

# EQUALITY

## - Regulation and reality

Belgrade, 2014.

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Koalicioni për Barazi HAPI  
Coalition for Equality STEP  
Koalicija za ravnopravnost KORAK

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# DISCRIMINATION

- Legal and institutional framework, notion and practice

## WHAT IS DISCRIMINATION?

Discrimination is any unequal treatment of a person because of his/her personal characteristics. Every individual is characterized by a multitude of personal traits such as nationality, ethnic origin, gender, sexual orientation, age, etc. Based on each of these traits, a person can be discriminated against, and sometimes it can even be on the grounds of several at the same time (dual or multiple discrimination). The examples above are just some of those mentioned in the 2009 Serbian Anti-Discrimination Law.<sup>1</sup>

Discrimination implies unjustifiably treating someone differently. It can also mean putting someone in a worse/better situation because of his/her personal characteristics. These personal traits can be real or assumed, that is to say, one may mistakenly think that someone else has a certain trait and discriminate against them for this reason. The actual existence of the personal characteristic is not crucial; what is important is the discriminatory intent. Discrimination can be directed against a person or a group.

## LEGAL FRAMEWORK

### **The Constitution Of Serbia And Anti-Discrimination Law**

The prohibition of discrimination is a human right guaranteed by the Constitution of Serbia. Discrimination is prohibited by Article 21, which establishes that, according to the Constitution and the Law, “all are equal before the Constitution and law and everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on those of race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.” Under the Constitution, affirmative action or special measures can be introduced to achieve full equality between persons who are in an unequal position compared to other citizens. These measures involve granting privileges to certain vulnerable groups. Nevertheless, these privileges are not considered as discrimination, although there is an unequal treatment, because they are fair and aim to achieve full equality.

Article 76 of the Constitution prohibits discrimination against national minorities. It states the following:

- Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection.

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1 Article 2.1 of the Anti-Discrimination Law defines discrimination as: any unjustified differentiation or unequal treatment, any omission (exclusion, restriction or preference), which can be explicit or implicit towards people, based on any of the following personal characteristics: race, colour, ancestry, nationality, national or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, property, birth, genetic characteristics, health status, disability, marital or family status, criminal record, age, appearance, membership in political, trade union and other organizations, and other real or supposed personal characteristics.

- Any discrimination on the grounds of affiliation to a national minority shall be prohibited.
- Specific regulations and provisional measures, which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions, which particularly affect them.

Article 77 of the Constitution refers to equality in the conduct of public affairs, and to participation in public life. The Constitution establishes that national minorities have, on the same terms as other citizens, the right to participate in public affairs and assume public office. It also states that recruitment in state bodies, public agencies; provincial and local governments must take into account the ethnic composition of the population and have an appropriate representation of national minorities.

Many other provisions of the Constitution of Serbia, directly or indirectly, are also related to the prohibition of discrimination.

Indeed, there are many important articles such as article 48 concerning the promotion and respect of differences or article 49 dealing with the prohibition of fuelling racial, ethnic and religious hatred. Article 49 states that inciting racial, ethnic, religious or other inequality, hatred, and intolerance is prohibited and punishable by law. Furthermore, Article 50 allows that the relevant court may prevent the dissemination of information through mass media in a democratic society only if it is “to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence.”

Article 44 of the Constitution refers to the churches and religious communities. It provides *inter alia* that the Constitutional Court may ban a religious community only if its actions “incite religious, national, or racial intolerance.” Similar restrictions have been established when it comes to freedom of thought, conscience and religion (Article 43) and freedom of association (Article 55).<sup>2</sup> Since there are many articles in the Constitution regarding the prohibition of discrimination, they had to be individually and specifically developed, and Serbia adopted the anti-discrimination Law<sup>3</sup> 2009 in order to implement these constitutional provisions.

### **The 2009 Anti-Discrimination Law**

The Anti-Discrimination Law was passed in 2009. It is a systemic framework law. It defines discriminatory conduct as any explicit or implicit

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2 Dejan Milenkovic, *A guide to the Anti-Discrimination Act*, Helsinki Committee for Human Rights in Serbia, Belgrade 2010.

3 K. Todorovic, I. Stjelja, N. Grujic, *Anti-discrimination mechanisms in practice*, Yucom Belgrade, 2013.

unjustified distinction, unequal treatment or omission (exclusion, restriction, or preference) towards a person or a group of persons and their family members (or persons close to them), on the grounds of race, skin colour, ancestry, nationality, national or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, property, birth, genetic characteristics, health status, disability, marital and family status, criminal record, age, appearance, membership in political, trade union and other organizations, and other real or supposed personal characteristics<sup>4</sup>.

This law also establishes the institutions of the Commissioner for the Protection of Equality.

### **Specific Laws**

In the context of anti-discrimination legislation, many specific laws are related to the prevention of discrimination in certain areas or towards certain vulnerable groups.

Several specific laws contain rules relating to anti-discrimination: the Health Insurance Law (2005), the Law on Higher Education (2005), the Law on Employment and Unemployment Insurance (2009), the Public Information Law (2003), the Law on Broadcasting (2002), the Law on Free Access to Information of Public Importance (2004), the Law on the Prevention of Violence and Misbehaviour at Sports Events (2003), the Law on Protection of Rights and Freedoms of National Minorities (2002), the Law on Churches and Religious Communities (2006), the Law on Prevention of Discrimination against Persons with Disabilities (2006), the Labour Law (2005), the Law on Execution of Criminal Sanctions (2005), the Family Law (2005), the Law on Primary Education (2003), the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (2005), the Law on the Prohibition of Manifestation of Neo-Nazi and Fascist Organizations and Associations and the Ban of the Use of Nazi and Fascist Symbols and Insignia (2009) and the Law on Gender Equality (2009).

## **INSTITUTIONAL FRAMEWORK – POSSIBLE PROTECTIONS AGAINST DISCRIMINATION**

There are several institutions in charge of the fight against discrimination. Indeed, there are many ways to achieve protection against discrimination.

### **The Commissioner for the Protection of Equality**

The Commissioner is an independent institution that was established to effectively fight discrimination. This body acts in accordance with the

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4 Anti-Discrimination Law, ("Sl. glasnik RS", no. 22/2009), article 2.

provisions of the Anti-discrimination Law, by which it is established, and is in charge of the application and the respect of these provisions.

The Commissioner acts based on the complaints received, so that the procedure before the institution starts only after filing a formal complaint. The complaint must contain personal information and a brief description of the situation that led to discrimination. It is necessary to submit all the documents that might be used to prove the claim of discrimination. However, it is often the case that the documents do not exist or are difficult to obtain. In this case, evidence must be collected by other means, for instance by testimony.

If the Commissioner determines that the complaint has sufficient grounds to start the procedure, s/he will deliver it to the alleged discriminator within 15 days from the day the complaint was received. The Commissioner will continue the investigation, and has no more than 90 days from the day the complaint was received to check whether the discriminatory act was committed. If the complaint is well founded, s/he will give his/her opinion and make recommendations to the accused on how to remedy the violation of rights. If the discriminator fails to act upon the recommendations, the Commissioner gives them a formal warning. The discriminator cannot appeal this decision. The Commissioner cannot represent people in court, but s/he may decide to lead the procedure for a determined case (which requires the consent of the victim of discrimination), in his/her own name and in the general interest of the whole society.

### **The Ombudsman**

The actions of public authorities may often constitute discrimination towards a certain category of people. The ombudsman can, as a protector of the rights of “public services,” analyse the hidden systemic discrimination against citizens done by public authorities. It can recommend remedying the lacking or violated rights guaranteed by the regulations of the central government. This independent body may decide to order the removal of violations that have anti-discrimination provisions related to the state authorities and other public offices. In this regard, it is important to cooperate with the Commissioner for the Protection of Equality concerning the division of responsibilities and who is in charge of the case.

Proceedings before the ombudsman are less formal than others. This institution expresses an opinion or recommendation and refers it to the relevant authority that violated rights by causing discrimination. A citizen should contact the Ombudsman if s/he believes that any institution or administrative body violated their rights. However, before s/he should first use all available legal means and opportunities that are available, and file a complaint directly to the state authority that violated his rights. The Ombudsman will make a recommendation about the wrong committed and the available remedies. The deadline for *corrigenda* is 60 days. After

that, the body to which the recommendation is addressed must inform the Ombudsman that it acted upon the recommendation, and if not, why.

### **Criminal Procedure**

A criminal procedure may be initiated in case of discrimination, offenses violating equality or promoting racial and religious hatred, or any other discrimination prohibited by the Criminal Code.

The Criminal Code introduced hate crimes in 2012. Article 54 states that hate crimes should be more severely sanctioned. A hate crime is any criminal offense committed against someone because he is “different”. Hatred as the motive of a crime is the basis for a more severe penalty, which means that the court will consider hatred an aggravating circumstance. According to the Criminal Code, if the offense was “committed with a hostile intention because of race, religion, national or ethnic origin, gender, sexual orientation or gender identity of another person, the court will consider this fact an aggravating circumstance, unless it is already included in the definition of the crime”<sup>5</sup>.

### **Civil Procedure**

Another way is to claim discrimination is to submit a lawsuit to the basic court. This kind of claim is treated by urgent by the court.

