STUDY ON IMPLEMENTATION OF ANTI-DISCRIMINATION LAW IN SERBIA
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2017.
It was a pleasure to cooperate with the author and provide the inputs for research on discrimination based on the materials that YUCOM had gained through developing its practice as human rights protection organization. Jealously protecting the documentation on strategic cases we have led, with no processing, organizing or with no clear methodology cannot lead to achieving the goal of showing the position of Serbia pertaining this issue. Together we also need to emphasize whether there was enough efforts to fight against discrimination, or whether those efforts produced any changes to the society. Having this in mind we had put the jealousy aside, if we had nurtured any, and shared our database data.

The answer can also be obtained from the question – where to next, as a primary question in the promotion and respect of human rights and in discrimination prevention. Even though we can carefully and adequately read the provision of our Constitution that clearly states that the distinguished level of protection of human rights cannot be decreased, the data obtained in the following research show that we need to fight over and over for our freedom and rights.

The Lawyers Committee for Human rights – YUCOM had recently celebrated 20 years of providing free legal aid. The Anti-discrimination Law was passed around nine years ago, somewhere in the middle of YUCOM’s existence, and the following years were marked with a large number of cases and litigation on all grounds provided by this act.

With this publication, we are trying to accentuate the engagement and efforts in proving discrimination in court, despite the apparent lack of elaborated mechanisms and standards before domestic courts. We also emphasize the importance of having for strong campaigns in schools, media, and other institutions and organizations for human rights protection, by which we were thriving to explain the provisions of the aforementioned law, despite the persistent resistance of the parts of society with outdated and clouded opinions, and who therefor remain unaware of the importance of the protection human rights in the 21st century. This task was made easier with forming of the independent institution of the Commissioner for the Protection of Equality, which since our founding has been a great ally in the opening of all issues of discrimination in the society that emerged from the collapsed values from the war, and is now trying to catch up with the developed countries in the respect of the rights of their citizens, as well as those individuals who live here.

The study in front of you is supposed to provide enough relevant information so that upon a read it should provide us opportunity to give the answer to the question of “where to next” together.

Milan Antonijević, YUCOM

We wish to express our gratitude to organizations, organs and institutions, as well as the Human Rights Unit of the UN Serbia, for their kind support throughout the process of preparation and realization of the study.
EXECUTIVE SUMMARY

The Law on the Prohibition of Discrimination was adopted in 2009. It is estimated that during eight years of implementation, around 150 cases were initiated before Serbian courts. The analysis presented here is based on a representative sample of 87 cases, gathered primarily from the legal service of the Commissioner for the Protection of Equality and the civil society organisation Lawyers Committee for Human Rights (JUKOM) from Belgrade.

The main questions examined during the research were to what extent courts in Serbia examine and correctly apply concepts which are deemed to be sufficiently clear in international law terms that there is limited if any scope for national divergence. These include the definition and core understanding of the following: direct and indirect discrimination; victimization; harassment; “instruction” or “incitement” to discriminate; denial of reasonable accommodation; “genuine and determining occupational requirement”; shift/share of burden of proof; effective remedy; statistics and other modes of documenting a claim; actio popularis matters.

On the basis of the cases reviewed, most of the cases of discrimination which have been brought to court in Serbia are ones from the field of labor law and social security. From 87 analyzed cases, 75 (86.2%) had the character of labor disputes, or were connected to labor and social rights of persons (Article 16 of the Law on the Prohibition of Discrimination). Most of other cases (11.5%) were about denial of services, including reasonable accommodation, and advocating or exercising discrimination by state organs or in the course of proceedings conducted before state organs1 (Article 17 and Article 13 Point 2 of the Law on the Prohibition of Discrimination). There was one case on hate speech (Article 11 of the Law on the Prohibition of Discrimination).

The Republic of Serbia ratified most of relevant international antidiscrimination instruments. Harmonization with EU law has not yet been fully successful, and there are several unresolved issues in order to finish this task.

The legal framework banning discrimination in Serbia is established under the Constitution of the Republic of Serbia and elaborated in a number of laws. The general law on the prohibition of discrimination is Law on the Prohibition of Discrimination. Other important laws in this area include the Law on the Prohibition of Discrimination against Persons with Disabilities, the Law on Gender Equality and the Law on Protection of the Rights and Freedoms of National Minorities. Discrimination has been prohibited in many lateral laws, covering certain aspects of social interactions and/or protection from discrimination. Important provisions in this regard are set out in Labor law, as well as in the Law on Professional Rehabilitation and Employment of Persons with Disabilities.

