducts in a general (public) interest, with a goal to, by

20 On the nature and importance of strategic anti-discrimination lawsuits, in detail: Strategic litigation of race discrimination in Europe: from principles to Practice (2004), ERRC, INTERIGHTS, London, available at Practice2004.pdf (Accessed 1 08th 2012); Vehabović, F., et al (2010). , Commentary on the Discrimination with explanations and review of practice in comparative law, Human Rights Center of the University of Sarajevo, Sarajevo, p. 115-119.

his/her procedural activity, as plaintiff in the litigation, contribute to the consistent application of regulations and improvement of legal practice, to further encourage and stimulate the victims of discrimination to initiate anti-discrimination litigations, support the rule of law and contribute to improving access to justice, to legally educate and sensitize the public about the problem of discrimination and the like. Conducting strategic litigation is part of "advocacy strategy, " of the Commissioner and one of the instruments used to fight discrimination and promote equality in social relations.

The Commissioner is expected to choose for conducting the so-called strategic litigation the cases of frequent and widespread discrimination, particularly those which cause particularly serious consequences on members of vulnerable, endangered, and marginalized groups, which rarely get an epilog of the court in legal practice, and regarding which there are good prospects for success in litigation. Accordingly, whether the case of discrimination is strategically important, does not depend on forms of discrimination, the consequences it caused, on who the victim and he perpetrator of discrimination is etc. Strategically important cases can be the cases of discrimination against a group of people, but also those whose victims are individually defined as physical and legal entities, cases of severe discrimination, and those who do not fall in this category, cases of discrimination committed by public authorities, but also by individuals, if they have the "potential" to achieve the goals of strategic litigation.

The Commissioner for Protection of Equality is authorized to present all requirements for legal protection prescribed by ZZD, except for a request for the recompense of consequential and non-consequential damage (Article 46, para 1, and Article 43 of ZZD). The Commissioner may point out requirements for legal protection prescribed by ZZD, as well as those prescribed by special anti-discrimination laws.

Which requirements of legal protection are going to be noted in the complain is decided by the Commissioner him/herself. He/she may cumulate and combine the requests freely, in accordance with the law, guided by the need to provide comprehensive and effective judicial protection, which will eliminate the condition and consequences of discrimination and prevent its further manifestation.

In order for the provision of legal protection in the litigation initiated by the Commissioner to be permitted , it is necessary for general and special procedural assumptions to be fulfilled. The Commissioner for Protection of Equality can file the lawsuit "if the court proceedings on the same matter have not been initiated or legally terminated" (Article 33, item 3 of ZZD), and lawsuit may be submitted

only if the discriminated person has agreed on that, in cases where discriminatory treatment relates only to the specific person (Article 46, para 2 of ZZD).

If discriminatory treatment applies only to certain person, the Commissioner for Equality,[21] can "press charges only with his/her consent, "[22] which must be in writing.[23] *Argumentum a contrario*, consent is not required if the same act of discrimination is related to two or more persons, and not only in cases where the act of discrimination is related to group of (individually unspecified) persons, but also when by the same act of discrimination, in the same time and based on the same personal characteristics, are discriminated two or more individually specified persons, members of the group.

The consent of the discriminated person to initiation of litigation for protection from discrimination is a one-sided declaration of will by which he/she expresses his/her consent to have the Commissioner for Protection of Equality initiate the litigation and seek providing of legal protection against discrimination to which he/she has been or is still exposed to.[24] The consent is given at the time the litigation has not yet begun, so it has a character of the so-called prior consent. A statement by which the discriminated person gives consent to initiation of litigation has a regular form of individual document, which, as evidence is submitted with the lawsuit.[25]