This lawsuit allows a victim to request:

- The ban of a procedure that has yet to be undertaken if it is considered that it will lead to discrimination or that discrimination will be continued;
- To remove the consequences resulting from a discriminatory treatment;
- To recover pecuniary or non-pecuniary damages.

### **Tort Claims Procedure**

In addition to the lawsuit, a report of the misdemeanour must be submitted. The outcome of this process is to get cash compensation due to the harm or loss caused. The charges must be submitted in a written form. The 2009 Anti-Discrimination Law states that the Commissioner for the Protection of Equality is responsible for the introduction of misdemeanour charges as a violation of this law.

### **Inspection**

Another way of fighting against discrimination is through inspections. Inspections can be done in workplaces, in schools, in health centres or hospitals, and so on, to determine if discrimination occurs in these places. In such a case, the authorized inspector must bring misdemeanour charges against the discriminator.

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5 Article 54 of the Criminal Code of the Republic of Serbia («Sl. glasnik RS», no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009 and 121/2012)

## TRIALS FOR DISCRIMINATION - THE STATE OF LEGAL PRACTICE

### Statistics and Analysis

The main tool in the fight against discrimination is legal protection - the initiation of litigation because of discriminatory actions / exclusions. In these procedures, general rules of legal proceedings apply, with certain exceptions prescribed by the Anti-Discrimination Law. These exemptions apply primarily to persons, which are authorized to submit lawsuits. The Commissioner for Protection of Equality and organizations dealing with the protection of human rights and the rights of certain groups may also file charges. Specific features of the procedure are reflected in the rules on the burden of proof included in the Code of Civil Procedure. Usually, the burden of proof is on the plaintiff, however, here it is transferred to the defendant, as long as the plaintiff provides reasonable grounds that the defendant discriminated against him/her. The purpose of this provision is to facilitate the position of the person making the claim, who is already in an unfavourable position because they have been discriminated against. Thus, by law, the plaintiff must show that s/he was treated differently in an illegal way, and demonstrate that s/he was treated differently than another person in the same situation. The defendant has an obligation to explain his/her behaviour in light of this, i.e., to provide evidence that this behaviour was applied equally in equivalent situations concerning people with differing personal characteristics.

However, the application of these provisions in practice is controversial. Indeed, the courts have interpreted that this means that the plaintiff must still actively provide evidence before the court, and the fact that that s/he made probable the discriminatory treatment is only a procedural precondition for further litigation. Thus, the standard burden of proof is meaningless, given that the plaintiff is left with a disadvantage, especially when it must be taken into account that discrimination is often indirect, covert, and difficult to prove.

Other general rules of conduct include the rule of objective responsibility,<sup>6</sup> the role of the so-called "Testers" who facilitate the proof of discriminatory behaviour,<sup>7</sup> considered a special instrument to collect evidence. It is important to point out that precautionary measures<sup>8</sup> may be invoked to prevent discriminatory treatment from doing any more harm or causing irreparable damage. The effectiveness of these provisions is

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6 Article 45 paragraph 1 of the Anti-Discrimination Law (If the court determines that the action indisputably performed direct discrimination to the parties, the defendant can not be exempt from liability by proving that it is not his fault).

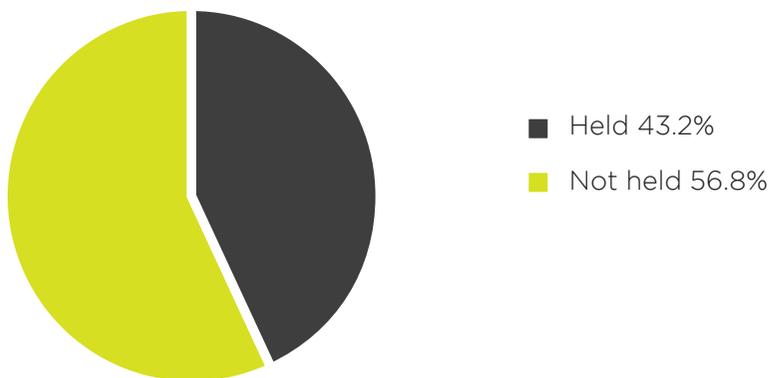
7 Article 46 paragraph 3 of the Anti-Discrimination Law (A person who knowingly expose discriminatory treatment, in order to directly verify the application of rules prohibiting discrimination in this case, may file a complaint under Article 43 items. 1, 2, 3, and item 5 of this Law).

8 Article 44 of the Anti-Discrimination Law

reflected in the fact that the court is obliged to issue a decision proposal for interim measures within three days after receipt. In order to gain preliminary insight into the basic problems of the functioning of mechanisms of legal protection against discrimination in the existing social and legal context, we addressed all the major courts in the territory of the Republic of Serbia a request to access information of public interest. The information request demonstrated how the procedure is initiated from the beginning of its entry into force, the outcome of the proceedings of the initial act, to how the decision ends the proceedings.

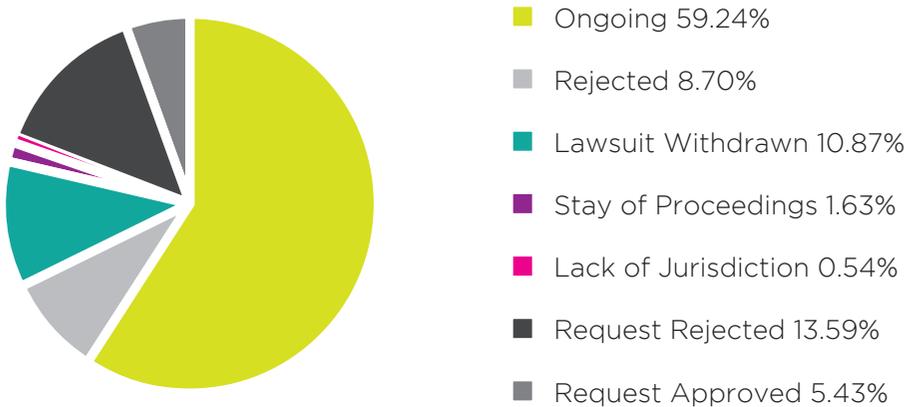
The most typical problems that arise in the application of legal regulations were unveiled by comparing information on the course and outcome of the litigation that were processed by competent courts, and by obtaining information from representatives of non-governmental organizations dealing with the protection of marginalized groups as well as members of minority groups themselves. The data obtained show that the 2009 Anti-Discrimination Law was actually applied/executed only in a very small number of cases. The proceedings were brought before thirteen courts, while in seventeen out of the thirty courts, which answered the request; the proceedings for the protection against discrimination were not conducted. The ratio between the courts that conducted these proceedings and those who did not is 43.2%: 56.8%.

**Percentage of Courts that have held discrimination proceedings under the Anti-discrimination Law and those that Have not**



184 procedures for protection from discrimination were initiated all over Serbia over the last three years. On the other hand, the number of litigations, which are annually brought before first instance courts, is far greater. Based on the annual report of the work of first basic courts, a significant discrepancy is evident between the total number of litigations and the proceedings that were conducted in order to get protection from discrimination. The provisions of the Anti-Discrimination Act related to judicial protection of civil procedure allow urgent proceedings in case of discriminatory treatments. It is necessary to ensure the consistent application of the Anti-Discrimination Law. It could be achieved by introducing additional mechanisms, which could guarantee the respect of its principles, since litigation proceedings can last a really long time. The outcomes of discrimination cases are varied. Discrimination was found in only 10 cases in the courts all over Serbia, whereas a large number of cases were closed on other grounds. Rejection, withdrawal of the complaint, incompetence or suspensions of jurisdiction were found for 21.8% of the initiated disputes.

### **Outcome of Anti-discrimination Proceedings in Basic Courts in Serbia**



Numerous opportunities provided by law are not used in practice. The Act provides that claiming the existence of discrimination aims to ban further discriminatory acts, to prohibit the repetition of discrimination, to make the judgement public, and to take steps to remedy the consequences of discriminatory treatment. In practice, the majority of claims to prove the existence of discrimination and to claim damages are limited.

The possibility to ask for interim measures during the civil proceedings is very rarely used in practice. When it comes to convictions, it's important to mention that mechanisms provided by international conventions that Serbia has ratified are rarely used. Therefore, they are an integral part of the domestic legal system and are directly applicable.<sup>9</sup> In their work, the courts almost never apply the practice of international institutions (especially the European Court of Human Rights). They even rarely apply the Constitution.

## CASE STUDIES

### **“M. A. v. Dario K. “**

Dario K. and M.A. worked together in a private company. Dario K. once took M.A.'s cell phone without his permission. He read his private text messages and found out about his homosexuality. After that, Dario K. began to insult and threaten M.A. over an extended period of time. These insults consisted of statements such as: “Ugh, you faggot! You make me sick!”, “You're disgusting, you should be impaled”, or “All of you should be killed.” He also said to M.A. “it will be the end of you if you go to the court or police”. M.A. stated that Dario K. was physically violent towards him several times and that he had to consult a doctor. M.A. filed a lawsuit and asked the court to determine that Dario K. had acted discriminatorily towards him and to order him to pay for non-pecuniary damages. The Basic Court of Vršac rejected the lawsuit, stating M.A.'s claim was unfounded. However, the Court of Appeal in Novi Sad, acting as the second instance tribunal, found that this decision was not legal. The Court of Appeal of Novi Sad, based on the evidence, found that the defendant had been discriminatory. The decision was made based on articles 12, 13 and 21 of the Anti-Discrimination Law.