In the analyzed sample, only in seven decisions (which makes only 8% of total of 87 cases)

1 Such possible discriminatory conducts could be denial of some rights or selective application of the law based on personal characteristic of the party in administrative or court proceedings (e.g. local selfgovernment refuses to issue building permit to a person although all legal conditions have been fulfilled, based on his political affiliation).
did courts make reference to international instruments. In all seven decisions they mentioned the European Convention on Human Rights, in three cases the International Covenant on Civil and Political Rights was referred to, and in one the European Social Charter and the Universal Declaration on Human Rights were referenced. In most of these decisions, international instruments were mentioned without further elaboration as to why they were significant for the case in question.

The application of legal definitions related to discrimination has been highly inconsistent in Serbian courts’ practices and jurisprudence. Judges appear to lack a sufficient background in the law of the ban on discrimination, and they frequently appear to understand discrimination as a vague and unclear construction, a philosophical matter subject to wide interpretation, rather than a legal matter regulated by precise rules, concepts and definitions. There also appear to be judges who are hostages to prejudice and stereotype, and who do not perceive anything wrong in discriminatory behavior - thus marking it as permissible and common conduct. Courts generally do not appear understand the notion of protected personal characteristics of the victim of discrimination. Courts for instance failed to see that discrimination existed in a case where it had been done by the act of publicly announcing job vacancies for women only. Courts have also misunderstood the role of testers in matters related to establishing discrimination. Also, indirect discrimination has to date not yet been recognized in court decisions. There were no cases in the analyzed sample that involved victimization, instruction or incitement to discriminate, genuine and determining genuine occupational requirement. Hate speech was the subject in one analyzed case. Lack of knowledge and experience leads to situation that there are noted inconsistencies in application of antidiscrimination law, even within same court. These matters should be addressed in training and continuing education of judges and other relevant legal practitioners.

Failure to distinguish harassment as a form of discrimination from mobbing as type of harassment at work is frequently observed in the jurisprudence. There are examples where courts do not distinguish mobbing and discrimination, regardless of different legal grounds and their nature. In some judgments, courts established the simultaneous existence of mobbing and discrimination. In some cases, however, courts did recognize that there is no discrimination without personal characteristic of the plaintiff as the motive for discriminatory conduct, or by simply stating that mobbing and discrimination are “two different legal categories”.

Denial of reasonable accommodation is not explicitly recognized as a form of discrimination under Serbian domestic law as currently construed. However, there are cases in which persons tried to vindicate their rights as concerns accessibility for persons with disability, based on general ban on discrimination and prohibition of certain forms of discrimination. The position of the Supreme Court of Cassation in one case significantly relativize norms on the removal of architectural barriers and represents in effect the legalization of (unlawful) practices of the state that does not provide equal access to public buildings, under the pretext that there are not sufficient funds for implementing such measures.
Courts do not apply rules on shifting the burden of proof in discrimination cases and do not refer to these rules when delivering their decisions. Out of 87 analyzed courts’ decisions, only six of them referred to the evidence process and explained in detail shifting the burden of proof by establishing the likelihood of unlawful conduct by defendant. In most of these cases, courts state that plaintiff did, or did not, prove the likelihood of discrimination, or that the plaintiff did not support his/her claims by any evidence whatsoever, without going into further details on how and why shift has or has not been done.

Based on the data from analyzed cases, temporary measures are not common in litigation, and plaintiffs appear in the main not to be requesting them.

In cases where courts established discrimination, they were using the possibility to take steps to redress the consequences of discriminatory treatment as complementary measures, in addition to imposing a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity and/or rewarding compensation for material and non-material damages. Apology as a type of remedy is not being used. However, in a small number of cases, defendants themselves expressed regret and apologized to plaintiffs during the procedure, before courts adopted any kind of decision. In one case, a court obliged the respondent to publish the judgment in daily newspaper at its own cost. In several other judgments, in addition to deciding that there had been discriminatory conduct, courts obliged respondents to “publicly publish the judgment”, without any precise instructions how this obligation should be done.