21 This assumption needs to be filled in the litigations initiated by the lawsuit of organization dedicated to the protection of human rights and the rights of certain groups (Art. 46, 3. ZZD).
22 Ratio of such a rule is quite clear: if a particular person is exclusive victim of discriminatory behavior, he/she should be enabled to assess his/her position and the need for judicial protection, and on this basis to make autonomous decision on whether the litigation is in accordance with his/her interests; since discriminatory treatment refers solely to one person, his/her will must be respected, regardless of how strong the reasons are for initiating the concrete litigation in the public (general) interest.
23 In this case, the consent of the discriminated person is required even when a lawsuit is initiated by organization dedicated to the protection of human rights and the rights of certain group of persons (Art. 46, 2. ZZD).
24 It should be noted that the statement of the discriminated person on agreeing to start litigation does not constitute a power of attorney because the Commissioner does not file a complaint on behalf of the discriminated person, but on his/her own behalf and in the name of public interest. The very consent to file the lawsuit for protection from discrimination cannot be conditioned by anything, nor the discriminated person may limit it, for example, by giving consent to highlight just some demands for legal protection.
25 The Commissioner regularly seeks the consent of the discriminated person for initiation of litigation, in such a manner that, after having assessed the specific case of discrimination is strategically important and that "deserves" a court epilogue, the Commissioner addresses the discriminated person, presents his/her intention and sets a deadline to be in writing expressly declared whether he/she agrees to file the lawsuit for protection from discrimination. The statement in which the discriminated person gives consent for initiating the lawsuit is in the form of a special writing serves as evidence and is, submitted with the complaint. It is possible, however, that the statement in which the discriminated person gives its consent to the Commissioner to be given in anticipation, in the complaint of discrimination with which the discriminated person addressed to the Commissioner. In such a case there is no impediment to attach along with the lawsuit, as evidence of existence of consent of discriminated person, the complaint containing statements of the discriminated person.

The consent of the discriminated person to initiating the lawsuit is, by its legal nature and effect, a specific procedural assumption on which the admissibility of legal protection depends. If the court determines that discriminated person did not give the consent, and that the lawsuit of the Commissioner was not accompanied by a written consent , it is obligated to dismiss the complaint and halt the procedure.

One part of the public experts expressed the view that the Commissioner for Protection of Equality may initiate the litigation for protection from discrimination only after he/she conducted the proceedings upon the complaint and issued an opinion and recommendation, and that the lawsuit he/she submitted before the proceedings have been carried out is "premature" and as such inadmissible. This position has no basis in ZZD and is an expression of a lack of understanding of the function and role of the Commissioner has in the legal system. If this view is accepted, it would mean that a proceeding on complaint that the Commissioner conducts has the character of the previous procedure, and that it must be implemented in order to allow providing of legal protection in anti-discriminatory litigation. Consequently, such view would mean that litigation represent only an instrument used by the Commissioner in situation when the discriminator does not act on his/her recommendations.

The legislator, trying to follow international standards, provided the Commissioner with a broad "maneuver" range for action. Accordingly, the law does not exclude the possibility that the Commissioner initiate the litigation for protection from discrimination after he conducted the proceedings on the complaint, found discrimination and gave appropriate opinion and recommendation. The Law, however, does not require that this procedure must be conducted prior to initiating court proceedings. The procedure on complaints conducted by the Commissioner and the litigation for protection from discrimination are two completely different and separate forms of protection from discrimination, and the proceedings on a complaint do not have a character of prior proceedings and do not represent procedural assumption upon which the admissibility of providing legal protection in anti-discriminatory litigation depends.

The Commissioner is authorized to build a strategy of action for each individual discrimination case , using all his statutory authority.

At the moment of initiating a complaint, the Commissioner acquires the procedural position of plaintiff. He/she is a party in a functional sense (party by duty, by

function), and exponent of public (general) interest, which in anti-discriminatory litigation achieves by his/her procedural activity. As a plaintiff in the litigation, the Commissioner determines the subject of litigation, by formulating claims determines the content of legal protection required, and by that also the subject of the trial and court decision-making. He/she is authorized to take all party litigation actions that plaintiff in the litigation may take, including any dispositive litigation actions, without seeking the consent of the discriminated person discriminated. The Commissioner is *dominus litis* and may without any limitation, under the terms and conditions prescribed by the law, display requests and proposals, dispose with the subject of litigation, make statements regarding the legally relevant facts, make statements on the allegations and demands of the defendant, express his/her interpretation of legal norms etc.