The decision of the Court of Appeal of Novi Sad stated, among other things, that there was “no doubt that the words ‘gay’ and ‘faggot’ are expressions which, in our language, have a negative, discrediting, condescending, and offensive meaning labelled to men who has a same-sex sexual orientation.” It referred to the defendant's actions as “distressing and humiliating actions aimed at undermining the dignity based on personal characteristics - in this case same-sex orientation.” Considering the behaviour of the defendant after he learned the sexual orientation

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9 Article 16 paragraph 2 of the Constitution of the Republic of Serbia

of M.A. and the fact that discrimination had become frequent, the Court of Appeal of Novi Sad found that such behaviour is a severe form of discrimination and ordered Dario K. to pay RSD 180,000 of pecuniary damages to M.A. for mental suffering and violations of personal rights, dignity and honour.

### **“Krsmanovača”**

In 2000, Roma inhabitants of Šabac were banned from entering the pool of the Sport Center “Krsmanovača”. To check if the frequent complaints of the local Roma people were true, the Humanitarian Law Centre, in cooperation with Roma NGOs, decided to implement so-called situational testing. On 8 July 2000, six persons, among whom three were Roma, attempted to buy tickets to enter the pool. The security guard who worked at the door refused to sell tickets to the Roma on the grounds that it was “against the Krsmanovača Sport Centre’s rules.” When the guards were asked to clarify, he said that the security guards of the sport centre would throw the Roma out even if he let them in. After that, the Humanitarian Law Centre filed a lawsuit against the owner of the Sports Centre on behalf of the discriminated Roma people. The judgment of the Municipal Court of Šabac found that the employees of the Sports Centre owned by the defendant, indeed prevented the plaintiffs from entering the pool just because they were Roma. The Court concluded that because of the defendant’s conduct, the plaintiffs’ rights were violated. It concluded that they did not get the same rights of the persons who are not members of the Roma community, which caused a sense of suffering and humiliation. The defendant was ordered to end the discrimination in service provisions and to issue a public apology to the plaintiffs. The District Court in Šabac confirmed the judgment of the Municipal Court. The Supreme Court of Serbia confirmed the first final verdict, condemning racial discrimination against Roma concerning access to public places in the Republic of Serbia in September 2004. According to the Supreme Court of Serbia, the lower court correctly concluded that the claim was established on the grounds of a violation of personal rights. In its decision, the Supreme Court of Serbia referred to the provisions of the Constitution (which guarantees the inviolability of the right to personal integrity, reputation, honour and dignity), and the provisions of international agreements and conventions Serbia ratified (International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights). Criminal proceedings were initiated against the guard of the swimming pool of the sport centre. In 2006, the Municipal Court of Šabac sentenced him to a conditional sentence of imprisonment for violating the equality of the citizens (Article 128 of the Criminal Code).

### **“Milanović against Serbia”**

Milanović is from Jagodina and is a member of the religious community Hare Krishna. In 2001, 2005, 2006, and 2007, he reported to the police that he had been threatened and assaulted by unknown persons who are supposed to be members of extreme right-wing organizations. His claims about attacks were backed by medical expertise, which showed the existence of injuries, results of the presumed attacks. He believed that the attacks were religiously motivated. Police did some investigation but the perpetrators of the attack against Milanović were never found. They did not take any concrete measures that could prevent the attacks from stopping, he was only advised not to go out at night because it would “obviously provoke” others. Dissatisfied with the failure of the police to identify the aggressors and due to their improper behaviour (he claimed that the police paid more attention to his “strange appearance” and religion than in looking for the attackers; they also suggested that he caused injury to himself, even though there was no evidence), he decided to submit his case before the European Court of Human Rights. In 2010, the European Court of Human Rights issued a judgment, which stated that Milanović was victim of violations of Article 14 (which prohibits discrimination) in conjunction with Article 3 (which prohibits torture, inhuman or degrading treatment or punishment) of the European Convention of Human Rights and Fundamental Freedoms. The Court first noted that the prohibition of torture in the Article 3 of the European Convention implies an obligation for the State to take reasonable and effective measures to ensure that all persons within its jurisdiction are protected from abuse in case of ill treatment. The state’s obligation to conduct an effective official investigation implies that it must be able to identify and punish those responsible of such abuse.

This investigation must be prompt and must inform the alleged victim, as long as it protects his/her legitimate interests. In this case, the European Court concluded that the investigation conducted by the police was ineffective, i.e. that all feasible and reasonable measures to find and punish the perpetrators of attacks against Milanović were not taken. In other words, the European Court found that the police failed to act diligently enough, since more than a simple formal investigation was required. In addition, it was concluded that the State has not taken appropriate measures to prevent the attacks against Milanović from repeating. The European Court stated that in this case, it led to discrimination. The judgment specifically states that the State’s obligation is to take special care to research signs that might indicate that violence is inspired by religious hatred. The Court adds that the religiously motivated violence cannot be treated as ordinary violence. According to the Court, if the state treats the two situations (a situation where there is religious motivated violence and a situation where there is “ordinary” violence)

equally, it could constitute discrimination. In this particular case, the European Court concluded that the State did not exercise due diligence in the scope of its investigations, even though Milanović's allegations clearly indicated that it might be religiously motivated violence. The Court considered that the suspicious treatment of the police officers towards Milanović was also the result of his religious affiliation.

**“Public discrimination of J. M. “**

On the 3rd of June of 2011, V.K. from Svrlijig, representing a housing facility built to accommodate refugees and displaced persons, stated to an RTS journalist that by the end of August, J.M. and her five children, members of the Roma national minority, should be moving into the facility based on a court judgement. In his statement, broadcast the 6th of June 2011, he used unambiguously offensive words towards this family, which clearly discriminated against the Roma community. By doing so, he violated article 13, paragraph 1 of the Anti-Discrimination Law, which prohibits inciting and encouraging inequality, hatred and intolerance on the basis of national, racial or religious background. V.K. said: “I’m against the Roma moving into the building. They have many children, five children, and the Roma are Roma. You know they should move to the special isolated part of town where their peers live, and stuff like that...” His statement clearly showed open hostility towards members of Roma minority. It was discriminatory behaviour based on race, nationality, and religion. The statement was given in relation to a judgement whereby the judge ordered J.M. and her five children to move into a residential property. The Centre for Social Work had assigned the property to them several years ago but another family illegally occupied it. The case ended up before the court, after the submission of the lawsuit by the Network of Committees for Human Rights in Serbia - CHRIS and CPE legal action in order to condemn this discriminatory treatment. The Commissioner for Equality filed a lawsuit on the 14<sup>th</sup> of June before the Basic Court of Niš, to establish discriminatory behaviour of the defendant V.K. from Svrlijig, in his statement to the media. On the 24<sup>th</sup> of June, a hearing was held for the trial in which the defendant V.K. said that the allegations in the complaint were true, but that he did not mean what he said to the journalist. He explained that there was a third party living in the apartment, and that his wife had signed a petition against their moving out. It also stated that on that day, he had consumed nitro-glycerine medication, just after which the journalist appeared, and he made the controversial statement. However, he did not want to discriminate against the Roma or any other nationalities. He said he would like to apologize and added that when he received the complaint, he felt very bad and experienced remorse for all of it.

Afterwards, the defendant stated that he intended to personally apologize to J.M. and the Roma minority in general. On the 5<sup>th</sup> of July 2011, he handed a written copy of his apologies to the court. He publicly apologized in the newspaper “Blic”. The Basic Court of Niš held the main hearing in July 2011. It issued a judgment, which approved the claim of CPE against the defendant V.K. It was established that V.K.’s statement was a severe form of direct discrimination against the Roma minority that is prohibited by the Article 13, paragraph 1, item 1 of the Anti-Discrimination Law (prohibiting inequality, hatred and intolerance on the basis of ethnicity). The Court judgment forbade the respondent to give another similar statement, which would repeat the discrimination against the Roma national minority. He also had to make a public apology at his own expense in a newspaper within 15 days from the date of the final judgment. V.K. followed the court’s orders.

### **“Discrimination due to unconventional communication”**

In August 2012 in a restaurant in Niš, a case of disability-based discrimination occurred. A group of children with disabilities (individuals with hearing impairment who use sign language) went to the restaurant “P.” in the park of Saint Sava in Niš. When they entered the place, according to their estimation, there were five people inside and four in the garden.

They sat at a table in the café in order to enjoy some pancakes. After a while, they wanted to order. Realizing that the children used sign language in order to communicate, the waitress approached them and said that they were sitting at a reserved table. No “Reserved” sign was seen on the table, as tends to be the case. M.M., the only one of the aforementioned children endowed with speech, pointed this out. M.M. suggested then that they move to another table. However, the waitress told her that all the tables were reserved. They went to the garden and another waitress told them that all the tables were also reserved there. She gestured them to leave the restaurant and to go to another place. As a result, the children felt humiliated and left. Based on these allegations and facts, the Network Committee for Human Rights of Serbia – CHRIS, which has an office in Niš, alerted the CPE of this case of discrimination on the basis of disability. The CPE, before these allegations, decided to fill a lawsuit for discrimination based on disability relying on Article 13 of the Law on the Prevention of Discrimination against Persons with Disabilities (more precisely the provisions concerning services and use of facilities and areas) and Article 17 of the Anti-Discrimination Law.