Statistics as a way of proving the existence of discrimination has not been stipulated by the law. One consequence of this is that they have not to date been used in practice. In several lawsuits, plaintiffs raised general and vague insinuations that they were not treated “similarly to everybody else”. These assertions have generally not been backed up by evidence or statistical data.

Situation testing is on the other hand a legitimate way of gathering evidence on discriminatory practices. Situation testing is not being used frequently – only three of 87 analyzed cases involved testers.

Courts have had problems when faced with actio popularis concept and the recognition of the right to sue against discriminatory practices in general, although it has been prescribed by the Law on the Prohibition of Discrimination.

Courts interpret their competencies in proceedings on discrimination narrowly. Some courts have ruled correctly that the court of general jurisdiction cannot assess the legality of general acts of employers, which is competence of the Constitutional Court, but only if a right of an employee has been infringed as a result of the adoption or implementation of such general acts. However, this cannot be used as a “standard of irresponsibility” of employers’ actions and

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2 “Situation testing” is an act of deliberately exposing oneself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination (Article 46 Paragraph 3 of the Law on the Prohibition of Discrimination). For further reading on situation testing: I. Rorive, Proving Discrimination Cases – The Role of Situation Testing, MPG and the Centre for Equal Rights, Stockholm-Brussels, 2009.
conduct. The practices of courts on this issue are inconsistent and it is proven to be an obstacle in courts’ ruling on cases of indirect discrimination³.

There are no rules on the relation between antidiscrimination law and other legal rules. As a result, judges are sometimes forced to take actions based on mixed rules of antidiscrimination law and other relevant laws (giving advantage to one or the other), which leads to legal uncertainties and peculiar/unjust outcomes.

Although cases of discrimination are considered particularly urgent, their flow and decision-making processes do not differ from the general rules of litigation. However, courts in many although not all cases appear more efficient in discrimination cases than in other cases.

Discrimination cases do not have particular judicial tag, so it is very difficult to track them. It is not possible to determine whether some case is about discrimination only by looking at their tags and/or reference numbers.

Finally, although it was not explicitly a subject of this study, as noted above, a number of provisions of Serbian anti-discrimination law require amendment, as they currently diverge from normative requirements. Particular items in focus include the Serbian law definition of indirect discrimination, the lack of a provision on denial of reasonable accommodation as a form of discrimination, a problematic definition of discrimination based on sexual orientation, as well as other matters.

If anti-discrimination law is to live up to its promise as the legal form in which exclusion is challenged, then there is still a long way ahead in its understanding and application, so that whole classes of victims could to benefit at all from the range of this area of law – law designed precisely to level the inequality playing field. At present, precisely those categories of persons most frequently identified in human rights review of Serbia as in states of extreme vulnerability to discrimination – such as Roma, persons with intellectual or mental disabilities, migrants and others – do not yet appear to be benefitting from anti-discrimination law in practices, as these and other categories of extremely excluded groups are very underrepresented among those whose cases are being brought to court. Anti-discrimination law is the legal expression of the global commitment to equality; the fact is that cases concerning most excluded groups are not even making it to court and this is a kind of practice that has to be changed in the near future.

Recommendations flowing from the conclusions of this study include:
- Reform of the antidiscrimination legal framework is still needed in some areas;
- Discrimination cases should be explicitly tracked and case law harmonized;
- Judges should receive further training on the law of the ban on discrimination and application of antidiscrimination law;
- It is important to include, support and encourage, members of vulnerable groups and discriminated individuals and groups in areas other than labor relations, to seek and use their right to judicial protection of the right to equality.

³ See for example the Judgment of the Appellate Court in Novi Sad Gž. 254/14 of February 14, 2014, analysed in part 4.1 of this report.
Content