The Commissioner bears the burden of litigation, and he/she is the one who should, in accordance with the rules on the allocation of the burden of proof, to make probable that the defendant committed an act of discrimination. The Commissioner, however, is not the holder of the rights that are protected in the process and that is why all the effects of this litigation and the judgment within, are put into effect directly for the person / persons whose right is protected in the litigation.

As a state agency, the Commissioner is exempt from court fees,[26] but there are no specific rules on reimbursement of litigation expenses occurred in procedure initiated by the Commissioner. Therefore, regarding recovery of costs of the procedure, standard rules on compensation of litigation costs are valid.

12.4.2. Commissioner for Protection of Equality in procedural position of intervener

Based on his/her legal authority to initiate anti-discrimination litigation, the Commissioner has the right to intervene in a litigation initiated by other legally authorized subject by joining the plaintiff.

ZZD does not contain specific rules on participation of the Commissioner as intervener in antidiscrimination litigation initiated by some other legally authorized person. Special rules on interference are provided by the ZRP, but they regulate interference in the litigation on trade unions and associations whose goals are to improve equality, as well as of the discriminated person. (Pajvančić Jasarević Petrusić, 2010, 107) The ZPP also does not contain specific rules on participation

26 Art. 9 of Court Fees Act ("Off. Gazette of RS", no. 28/94, 53/95, 16/97, 34/01 - Dr. Law, 9/02, 29/04, 61/05, 116/08 - Dr. law, 31/09 and 101/11).

of the Commissioner in someone else›s litigation, but only regulates a special regime on the participation of the public prosecutor in another litigation, to whom it provides broad procedural powers to enable him/her to protect the public interest in someone else›s litigation. In the absence of specific regulations on interference of the Commissioner with anti-discrimination litigation regarding his/her interference general civil procedural rules on the participation of ordinary intervener, contained in Art. 215 -217 of ZPP, must be applied accordingly.

Unlike ordinary interveners in «classic» cases, who intervene in others› litigation to protect their own legal interests, the Commissioner intervene with anti-discrimination litigation in order to contribute by his/her actions to the plaintiff achieving the required legal protection. In this way, contributing to the success of the plaintiff, the Commissioner protects the public (general) interest because the plaintiff›s success in each anti-discrimination litigation is a contribution to the prevention and elimination of discrimination in social relations. In accordance with the provisions of the ZPP, the Commissioner may enter into a litigation from the very initiation of the proceedings, until the final legal decision on the complaint, as well as during the proceedings by extraordinary legal remedy (Article 215, para. 2 of ZPP). The Commissioner may give the statement on interference verbally at the hearing or by referral.[27]

The initiative for the interference may come from the plaintiff, who invites the Commissioner to join him/her in his/her cause, but the Commissioner is authorized to intervene in the litigation voluntarily as well. The criteria on which the Commissioner decides whether to intervene in the litigation and join the plaintiff, essentially is no different from the criteria that guide him/her when deciding on initiating the complaint, but he/she has to take care of some procedural circumstances. So, for example, the Commissioner should consider the stage in which the litigation is, because he/she takes over the litigation in the state, and in the stage where it is at the moment he/she enters in it, and that there is no possibility to take actions that are related to a certain stage, that has passed. The Commissioner must have in mind the fact that, as an ordinary intervener the litigation, he/she has narrowed powers and subordinate position in relation to the party and the like.

In accordance with Art. 216 of ZPP, each party may oppose to the interference of the Commissioner,[28] disputing the existence of his/her legal interest in interference.

27 Statement of the Commissioner on interference may be contained in a filing which is common to the plaintiff and the Commissioner who joined him (e.g. in lawsuit).

28 However, the plaintiff cannot object to the participation of the Commissioner if he/she informed the Commissioner about the lawsuit and urged him/her to intervene.