In September 2012, the Commissioner for Protection of Equality submitted a lawsuit before the First Basic Court of Belgrade to prove the discriminatory behaviour of A.M, the owner of the restaurant. The complaint and the notification about the consequences of the failure to reply to the charges were delivered to the defendant. He was warned on the

8<sup>th</sup> of December of 2012 that the court would issue a default judgement if he did not file a statement of defence within the statutory time. As the owner failed to answer the court, the court issued a default judgment in January 2013. The verdict stated that the defendant A.M., owner of a restaurant in Niš, refused to provide services to people with disabilities, M.M., R.M., T.N., and the minor E.R. By doing so, he performed indirect discrimination against persons with disabilities in the provision of public services. According to the judgement, the defendant was prohibited to treat persons with disabilities in this way again. Furthermore, the judgment ordered the defendant to publish the results of the sentence in a national newspaper at his own expense within 15 days after the receipt of the written judgment. As the defendant has not received a written copy of the judgment, the proceedings are still pending.



# THE STATE OF LGBT RIGHTS IN SERBIA

## LEGAL FRAMEWORK<sup>10</sup>

In Serbia, we can no longer speak of the existence of institutional discrimination. Discrimination is rather now on individual cases. There is a need to raise awareness and knowledge on this field. Indeed, employees in public institutions must be sensitized to the rights and issues affecting LGBT people.

In Serbia, homosexuality was decriminalized in 1994. The legal basis to investigate cases of violence and discrimination based on sexual orientation and gender identity are the following:

- The Constitution of the Republic of Serbia<sup>11</sup>
- The Criminal Code of the Republic of Serbia<sup>12</sup>
- The Anti-Discrimination Law<sup>13</sup>

Further laws contain general anti-discrimination provision. In Serbia, there are eight laws that contain anti-discrimination provisions that specifically include sexual orientation and / or gender identity:

- The Labour Law<sup>14</sup>
- The Law on Higher Education<sup>15</sup>
- The Broadcasting Law<sup>16</sup>
- The Public Information Law<sup>17</sup>
- The Juvenile Law<sup>18</sup>
- The Health Insurance Law<sup>19</sup>
- The Social Security Law<sup>20</sup>
- The Pupils and Students Standards Law<sup>21</sup>

It is also important to mention the existing Public Assembly Law, which is problematic today for several reasons, the most important being its non-compliance with the Constitution. However, the Ministry of the Interior, as an authorized petitioner, has not yet proposed a new law on

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10 GSA annual report on the human rights of LGBT people in Serbia in 2011 and 2012.

11 Constitution of the Republic of Serbia ("Official. Gazette of RS", no. 98/2006)

12 Criminal Code ("Off. Gazette of RS", no. 85/2005, corrected by 88/2005, 107/2005, 72/2009, 111/2009 and 121/2012)

13 Anti-Discrimination Law ("Off. Gazette of RS", no. 22/2009)

14 The Labour Law ("Off. Gazette of RS", no. 24/2005, 61/2005, 54/2009 and 32/2013)

15 The Law on Higher Education ("Off. Gazette of RS", no. 76/2005, 100/2007, 97/2008 44/2010 and 93/2012)

16 The Broadcasting Law("Off. Gazette of RS", no. 85/06, 62/06, 85/06)

17 The Law on Public Information ("Off. Gazette of RS", no. 43/2003, 61/2005, 71/2009 89/2010 - decision and 41/2011 - Decision of the Constitutional Court)

18 The Juvenile Law ("Off. Gazette of RS", no. 50/2011)

19 The Health Insurance Act ("Off. Gazette of RS", no. 107/2005, 109/2005 - correction, 57/2011, 110/2012 - Decision of the Constitutional Court and 119/2012)

20 The Law on Social Security («Off. Gazette of RS», no. 24/2011)

21 The Pupils and Student Standards Law («Off. Gazette of RS», no. 18/2010)

freedom of assembly, despite the very specific recommendations of the Venice Commission and the Working Group for the promotion of freedom of assembly.

Serbia has an adequate legal framework to fight violence and discrimination but there is still a problem of implementation. At the end of 2012 this legal framework was completed with the introduction of the notion of “hate crimes” in the Criminal Code of the Republic of Serbia. This is one of the most important legislative steps, which was taken last year concerning LGBT population. On the initiative of the Gay Straight Alliance (GSA) and the Lawyers Committee for Human Rights (YUCOM), and the proposal of the Ministry of Justice and Public Administration, article 54a of the RS Criminal Code was introduced. Now, acts committed out of hatred are considered as a mandatory aggravating circumstance during trials.

Still, the biggest problem to tackle in order to improve the situation of LGBT people is the lack of national statistics on cases of violence based on sexual orientation and gender identity. The databases of all the cases of relevant institutions are listed according to the type of crime, but not the motive, though it is expected that the introduction of “hate crimes” in the Criminal Code will enhance the creation and monitoring of statistics related to these cases.

In Serbia, there is still no legislation that in any way regulates same-sex partnership and property rights and other relations within those relationships. However, in 2012, the organization Labris, along with other members of the Coalition Against Discrimination presented a draft proposing same-sex registered partnership,<sup>22</sup> and a draft of the recognition of the legal consequences of sex change and confirmation of transsexuality. Lobbying for their adoptions is in progress.

## HUMAN RIGHTS OF LGBT PEOPLE IN SERBIA

The safety and security of LGBT people and the problem of violence against them is still a topical issue. The main finding of the cases reported to the GSA in recent years is that there is still a significant number of cases involving physical violence or attempted attack based on actual or perceived sexual orientation and gender identity. Assaults and attempted assaults represent about 70% of the reported cases in 2012, while the rest included other threats, hate speech, and discrimination. Cases of violence and discrimination based on sexual orientation and gender identity happen throughout the year, but their frequency is concentrated in the period around the Pride Parade.

There is a trend observed since 2011 and continuing in 2012, which shows that cases are more and more reported to the police on the own initiative of the victims. More than 70% of the total number of assaults

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22 <http://www.mc.rs/predstavljanje-tri-modela-zakona-u-oblasti-borbe-protiv-diskriminacije.4.html?eventId=8494>

and attempted assaults that the GSA got knowledge of were reported to the police and / or processed before the competent authorities. This information because in the previous years LGBT people did not trust the police and the courts, and the willingness to report and prosecute these cases to the authorities was very low. Although for two years in a row the GSA has noted a positive trend showing that victims are more willing to report to the police and go through the institutions of justice, it is important to specify that there are still numerous cases that remain unreported. This is a grey area, and it is essential that the authorities, especially the police, systematically start to work to increase the number of reported cases of violence and discrimination against LGBT people in the future.

The GSA's Legal Service has been operational since 2009. Their work on victim advocacy before the courts in Serbia and the prosecution of cases of violence and discrimination significantly contributed to the creation of case law when it comes to cases of discrimination on the basis of sexual orientation and gender identity. At this point the Legal Service of GSA is involved in 32 court cases. In 2012, they closed several court cases—that is to say, they obtained a final conviction. The Belgrade Court of Appeal sentenced a final judgment against the newspaper "Press" Ltd. for hate speech against LGBT people, and by doing so, confirmed the ruling of Belgrade First Basic Court. The judgment of Belgrade First Basic Court in July 2012, which was dealing with severe discrimination against LGBT people committed by Nebojša Bakarec, a city councillor and official of the Democratic Party of Serbia (DSS), has become final after the convicted Bakarec did not appeal in October 2012.

On the other hand, in September 2012, the Belgrade Court of Appeal revoked the first instance verdict for severe discrimination against LGBT people of Dragan Marković "Palma", President of the United Serbia party (US) and Member of Parliament, because of procedural errors and remanded the case for a new trial.

One of the most important final judgments the GSA Legal Service delivered was at the end of 2012. It refers to the sentence of Novi Sad Court of Appeal, which raised the case against the discriminatory behaviour and severe discrimination against M.A. (25) from Vršac by his colleague Dario K. (26) from Vlačkovac. Discrimination occurred for several consecutive months in a private company in Vršac, where both were employed. This is the first final judgment in Serbia based on the Anti-Discrimination Law and dealing with discrimination at work because of a different sexual orientation. The GSA Legal Service represented the victim M.A. during the trial against Dario K., which began in April 2011. In the final judgment of the Court of Appeal, Dario K. was ordered to pay damages to M.A. of 180,000 RSD for mental suffering due to a violation of personal rights, dignity and honour. He also had to reimburse Legal Department of the GSA their court

expenses to the amount of 99,000 RSD. For further information about this case, please refer to the previous section.

In 2011 and 2012, the judicial system showed more dynamic work than ever before, both in individual cases of violence and discrimination, and in cases related to right-wing extremist organizations and their members.

In 2011, the Constitutional Court of Serbia accepted the constitutional appeal of the organizers of 2009 Pride. In 2012, it declared the decision of the Ministry of the Interior unconstitutional to move the gathering to another location, thus confirming a violation of the right to freedom of assembly. In 2012, it allowed the appeal of a person, following a sex change, was denied the right to change their name in the register book. It ordered the change to occur within 30 days. In June 2012, the Constitutional Court banned the far-right fringe organization "Obraz". The Public Prosecutor started the procedure in October 2009. Proceedings were also conducted before the courts against Obraz's members because of discrimination and violent attacks during the Pride Parade 2009 and 2010, of which they were convicted by the first instance judgment. However, the Belgrade Court of Appeal remanded the case. The Constitutional Court of Serbia rejected the request to ban right-wing extremist organisations "Naši" and "1389."