EXECUTIVE SUMMARY ............................................................... 5
1. INTRODUCTION .................................................................. 10
2. METHODOLOGY ................................................................... 11
3. NORMATIVE FRAMEWORK OF ANTI-DISCRIMINATION LAW IN SERBIA ......................................................... 13
3.1 International antidiscrimination instruments ratified/confirmed by Serbia .............................................................. 13
Republic of Serbia ratified most of relevant international instruments of relevance to the ban on discrimination: ........................................... 13
3.2 Domestic law ................................................................... 14
3.3 Aspects of international ....................................................... 15
antidiscrimination law incorrectly or inadequately transposed into national law .......................................................... 15
3.4 Practice of applying international instruments by courts ......................................................................................... 16
4. PROBLEMATIC ASPECTS IN THE DOMESTIC APPLICATION OF ANTI-DISCRIMINATION LAW IN SERBIA ................. 18
4.1 Direct and indirect discrimination ........................................ 18
4.2 Victimization ..................................................................... 21
4.3 Harassment ..................................................................... 22
4.4 Hate speech .................................................................... 24
4.5 Instruction to discriminate .................................................. 25
4.6 Denial of reasonable accommodation ..................................... 26
4.7 Denial of accessibility measures ........................................... 26
4.8 Genuine and determining occupational requirement ............. 26
4.9 Shift/share of burden of proof ................................................. 26
4.10 Right to an effective remedy ................................................ 28
4.11 Statistics and other modes of documenting a claim ............... 30
4.12 Actio popularis .................................................................. 31
5. OTHER ISSUES ARISING IN THE COURSE OF EFFORTS TO SEEK APPLICATION OF ANTI-DISCRIMINATION LAW IN THE DOMESTIC SYSTEM .............................................................. 32
5.1 Problem with the right to sue and the ability to sue the employer ................................................................................ 32
5.2 Competence issues ............................................................. 33
5.3 “Complex litigation” ............................................................ 34
5.4 Inconsistencies in courts’ practices ......................................... 35
5.5 Length of procedures .......................................................... 35
5.6 Tracking of discrimination cases and their statistics .............. 36
6. SOME EXAMPLES OF COURT PRACTICE ............................................. 37
6.1 Commissioner for Protection of Equality vs. MMM Pizza Group - employment discrimination based on gender .................. 37
6.2 S.A. vs. T.M. employment discrimination based on gender/marital status/family obligation ........................................ 38
6.3 Commissioner for Protection of Equality vs. N.F.R. - denial of service to Roma ......................................................... 39
6.4 M.P. vs. National Bank of Serbia - employment discrimination based on health condition/disability ................................................... 41
6.5 Pfajfer vs. Republic of Serbia – employment discrimination ........................................................... 42
7. CONCLUSIONS AND RECOMMENDATIONS ................................. 43
1. INTRODUCTION

In reviews of Serbia, United Nations, Council of Europe and other human rights review bodies have repeatedly identified discrimination to be among the issues of highest priority for action. The need to strengthen action to tackle discrimination and to strengthen the inclusion of vulnerable or marginalized groups also features prominently in regular reporting by the European Union on Serbia’s progress toward accession.

In the past decade, Serbia has acted to strengthen the domestic anti-discrimination law framework. The Law on the Prohibition of Discrimination, adopted in 2009, is the most comprehensive effort in this area, and an important milestone in transposing international human rights law into the domestic legal order. The Law inter alia establishes the office of the Commissioner for Equality.

In the period since its adoption in 2009, cases of discrimination have been brought to court on the basis of the 2009 Law. Circa 15 cases were filed in court by the previous Equality Commissioner. Civil society groups have also supported victims of discrimination in taking legal action to secure rights set out under the 2009 Law, and have also used actio popularis standing to challenge discrimination as part of their public interest role. It is assumed also that victims have brought cases via independent advocates or other representatives. As yet, however, there is no detailed assessment of how courts have ruled on such cases, and no clear understanding of issues in the judiciary’s competence to issue well-founded judgments in this area.

The effective transposition of international and European law in the area of the ban on discrimination is of particular relevant both for UN human rights review, as well as for EU areas including in particular as concerns Chapters 23, 24 and 19.

This study aims to examine areas of unequivocal, settled law, including:
- Competent and appropriate application of international and regional law definitions including but not necessarily limited to direct and indirect discrimination, denial or reasonable accommodation, harassment, instruction or incitement to discriminate, victimization and racial segregation if and as relevant;
- Courts’ actions in accurately drawing inferences of possible unequal treatment from material presented;
- Courts’ actions in grasping and correctly applying the shifting/sharing of the burden of proof;
- Courts’ actions in fashioning effective remedy, including in applying sanctions which are effective, proportionate and dissuasive;
- Correct application and recognition of actio popularis, as well as other matters related to civil society or expert involvement.

Other issues as arising from the examination of material examined are also presented here.