The court is obliged to examine the merits of this proposition, and when there is no such a proposition, the court is obliged by its official duty to examine the merits of the Commissioner's interference and allow him/her to interfere. In reaching this decision, it is essential that the court has in mind the function and the role of the Commissioner, and the fact that the reason for his intervention in the antidiscriminatory litigation lead on the basis of the complaint of another actively legitimated subject, is to help by his/her activity to the plaintiff to succeed in the litigation, protecting in this way the plaintiff's and the public (general) interest of society. Accordingly, it is evident that the Commissioner, by definition, has a legal interest to intervene in anti-discrimination litigation as a plaintiff.[29]

From the moment when he/she gains the position of the intervener, the Commissioner must ensure to participate in the proceedings, including the duty of the court to invite him/her to all hearings and to provide him/her all submissions. As an intervener in the litigation, the Commissioner takes action on his/her own behalf and not on behalf of the plaintiff, because the Commissioner is neither the attorney of the plaintiff, nor his/her legal representative. Accordingly, in taking actions he/she is not bound with the instructions of the plaintiff.

When intervened in litigation, the Commissioner does not become a (co-) plaintiff, but acquires the procedural position of the plaintiff. This means that he/she can take actions to which is authorized the plaintiff him/herself, and within the deadlines that apply to plaintiff. However, he/she is not authorized to take dispositional litigation actions, apart from the possibility to state a legal remedy. Besides that, the Commissioner, as the intervener in the litigation, is only a helper to the plaintiff, so he/she can take only those procedural steps that are favorable to the plaintiff. His/her actions do not produce immediate effects, i.e. do not bind the court, nor the plaintiff he/she joined to, nor the opposite party. In order for the Commissioner's action to provide an effect, it is necessary that, in abstract

29 Application of the pprovisions of ZPP on the participation of ordinary intervener opens in principle a possibility that the Commissioner acquires the position of intervener although to that is opposed not only the defendant, but the plaintiff he/she joined. Although the role of the Commissioner is to help the plaintiff to succeed in a lawsuit, as intervener with his/her procedural activity, the plaintiff may have a legitimate interest to oppose the participation of the Commissioner, particularly because in case he/she lose the process, the plaintifft shall be required to reimburse to defendant those costs caused by actions taken by the Commissioner. On the other hand, there is no doubt that opposing of the plaintiff to the Commissioner's participation is in a way pointless, particularly having in mind the power of the plaintiff to annul the effect of every Commissioner's procedural action. Therefore, the Commissioner's intervention in someone else's anti-discrimination litigation should be conditioned by the consent of the plaintiff. Such rule exists in Croatian legislation. See Art. 21 of the Anti-Discrimination Law, "National Gazette ", no. 85/08).

terms, it is not harmful to the plaintiff, that the plaintiff does not express objection to that action, i.e. that the Commissioner's action was not contrary to the action taken by the plaintiff (Art. 217, para 4 of ZPP).

The Commissioner is authorized at any time to withdraw from the litigation he/she entered, with no obligation to state reasons for doing so, nor to withdraw from the lawsuit requires the consent of the prosecutor.

According to Art. 217, para 5 of ZPP, the Commissioner may, with the consent of both parties, to engage in litigation on the position of the party he/she joined. In this case there is a lawsuit procedural succession, and the Commissioner takes over litigation in the state in which it is at the moment of the entry to the position of the plaintiff.

In terms of bearing the costs of the proceedings in cases in which Commissioner occurs as a intervener, the rules of the ZPP are applied subsidiarily.

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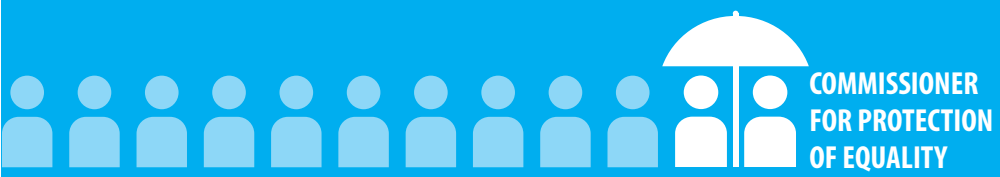

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