The Parade was held in 2010 but was banned in the next two following years (in 2011 and 2012). Concerning the right to freedom of the LGBT population we cannot say that it is completely denied but rather is selectively implemented. The police protects LGBT gathering places such as clubs and bars, and events organized by LGBT organizations. In June 2012, several organizations working on LGBT Human Rights (Queer Life Centre, Pride, Labris, and Women in Black) organized a walk in downtown Belgrade on the 27<sup>th</sup> of June for Pride Day. Furthermore, the project "Together for LGBT Equality," which was conducted by the GSA, in cooperation with four other organizations in Belgrade, Novi Sad and Niš, organized successful actions in town squares. Nevertheless, this event was banned in Kragujevac by the city authorities due to security reasons. Pride Week, as a programme accompanying the Pride Parade, has been held since 2010. In 2012, there were a significant number of police forces (about 2,000 police officers) present in order to protect the exhibition "Ecce Homo," which was part of Pride Week in 2012.

Important positive steps regarding healthcare and the status of transgender persons were achieved by adopting amendments on the Law on Health Insurance, which enables sex changes at the expense of the Republic Fund for Health Insurance. The bill has caused a public debate and some negative comments, but the Ministry of Health, which initiated the law did not withdraw the proposed changes.

While there have been some improvements in the work of the institutions and political actors, homophobia and transphobia remains an evi-

dent problem in contemporary Serbian society. The LGBT community is still one of the most vulnerable minority groups, according to the survey office of the Commissioner for Equality, citing the great social distance from the group and that fact that its members are subject to discrimination at various levels and in various fields. Hate speeches against LGBT people, are still noticeable in social networks, on the Internet, and in public spaces and are also present during the proceedings of the Parade and other activities of LGBT organizations.

The most significant shift in improving the situation of LGBT people is the creation of policies for specific sectors of marginalized groups. This was made on behalf of the Office for Human and Minority Rights of the Republic of Serbia in 2012. They elaborated a draft called the “National Strategy for Combating Discrimination”. It includes nine of the most vulnerable social groups, including LGBT people. Many of the existing LGBT organizations participated in the development of the Strategy related to LGBT people. Furthermore, the Office, in cooperation with the Council of Europe, made the first conference-seminar organized by the State related to the topic and participated in several seminars in various other countries. This is part of a project, which aims at improving the situation of LGBT people and implementing recommendations of the Council of Ministers, which involved six countries, including Serbia. The Office and the Directorate for Human and Minority Rights from the previous government also supported LGBT rights and LGBT organizations publicly through lessons and affirmative statements and the allocation of funds for thematic projects.

The education system has not yet shown readiness to deal with systematic peer violence and discrimination based on sexual orientation in educational institutions. Textbooks remain full of homophobic content, which was the subject of the Working Group established by the Commissioner for the Protection of Equality. In 2011, the CPE presented a set of recommendations to the Ministry of Education and Science of the Republic of Serbia, the National Council of Education, and the Department for the Improvement of the Quality of Education, asking them to remove any discriminatory content in the learning materials and the teaching practice. She recommended promoting tolerance, respect for diversity, and human rights. The research project of YUCOM, “Attitudes of high school students of minority groups, violence and discrimination,”<sup>23</sup> also demonstrates the need for intervention in the education system in order to educate and increase tolerance towards LGBT people, given that the results of this survey were very alarming.

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23 [http://yucom.org.rs/upload/vestgalerija\\_100\\_4/1343298122\\_GS0\\_Diskriminacija\\_u\\_srednjim\\_%C5%A1kolama\\_prezentacija.pdf](http://yucom.org.rs/upload/vestgalerija_100_4/1343298122_GS0_Diskriminacija_u_srednjim_%C5%A1kolama_prezentacija.pdf)

**PARTICIPATION  
OF WOMEN IN  
POLITICAL LIFE  
/ WOMEN AS  
DECISION-MAKERS**

## LEGAL FRAMEWORK

Gender equality is a fundamental human right and is one of the fundamental values of a democratic society. The Republic of Serbia has ratified the international instruments, which guarantee gender equality and are directly applicable. These are primarily the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as a number of protocols that follow.<sup>24</sup> The Constitution of the Republic of Serbia, in article 15, guarantees gender equality (equality between women and men), and proclaims an equal opportunity policy. Ensuring equality between women and men is a fundamental assumption and condition for exercising all other rights and freedoms. The Constitution also prohibits discrimination on the grounds of sex, and confirms reproductive freedom and rights of all citizens. Constitutional provisions further elaborated on the Gender Equality Law, and other laws and by-laws.

The Gender Equality Law was adopted in 2009. It is the first law regulating gender equality in Serbia. It monitors the creation of equal opportunities to exercise rights and obligations, taking specific measures to prevent and eliminate discrimination based on sex and gender, and offers legal protection for persons exposed to discrimination.<sup>25</sup> However, the law does not cover all of the areas related to gender equality, only the most important, while others are regulated by other laws, such as the Labour Law,<sup>26</sup> the Family Law, the Health Care Law,<sup>27</sup> the Law on Primary Education,<sup>28</sup> and so on. This law, aside from the provisions relating to the general prohibition of discrimination in the areas that it regulates, contains other provisions relating to the specificities of these areas on gender equality. By-laws of the autonomous provinces, cities, and municipalities of Serbia additionally protect gender equality.<sup>29</sup>

The Gender Equality Law defines equal opportunities as equal gender participation in all phases of planning, decision-making and implementation of decisions that have an impact on women and men. The policy of equal opportunities is an important principle of the Convention on

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24 Article 14 of the Law on Ratification of the International Covenant on Civil and Political Rights («Off. Gazette of SFRY», no. 7/71); Article 14 of the Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms («Off. Gazette» - International Treaties, no. 9/2003, 5/2005, 7/2005).

25 Law on Gender Equality («Off. Gazette of RS», no. 104/2009)

26 Article 18 of the Labour Law («Off. Gazette of RS», no. 24/2005, 61/2005 and 54/2009)

27 Article 20 of the Health Care Law («Off. Gazette of RS», no. 107/2005, 72/2009 - Dr. law 88/2010, 99/2010, 57/2011 and 119/2012)

28 Article 44 of the Law on Primary Education («Off. Gazette of RS», no. 72/2009 and 52/2011)

29 Marianne Pajvančić, Nevena Petrušić, Senad Jasarevic, Commentary on Law on Gender Equality, Centre of Modern Skills, 8 april 2013 [http://www.ombudsman.rod-naravnopravnost.rs/attachments/032\\_Komentar 20zakona% 20o%%% 20ravnopravnosti20polova.pdf](http://www.ombudsman.rod-naravnopravnost.rs/attachments/032_Komentar%20zakona%20o%20ravnopravnosti20polova.pdf)

the Elimination of All Forms of Discrimination against Women, and also represents a constitutional principle that modern constitutions define as constitutional right and duty of the state. It is also important to mention the constitutional provisions whose purpose it is to eliminate or change circumstances that impede the achievement of full equality of persons or groups of persons who are in a disadvantaged position compared to other citizens. In this case, the state takes special measures. Special measures, such as affirmative action, are the instrument by which the government realizes an equal opportunity policy, thus responding to and alleviating de facto inequality. According to the explicit constitutional provision, the special measures to be taken to eliminate actual inequality are not considered discrimination. They place a disadvantaged person or a group of persons in a more favourable position, which is why it is necessary to make the provision of the non-discriminatory nature of special measures, as they would otherwise be perceived to be unconstitutional.<sup>30</sup>

The law is thematically divided into several parts, which are prescribed by the rules and measures to protect gender equality. These areas are: employment, social protection and health care, family relations, education, culture and sports, political and public life.

When it comes to political and public life, the law guarantees equal representation and equal access to the executive and legislative authorities (President of the Republic, MPs, MPs of local assemblies), to public, financial and other kind of institutions. Moreover, bodies of local self-government, within its jurisdiction, shall ensure gender equality and equal opportunities. When it comes to international cooperation, the Law provides that upon election or appointment of a delegation representing the Republic of Serbia, the composition of the delegation must necessarily include at least 30% of the under-represented sex, in accordance with international standards.<sup>31</sup>

## SITUATION IN PRACTICE

Women are underrepresented in public and political life, which is especially true for women from vulnerable social groups. In this regard, it is essential that women are aware of their rights and the remedies available to them if they are denied these guaranteed rights. In addition, it is important to provide opportunities for post-education training, which would increase employment opportunities and thus their independence. This would have many positive legal solutions instead of ordinary decla-

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30 S. Lilić and I. Stjelja, Gender equality as international and local obligations, presented at the Conference "Action plans for the local bodies for gender equality: Equality begins at the local level", Belgrade, 2010.

31 Art. 37, 38 and 39 of the Law on Gender Equality («Off. Gazette of RS», no. 104/2009)



ratory norms. It could become a mechanism to strengthen the position of women and their active participation in decision-making processes.