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2. METHODOLOGY

This study is a result of analysis of 87 of courts’ decisions in antidiscrimination cases, applying the Law on the Prohibition of Discrimination and other antidiscrimination law provisions. There are no precise statistics how many cases have been brought to trial regarding implementation of antidiscrimination laws. However, rough estimates are that there were around 150 such cases. A sample of 87 cases, gathered primarily from the legal service of the Serbian Commissioner for Protection of Equality and civil society organisation Lawyers Committee for Human Rights (JUKOM) from Belgrade, has been researched in order to provide answers on how Law on the Prohibition of Discrimination is being implemented and whether there have been any irregularities that are common to this type of cases before various courts. These cases have been ruled on by Basic and Appellate courts, as well as in some cases by the Supreme Court of Cassation. Some of the cases analyzed are still ongoing, which is also a fact worth mentioning when we consider that some of these cases are older than five years although they should be designated as urgent due to the nature of the issue as prescribed by the Article 41 Paragraph 3 of the Law on the Prohibition of Discrimination.

As noted above, core issues examined include those matters deemed central to the normative understanding of the ban on discrimination under international and European law, including direct and indirect discrimination; victimization; harassment; “instruction” or “incitement” to discriminate; denial of reasonable accommodation; “genuine and determining occupational requirement”; shift/share of burden of proof; effective remedy; statistics and other modes of documenting a claim; and actio popularis. The study has aimed to assess to what extent these areas of settled law are correctly applied in the domestic system in Serbia.

All these have been elaborated in specific sections/subsections. The research found both examples of good and bad practices, which are represented through thematic analysis on various issues regarding courts’ procedures. Besides this approach, we used basic case-study methodology to present several important cases in their entirety, pointing out all characteristic mistakes of courts when applying antidiscrimination norms.

Most reported cases of discrimination in Serbia are ones from the field of labor law and social security. From 87 analyzed cases, 75 (86.2%) had the character of labor disputes, or were connected to labor and social rights of persons (Article 16 of the Law on the Prohibition of Discrimination). Most of other cases (11.5%) were about denial of services, including reasonable accommodation, and advocating or exercising discrimination on the part of state organs or in the course of proceedings conducted before state organs (Article 17 and Article 13 Point 2 of the Law on the Prohibition of Discrimination). There was one case on hate speech (Article 11 of the Law on the Prohibition of Discrimination). Major areas at issue in the international human rights law ban on discrimination, as well as covered by relevant European Union directives in the field of discrimination, such as the law on occupational safety and health, the law on equal pay, the law on working time, the law on non-discrimination in education, the law on non-discrimination in housing, and the law on non-discrimination in access to goods, services, and facilities.

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6 This number is based on partial research into courts’ practices. As it will be explained in the text below there is no mechanism to track discrimination cases, so it is impossible to know the exact number.

7 Article 41 Paragraph 3 of the Law on the Prohibition of Discrimination: “The proceedings shall be conducted urgently.”
as discrimination in the fields of education, housing or health care services, appear not yet to be the subject of extensive litigation efforts in Serbia. At the same time, there are regular reports of discrimination in these areas. As such, there is as yet a gap between reported discrimination in Serbia, and efforts to claim justice in these areas.

Finally, conclusions are presented in order to give grounds for some future improvements of antidiscrimination law in Serbia. Some of recommendations are pointed to legal deficiencies, suggesting that normative intervention and legal amendments are in order. Some of them are however intended for judges implementing existing legal norms, in order for them to understand certain specific legal issues and standards of antidiscrimination law and in order for such legal rules be interpreted in the spirit of prohibition of discrimination and promotion of equality.

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3. NORMATIVE FRAMEWORK OF ANTI-DISCRIMINATION LAW IN SERBIA

3.1 International antidiscrimination instruments ratified/confirmed by Serbia

Republic of Serbia ratified most of relevant international instruments of relevance to the ban on discrimination:

<table>
<thead>
<tr>
<th>International organisation</th>
<th>International instrument</th>
<th>Year of entry into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Nations (UN)</td>
<td>International Covenant on Civil and Political Rights</td>
<td>1971</td>
</tr>
<tr>
<td>UN</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
<td>1971</td>
</tr>
<tr>
<td>UN</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
<td>1967</td>
</tr>
<tr>
<td>UN</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
<td>1981</td>
</tr>
<tr>
<td>UN</td>
<td>Convention on the Rights of the Child</td>
<td>1990</td>
</tr>
<tr>
<td>UN</td>
<td>Convention on the Rights of Persons with Disabilities</td>
<td>2009</td>
</tr>
<tr>
<td>UN</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
<td>not ratified</td>
</tr>
<tr>
<td>ILO</td>
<td>Equal Remuneration Convention, C100</td>
<td>2000</td>
</tr>
<tr>
<td>ILO</td>
<td>Maternity Protection Conventions, C103 and C183</td>
<td>C103 1955, C183 2010</td>
</tr>
<tr>
<td>ILO</td>
<td>Discrimination (Employment and Occupation) Convention, C111</td>
<td>1961</td>
</tr>
<tr>
<td>ILO</td>
<td>Employment Policy Convention, C122</td>
<td>1971</td>
</tr>
<tr>
<td>ILO</td>
<td>Vocational Rehabilitation and Employment (Disabled Persons) Convention, C159</td>
<td>1987</td>
</tr>
<tr>
<td>ILO</td>
<td>Private Employment Agencies Convention, C181</td>
<td>2013</td>
</tr>
<tr>
<td>CoE</td>
<td>Revised European Social Charter</td>
<td>2009</td>
</tr>
<tr>
<td>CoE</td>
<td>European Charter for Regional or Minority Languages</td>
<td>2005</td>
</tr>
<tr>
<td>CoE</td>
<td>Framework Convention for the Protection of National Minorities</td>
<td>998</td>
</tr>
</tbody>
</table>

However, there are several other important instruments that need to be considered when harmonizing Serbia antidiscrimination law with acquis communautaire, as will be explained in more details in the text below (see part 2.3). The Action Plan for Chapter 23 includes adoption of amendments to the Law on the Prohibition of Discrimination. This action was planned for 2016\(^9\). At the time of writing amendments to the 2009 Law were being prepared.

### 3.2 Domestic law

The antidiscrimination system in Serbia is set out both in the Constitution of the Republic of Serbia\(^10\) and in various laws. The Constitution contains a general prohibition of discrimination and proclamation of the right to equality, as well as provisions on protection of particular vulnerable groups. The primary general law setting out in detail the prohibition of discrimination is Law on the Prohibition of Discrimination\(^11\), which stipulates definitions of discrimination and regulates all important issues regarding prohibition of discrimination and mechanisms for protection from discriminatory conduct.

Other important laws in this area include the Law on Prevention of Discrimination of Persons with Disabilities\(^12\), the Law on Gender Equality\(^13\) and the Law on Protection of Rights and Freedoms of National Minorities\(^14\). Discrimination has been prohibited in many other laws, partially covering certain aspects of social interactions and/or protection from discrimination. The most important ones are in the Labor law\(^15\), the Law on Professional Rehabilitation and Employment of Persons With Disabilities\(^16\), the Law on...

\(^{9}\) Measure 3.6.1.5 of the Action Plan for the Chapter 23, p. 259.

\(^{10}\) Official Gazette of the Republic of Serbia 83/2006.

\(^{11}\) Official Gazette of the Republic of Serbia 22/2009.


\(^{13}\) Official Gazette of the Republic of Serbia 104/2009.


the Constitutional Court\textsuperscript{17}, the Law on the Protector of Citizens\textsuperscript{18}, the Law on Peaceful Solution of Labor Disputes\textsuperscript{19}. Certain aspects of criminal law are also relevant, for example as concerns gender-based violence.

### 3.3 Aspects of international anti-discrimination law incorrectly or inadequately transposed into national law

Although Serbian antidiscrimination legal framework is fairly well developed, there are still some issues which require harmonization with international standards and ratified international instruments and EU law. This study does not analyze divergence between international and national law in detail, inter alia because it is taken as given that courts will apply the correct standard regardless of whether Parliament has correctly or incorrectly transposed a norm. Nevertheless, a summary of some key divergences follows here:

First of all, the definition of indirect discrimination in Article 7 of the Law on the Prohibition of Discrimination has not been harmonized with EU directives 2000/43, 2000/78 and 2006/54. The definition of indirect discrimination as provided in the Directives\textsuperscript{20} is as follows: “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons (of a racial or ethnic origin/ having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation/ of one sex) at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” However, the definition of indirect discrimination as provided in Article 7 of the Law on the Prohibition of Discrimination \textsuperscript{21}differs: “Indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favorable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.”