Although the Labour Law regulates the status and rights of women, cases of discrimination against women still exist in this area. In fact, the data show that the difference between employment rates of men and women is decreasing. Fewer women than men are employed (42.7% against 57.4%), and women tend to wait longer for their first job, and have higher unemployment rate (19.1% against 16.1%).

Significantly a higher percentage of men are self-employed, while women make up the majority of the group taking care of the family members. At least twice as many men as women are employers. In addition to the financial sector, women are over-represented in low-paid industries. Women are more likely to face discrimination in employment, particularly for disadvantaged mothers with children and women over the age of 40. 52.1% of women and 47.9% of men are below the poverty line.

Although the Law on Amendments to the Law on the Election of Deputies states that for every three candidates, there must be at least one female member, the law does not prescribe a duty to, in the event of the termination of the mandate, replace the delegate with a person from the underrepresented sex. From 2008 to 2012, among the members of



parliament, women represented 20.4% of the deputies, and 27% of the local councillors.

The actual situation shows that in other areas of political life, especially in the area of the executive power, there is a need at all levels for affirmative action in order to achieve full equality and full participation of women. Data show that from 2008 to 2011, there were only five female ministers out of the 24 ministries in the government. From 2008 to 2012, out of 159 mayors, only 7 were women. In the field of diplomacy, the Republic of Serbia has 10 female ambassadors and 4 general consuls (9.24%).

Data shows that women make up the majority of the population with lower levels of education: 0.6% of men and 1% of women have no education, 3.5% of men and 5.6% of women have incomplete elementary education, 21.9% of men and 25.9% of women have only elementary education, and 60.9% of men and 51.6% of women finish high school. At the same time, women make up the majority of the population with higher education (10.3% against 8.3%).<sup>32</sup>

There is still much discrimination against women in the media, both in terms of their position in the media industry and in the image of women in media content. Media content still relies on stereotypes and follows typical patriarchal patterns where women's role in society is seen as belonging in the family. The following charts provide an overview of the



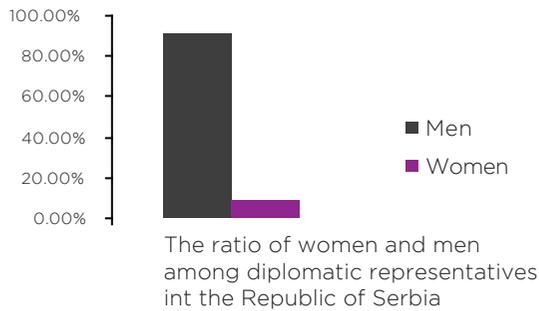
The ratio of women and men among deputies of the National Assembly in the Republic of Serbia

ratio of male and female involvement in political and public life:

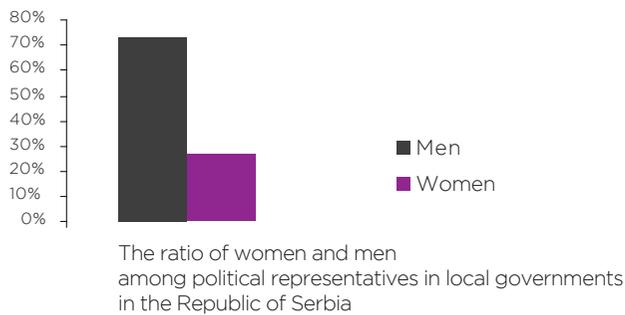
1.) In National Assembly

32 Draft of the Anti Discrimination Law of the Government of Serbia, Office for Human and Minority Rights, 2013

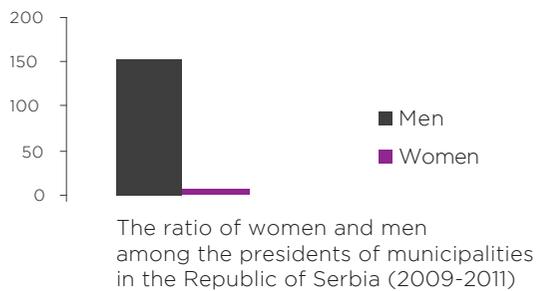
## 2.) Diplomatic representatives



## 3.) Political representatives in local governments



## 4.) Presidents of municipalities



## The use of gender-sensitive language

Discrimination in general, or towards women, does not necessarily have to result from a violation of the human rights of the person discriminated against. It can be expressed through active or passive behaviour, as well as through speech (using gender-insensitive language, politically incorrect terms, “black” humour, denigrating women, using stereotypes, and the like).

The media has an important role in the introduction of gender-sensitive language in everyday speech through using politically correct expressions when speaking of women. Research found that the media pay little attention to the issue of the multiple discrimination faced by women, that gender-sensitive language is not used sufficiently, and that all in all politically incorrect reports of women are still present in the media.

It is necessary:

- To educate journalists about gender equality in order to properly do gender sensitive reporting;
- To improve the education of students of journalism on this topic;
- To improve the permanent training of representatives of political parties as well as public authorities to use gender-sensitive language in the media.

In almost every country there is a statistical department or institute that collects data on thousands of issues, including basic information about the census, economy, education, health, lists of social welfare recipients, etc. Ideally, information should be available in a form, which allows making a comparison between men and women when it comes to literacy, education, employment, and income. It is necessary that the data be statistically displayed from a gender aspect.<sup>33</sup>

It can be said that Serbia has a variety of institutional mechanisms for the promotion and protection of gender equality: the constitutional provisions, the Gender Equality Law and the laws that govern other areas (e.g. family relationships, work, education, etc.), the Gender Equality Directorate, and local bodies established in the municipalities. The progress in this area, particularly in the institutionalization of political strategies and the new legislative framework, is very important. However, in practice, men and women often do not have the same rights. Social, political, economic and cultural inequalities are still present. Equal rights does not always mean equal status, so it is necessary to continuously improve the effectiveness of the legal and other mechanisms of protection against discrimination, so that gender equality becomes a true social value and a personal belief in Serbia.<sup>34</sup>

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33 YUCOM, *Strengthening the role of women in political and public life*, Belgrade, 2012.

34 S. Lilić and I. Stjelja, *gender equality as international and local obligations*, presented at the Conference “Action plans for the local bodies for gender equality: Equality begins at the local level”, Belgrade, 2010.



# THE LEGAL NATURE OF TRIAL MONITORING

Guaranteeing the transparency of a trial is a component of one of the basic human rights: the right to a fair trial. The public judicial authorities must be tested to see if they respect this principle. This work is usually led by civil society organizations.

“... It is necessary that the judicial authorities enforce the respect of human rights and prescribe legal procedures during all the stages of the trial: to respect the presumption of innocence, the right to proper legal defence, the right to privacy (after the proportionality test) and allow the use the transparency of the trial, providing an impartial trial. Only a very high level of expertise and professionalism will provide the right to a fair trial to all participants, particularly when it has to be processed in a reasonable time.”<sup>35</sup>

The authority of the judiciary depends on whether its work is beneficial according to the public. Monitoring raises the importance of including the public in work of the justice administration at a higher level, given that these cases are often a particular type of power abuse and are mixed with public and private interests. The individuals exceed their authority and thus can obstruct the bases of the stable democratic institutions in the country for their own financial gain.

The right to observe trials is the primary expression of the general right to promote and ensure the protection and realization of human rights and fundamental freedoms, as guaranteed by the Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders).<sup>36</sup> Within this general law protecting human rights, the UN General Assembly has expressly recognized the right to a bystander to attend the public hearing at the trial, as well as other stages of the procedure. By doing so, they can form an opinion about the judicial institutions’ compliance with national legislation and applicable international obligations regarding the guarantees that the State provides concerning the realization of human rights.<sup>37</sup>

Public participation is part of the right to a fair trial, according to all major international acts that regulate this area. The Universal Declaration of Human Rights, in Article 10, outlines an individual’s right to a fair trial as “the right to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

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35 Vida Petrovic Škero, *The victim is a priority, Justice in Transition*, no. 1, Centre for Transitional Justice and Office of the War Crimes Prosecutor, 2005, p. 1.

36 Adopted by the General Assembly in the Resolution 53/144 of the 9<sup>th</sup> of December in 1998.

37 Article 9 (3) (b) of the UN Declaration Human Rights Defenders.

The European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 6 emphasizes the importance of public hearings by stating that everyone “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The European Convention, besides public hearings, emphasizes the importance of the public announcement of the judgment, and careful determination of under which circumstances the public may be excluded from the proceedings, which does not affect the obligation to publish the judgment. The Constitution of the Republic of Serbia, in article 32, defines the right to a fair trial in the following way: “everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them. The press and public may be excluded from all or part of the court procedure only in the interest of protecting national security, public order and morals in a democratic society, interests of juveniles or the protection of private life of the parties, in accordance with the law.”

The Civil Procedure Code (CPC) follows the above provision of the Constitution, stating that the exclusion of the public does not apply to parties and their attorneys. For researchers who observe trials, there are special provisions in Article 323 of the CPC.<sup>38</sup> The bench of judges may allow legally authorized individual officials and scholars to attend, during main hearings that exclude the public, if their service or professional activity is of any interest. The bench of judges’ decision to exclude the public must be motivated and made public (Article 324). Furthermore, it adds that the trial can be fair only if it is public. However, declarative publicity would not have much significance if impartial and independent individuals and organizations didn’t follow such procedures, in order to monitor the respect of constitutional and international standards in all the stages of the proceedings. Their presence must be known, so that the court and the parties know that their work is somehow regulated.

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38 The same provision is contained in the new Criminal Procedure Code (articles 364 and 365), which, according to the latest amendments of the 24th of December 2012, will be applicable to all courts in Serbia as of the 1<sup>st</sup> of October 2013, except in case of criminal offenses for which a special law appoints a special jurisdiction of the public prosecutor’s office to act (in this case, it’s applicable as of the 15<sup>th</sup> of January 2012.

## THE IMPORTANCE OF MONITORING DISCRIMINATION TRIALS

Trial monitoring is a specific form of control over the behaviour of the judiciary. It aims to inform the general public that these procedures respect national and international regulations, with a special focus on regulations that are directly related to human rights.

The affected party often regards these observers as supporters of their human rights and procedural rights. This is particularly true for the right to a fair trial, especially if an observer comes from the organization for the protection of human rights. Some judges consider certain types of public presence as “backup protection” for these kinds of cases. When representatives of competent organizations do the observing, they promote the ideal of trial monitoring, which benefits their advocacy for the respect of human rights in criminal and other legal proceedings.

In order to efficiently monitor the flow of cases, trial observations and evaluations of the work of actors in the procedures determining the existence of discrimination, we methodologically set up a series of necessary steps that are made to benefit researchers, NGO representatives, journalists, and students.

The latest reform of the judiciary has left a major impact on the principle of legal certainty, on the functioning, independence and autonomy of the legal system, and on the work of the judiciary. It is necessary for authorities that are responsible for evaluating the performance of judges and prosecutors to achieve complete independence, professionalism, and expertise.

During the implementation of monitoring activities, the goal is to enable transparency and the publicity of the procedures, and to define the main defects in the systematic process. The public and civil society understand that the work of the judiciary, as well as the implementation of new laws, may have some gaps caused by the complexity of the matter and social conditions. The aim is to provide a full public hearing and to inform and sensitize society on issues of discrimination. The effects of the

Anti-Discrimination Law do not only depend on its quality and use but also on the level of public awareness.

It must be kept in mind that discriminated people often fear beginning legal proceedings because they tend to be members of vulnerable groups. They also tend to be afraid that the discriminatory treatment will go on. The task of the whole of society, especially the judiciary, is to take a clear position on the issue of discrimination, to demonstrate its intention to protect vulnerable people, and to enable consistent application of the law.

The media and public monitoring can contribute to the application of legal norms and accepted standards of human rights. In order to recognize the work and the capacity of the court, the public and civil organizations must be able to have access and to implement monitoring throughout the proceedings.

It is assumed that the goal of the court is to decide on the claim in a lawful manner and that the effectiveness of these procedures will achieve public support. In this context, monitoring trials is in the interest of the court.

## GUIDELINES FOR MONITORING DISCRIMINATION

### **1 Defining the objectives of monitoring trials**

The main goals of trial monitoring include:

- Identifying systemic deficiencies of the judiciary, in order to make recommendations for achieving more effective actions in these cases,
- Ensuring the presence of impartial experts in these matters,
- Objective and impartial public reporting of the proceedings.

In this way, citizens would be more interested in these procedures and would be aware of their progress and importance.

The ultimate goal would be to make the procedures faster, more efficient and more equitable. This could be achieved through proposals of amendments of legal norms that regulate it.

The goals of human right organizations involved in anti-discrimination activities are to affirm the importance of the realization of the right to a fair trial, ensure the compliance with fundamental human rights during the proceedings before public authorities and spread public awareness of the necessity of a common fight against discrimination.

The aim of monitoring discrimination cases can be of a different kind, for example determining through cases who is at greatest risk of suffering discrimination, or who in society tends to discriminate. Using this information, the work on preventing discrimination could be better organized and the funds given to NGOs could be put to better use.

### **2 Selecting the monitors (observers)**

It is essential that the panel that observes the trial and conducts the research includes persons who understand well basic human rights standards and basic concepts in the area of discrimination, but also the relevant material and procedural law.

Human rights organizations have the task in a variety of ways to inform and educate other interested observers about the legal standards and procedures, in order to enable them to express legitimate opinions and conclusions concerning the procedures that are being monitored.

The success of monitoring depends on whether the person in charge of it is able to follow the whole process. It is necessary for the whole process of the court's evaluations and decisions to be documented, as this is the only way to contribute to the assessment of justice and the credibility of the monitoring analysis.

### **3 Identification and selection of cases**

To keep track of litigation, from the filing of lawsuits until the execution of the judgment, it is necessary, firstly, to collect information on submitted complaints and opened cases. Unlike many crimes that are usually reported by the media, it isn't easy to get information about the civil proceedings of the Anti-Discrimination Law. This is the first prerequisite for the successful implementation of monitoring. The selection procedures must take into account the resources of the civil society. The basic method, which can be used to identify cases, is to send requests to access to public information. Article 5 of the Law on the Free Access to Information of Public Importance states that any person has the right to be informed whether the public authority has certain information of public interest available or not. Article 46 of the Anti-Discrimination Law establishes that human rights organizations may file a complaint for cases specified in Article 43 (paragraph 1, 2, 3 and 5). No obstacles must be found when obtaining information about initiated procedures. The representatives of the court (the president of the court or the department, and/or the spokesperson of the court) and the lawyers involved can meet in order to accelerate the process of identifying cases. It is advisable to contact the office of the Commissioner for Protection of Equality about the current cases of discrimination s/he or its administration are conducting. The Commissioner's ability to inform the public about the most common, typical and severe cases of discrimination should enable the identification procedures. A method of information exchange between the Commissioner and civil society should also be developed. The type of discrimination being tired, the length of the hearing, and other information that the public has the right to know should be easily accessible. There are two ways of contacting the prosecutor: either through the Commissioner or through providers of free legal aid. However, direct contact with the prosecutor is not necessary in order to monitor.

At the same time, according to the article 36 of the ADL, the Commissioner can be involved in the complaint only if the court proceedings have not begun or when there is no valid judgement. This is why the coordination with the Commissioner is important.

Moreover, the institution of the Ombudsman of the Republic of Serbia can be a source of information. In order to exchange information, cooperation must be clearly achieved as well as contacts with other human right organizations that deal with discrimination issues. The work of CSOs can make direct cooperation with the discriminated persons possible. Many applicants are more likely to continue contacting non-governmental organizations and other providers of free legal aid with experience in the representation in discrimination cases. The most common way to support these requests is to monitor the proceedings.

#### **4 The analysis of cases**

Before starting monitoring procedures, observers have to:

- Collect basic information about the parties and the proceedings (the status of the parties, the facts, the media coverage of the case, the events leading up to the trial),
- Obtain the claim and the response to the complaint,
- Study the law and the procedure related to the case (the Constitution of the Republic of Serbia, the procedural norms, the relevant international law, etc.).

The grounds of discrimination are multiple as stated in the law. A precise analysis of individual and civil cases dispute needs to be done. A possible model for the analysis is either to sort out all legal kinds of discrimination or to focus on cases of greater importance. The problem with implementation is not just a question of how discrimination can be eradicated but also which percentage of population actually regards this act as discrimination, even though the law states that it is.

The actual situation in Serbia also shows that the question of national minorities is important. The cases can be analysed according to their social importance, i.e. their range. Regarding the prohibition of discrimination, it is important to monitor so-called “strategic” litigation because of the certainty of its impact on the progress of society. In this regard, it is important that disputes are more or less typical or systematic violations of human rights. During the analysis or during the selection of cases, it should be determined whether the discrimination is direct or indirect, and whether it is committed by a public or private entity. In this way, it’s possible to evaluate how discrimination actually appears in Serbia and who are the perpetrators and the victims.

#### **5 Providing legitimacy and the publicity of the monitoring mission**

Beside the written appeal to the President of the Court, which includes the monitoring of the procedures done for the specific period and the explanations of the objectives of the research, the observer must inform the bench of judges / the judge about the monitoring of the trial. Then, a meeting with the president of the court / department and spokesman of the court is strongly advised.

Furthermore, the observer should get a written approval from his/her organization in order to greatly enhance the legitimacy and importance of the monitoring procedure and by doing so s/he can influence the stakeholder professional conduct in the process.

With this approval, it is easier for the judge to identify the observer when registering his presence in the record.

## **6 Implementation of the court proceedings monitoring**

In accordance with article 9 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, “everyone has the right, individually or in association with others, to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments.” So the right to observe the trial is a part of fundamental human rights. It is indirectly an important component in the protection of the public during the proceedings, which is also considered as a part of the basic human right to a fair trial.

At this stage of the observation, the observers arrive at the court at the scheduled time. The monitors can get information about the dates and the changes in the proceedings at the court clerk’s office. Organizations should establish a web database with announcements and information on certain cases that are regularly updated.

During the monitoring, it should be checked whether the court provides the principle of transparency. Any interested person can monitor the entire process or a part of the proceedings. There is also the question of the capacity of the court and the room where the procedure is conducted. The observer should arrive on time to be sure to have a place in the courtroom. The issue of capacity is relevant when the court deliberately reduces the spatial capacity in order to violate the principle of transparency.

If a third party does not wish to have the public attend the process in order to prevent the realization of the principle of publicity, the court should take the necessary measures to enable its realization.

Monitoring can be much more efficient if it is based on cooperation with other NGOs and institutions. Knowledge, experience and potential resources could be joined, and thus allow better implementation of the anti-discrimination law. Cooperation can be achieved with current partners, and other interested non-governmental and international organizations, or even independent bodies, which could also contribute to the monitoring and formulation of recommendations to improve the protection against discrimination.

## **7 Recording and elaborating daily reports**

In all of the trials that are being followed, it is necessary that monitors make records (transcripts) according to some established rules. It is important to note the facts associated with the procedure of the case such as the offer and the way of providing the proofs, the court decisions, and the regulations on which the calling party relies on in the proceedings. Special attention should also be paid to the rules of procedure, pleadings of the parties, the general behaviour of the parties and anything else

that might be of importance for achieving the objectives. Notes include the observations of the monitors about the fulfilment of procedural rules and fair trial standards. Comments and observations about the parties' speeches at the main hearing of the trial may only be a complement to the exact findings of fact in the course of the proceedings (such as duration of the proceedings or causes of delay). The facts stated by the lawyers can say a lot about the operations of the state authorities in the proceedings. Referring to the work of judges in the process and procedural defects, it must be taken with some reserve. Nevertheless, the observer can use them in the preparation of notes and in the final analysis procedure. After having attended the hearing, the observers prepare daily reports of the events that happened in the court. In this report, s/he objectively presents the facts and observations of the trial. This is a very important phase of the observation because citizens can thus access judicial power and be informed about its effectiveness. According to the model we propose, the reports are published on our website. During the preparation of the report, particular attention should be paid to their objectivity, equal treatment of all participants in the process, and personal data protection.

### **8 Contacting the parties in the proceedings**

Depending on the capacities and the circumstances, observers can contact victims and lawyers in order to examine their perceptions of the procedure and any objections they may have. YUCOM's practice suggests that observers often have direct contact with the victims or their families in order to make sure that the observation is objective and impartial. Victims or their families should also send requests for legal aid in order to protect human rights, in particular the right to a fair trial.

### **9 Interacting with the media and informing citizens**

For the success of the monitoring process, cooperation with the media is vital. The monitoring process should be completely and regularly available to all media. Furthermore, the organization (or coalition) that is monitoring should establish direct contact with the media so they can start broadcasting the civil procedure and discrimination cases in the best way possible. They broadcast direct information not only related to the litigation, but also on whether the monitoring process encountered substantial obstacles from the court or other persons. The observers must evaluate whether they should provide such information during the trial or at the end. This will allow them to open a discussion about judicial practice in the case the other monitoring objectives are difficult or impossible to achieve. In order to ensure a uniform procedure, it would be useful to delegate one person to be in contact with the media and with the public, to whom the observers would deliver important information.

It would be ideal if this person were also responsible for public database (website, newsletter, etc.). The organization should establish an Internet database for announcements and sharing information on selected cases that are regularly updated.

### **10 Analysis of the court decisions and the sanctions imposed**

At the end of the proceedings, the observers analyse the merits of court decisions, report on its contents, and can give an assessment of the course and outcome of the procedure.

For cases that draw the media's attention, media coverage of the verdict as well as the public reaction should be monitored. The aim is to draw some conclusion about how the public was informed about the course and the nature of the trial.

In addition, even if discrimination *is* determined, the question of effectiveness and the equitable application of the Anti-Discrimination Law depend on the appropriateness of the sentence. If discrimination is proven but not adequately punished, obtaining justice before the court might become impossible in particular cases. This also diminishes the preventative effect of the law; if it is demonstrated to the public that the protection provided by the law is insufficient.

### **11 Analysis of monitoring results and its use**

At this stage of the observation, the observers, based on the hearings, answer some specific questions about the procedure, focusing on the impartiality and independence of the courts and judges, the parties' conduct, the respect of human rights and freedoms guaranteed by the Constitution and international law (especially the right to a fair trial). The results of the analysis of the procedures should be discussed with the members of the judiciary and the public officials, in order to improve the implementation of the law and the protection from discrimination. Furthermore, the process has to take note of the recommendations for the further development of the law and other human right protection measures in Serbia.

## **SPECIFICITIES OF THE PROCEDURES AND HUMAN RIGHTS STANDARDS THAT ARE IMPORTANT FOR MONITORING AND ANALYSES**

### **1 The burden of proof**

Perhaps one of the most important principles in legal proceedings is the burden of proof. When assessing and documenting the decision of the court, it's important to know the specificities about this civil procedure. The Anti-Discrimination Law (ADL) introduces a new standard: under article 45 of the ADL, if the court finds out that there is direct dis-

crimination, the defendant cannot be released from liability by proving not guilty. If the plaintiff satisfies the court that the defendant committed an act of discrimination, the burden of proof that the act did not violate the principle of equality or the principle of equal rights and obligations shall be borne by the defendant.

The decisions of the court defined by the Code of Civil Procedure (CCP) must be in accordance with article 45 of the ADL. Monitors need to pay attention to this part of the process, after which the burden falls on the defendant.

The mandatory participation of the parties in civil procedures proves that it is an important principle of adversary procedures. According to Article 5, “the Court shall afford each party leave to declare on claims and allegations of the other party.” In addition, article 7 of CCP states that “the parties are required to present all facts on which they base their claims and propose evidence supporting such facts.” According to paragraph 2 of Article 7 of the CCP, “the court shall consider and determine only facts presented by the parties and shall exhibit only evidence proposed by the parties, if the law does not stipulate otherwise.”

This previous disposition shows the fundamental principle that the parties can comment on the course of the process and provide evidence for the court’s request. The rule is that the court does not collect factual evidence—it is provided by the parties. The evidence brought forward by the parties, influences the decision of the court. Based on the evidence presented by the parties, the court shall decide which will be accepted. The court can determine facts that the parties have not brought forward and to present this evidence only if the parties are unable to do so by law.

## **2 Situational testing**

Situational testing, used properly, is a legal and effective technique to examine whether the law really guarantees our rights, and a way to empower the victims of discrimination. It is a rather experimental method. It aims to highlight, in a comparable situation, that a person who possesses certain personal characteristics is treated less favourably than another person who does not such have such characteristics. In this way, discrimination is determined “on the spot.” If it is necessary to determine an act of discrimination and shift the burden of proof on the defender, the “testers” create an analogous situation in order to unveil if there is a perceived or assumed discriminatory behaviour. According to article 245 of the CCP, testers as witnesses could then determine that the defendant committed a discriminatory act. In this way, it is possible to provide assistance to the victim in order to prove a case where evidence is hard to collect. At the same time, NGOs should not have an impact on witnesses who do not testify in favour of the plaintiff. The NGOs’ goal is to find out

the truth—not to condemn the defendant. Part of the monitoring process as well as the evaluation of the monitoring in case of situational testing (where testers are witnesses) must be sensitive on the issue of whether the court’s decision on the assessment of credibility of witnesses and their statement can be accepted or not and on the way the decision was made.

### **3 Written arguments between the parties**

According to article 4 of the CCP, the court decides on the claim based on an oral, direct and public hearing. Public oral hearing is an essential part of the monitoring process. Nonetheless, article 14 of the CCP states that “if, for particular actions, the law does not specify in which form they may be undertaken, the parties shall undertake procedural actions either in writing outside of hearing or orally at a hearing.” Thus, it reinforces the importance of the written part of the process. It does not facilitate the monitoring process but it is an important aspect of the success of the monitoring as a part of a process that is outside the public debate. A possible way of overcoming this problem is to contact the parties to get information from the written hearing, so that this part of the process could be assessed. If this is not possible, the written hearing is concluded to be out of reach. The reactions of the parties will also be more obvious in the court, so the discussion will take place more often orally. This would still be a possible way to achieve sufficient analysis.

### **4 Duration of the process from filing a lawsuit until the final court decision**

The duration of the procedure is part of a key goal of monitoring: ensuring an efficient court system and good protection from discrimination. In fact, this is why such procedures, under article 41, paragraph 3 of the ADL, are always urgent.

This means that the evaluation should contain information not only about when the discrimination happened, but also how much time passed before the trial began and how long it lasted.

### **5 Costs of the proceedings**

The court’s decision regarding who should bear the costs of the proceedings ought to be taken into account. According to article 153, paragraph 1 of the CCP, “a party who loses a case completely is obliged to pay the costs of the opposing party.” Paragraph 2 states that “if a party is partially successful in his or her suit, the court may, in view of the success achieved order each party to bear their own costs or for one party to pay the other a proportional share of the costs.” This decision is important because it raises the question of whether the decision about

the costs could prevent the full implementation of the law if, after establishing discrimination, the plaintiff is ordered to share the costs.

The question is whether the plaintiff is able to bear the costs of the litigation procedure, which is, in essence, the question of whether protection against discrimination in general can be obtained. Economic measures are key when exercising protection against discrimination. According to article 168 of the CCP: "the court shall exempt a party from the liability of paying the costs of the proceedings where that party's material situation does not allow them to bear such costs." The article is the only legal source regarding the use of general free legal aid in Serbia because legislation is still pending on this field.

Moreover, this decision is very important for the implementation of the law. For example, when we have in mind the social status of minorities, it often happens that those who are discriminated based on ethnicity have insufficient economic resources. The problem can be prevented if NGOs file lawsuits on their behalf or a third person is supporting the applicant.