Secondly, the notion of discrimination based on sexual orientation in Article 21 of the Law on the Prohibition of Discrimination is too narrow. It seems that it does not provide full protection since it only covers the declaration of sexual orientation, not the equal treatment regardless of declared or presumed sexual orientation, or its public expression: “Sexual


\textsuperscript{19} Official Gazette of the Republic of Serbia 125/04 and 104/09.


\textsuperscript{21} Article 7 of the Law on the Prohibition of Discrimination.
orientation shall be a private matter, and no one may be called to publicly declare his/her sexual orientation. Everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden.”

In addition, denial of reasonable accommodation is not clearly stated a form of discrimination, as required by Directive 2000/78 and Convention on the Rights of Persons with Disabilities;

Another area in need of further transposition concerns racial segregation. Segregation has not been noted as a type of discrimination, although it is common occurrence in some areas of social life, including education and housing, in particular as concerns Roma.22

Also, statistical evidence has not been recognized as valid way to prove discrimination in litigation, so this solution is not harmonized with Directive 2000/43.

Finally, Labor Law does not contain several important antidiscrimination norms, such as explicit prohibition of discrimination of temporary employees compared to employees for indefinite period (as proscribed in Directive 1999/70; same goes for the lack of legal standard of “comparable employee” (as set in Directives 1997/81 and 104/2008).

3.4 Practice of applying international instruments by courts

The problem of not applying the correct definitional basis or scope of legal norms in clear areas of settled law in the field of discrimination is to a certain extent linked to wider difficulties Serbian courts have had in applying international law in the domestic system, as required by the Constitution.23 Serbian courts have in many cases struggled to implement international instruments when establishing legal framework of the case and delivering decisions. This problem is not specific for discrimination cases only. Although there is clear obligation of applying ratified international instruments in the Constitution of the Republic of Serbia,24 international standards are generally applied in domestic proceedings only if they are transposed into Serbian legal system by domestic laws, or if very strenuous efforts are made by advocates in a particular case.

In the analyzed sample, only in seven decisions (which makes only 8% of total of 87 cases) did courts make reference to international instruments. In all seven decisions they mentioned the European Convention on Human Rights, in three the International Covenant on Civil and Political


23 Article 16 of the Constitution of the Republic of Serbia: “The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law. Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution.”

24 “Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.” Article 16 Paragraph 2 of the Constitution of the Republic of Serbia.
Rights, in one the European Social Charter and the Universal Declaration on Human Rights. In most of these decisions, international instruments were mentioned without further elaboration as to why they were significant for the case in question. Only in several decisions did courts mention a specific article of the international instrument that was relevant for the case – it was always regarding Article 14 of ECHR or Article 1 of Protocol 12 of ECHR. In most of these decisions, courts took note of ECHR only because plaintiffs claimed that this international instrument was violated by the defendants. Not once did courts declare this true or false. In all decisions that mention international instruments, they were simply listed by their names – there is no clear indication of how courts found them for the given case, or if or how they were applied in the given judgment.

Perhaps the clearest example of this problem when it comes to cases concerning discrimination is seen in decision of the High Court in Belgrade25. In its decision on Pfajfer case, regarding the claims of the former pilot of German origins who was discriminated by the national airline JAT, the Court declared there was discrimination in conduct of JAT but only regarding the period after 2003 – since discrimination has not been forbidden by the Serbian (Yugoslav) laws before that time. Little did the judge know that first antidiscriminatory provisions found their place in the Constitution of Yugoslavia from 1974, and that both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights former Yugoslavia ratified in 1971.26 Such ignorance directly led to unjust outcome of the case and influenced on prolonging its conclusion for another significant period of time (see more details on this case in the text below).

26 Both Covenants entered into force in 1976 after 10 ratification had been deposited.
4. PROBLEMATIC ASPECTS IN THE DOMESTIC APPLICATION OF ANTI-DISCRIMINATION LAW IN SERBIA

Although the Law on the Prohibition of Discrimination was adopted and came into force eight years ago, there are some aspects of antidiscrimination law in Serbia that are not used or recognized consistently or regularly, according to analyzed sample of courts’ decisions. Some other aspects of anti-discrimination law appear to be applied correctly, but not consistently enough so that we could speak of correct courts’ practices and standards of interpretation as a general matter.

4.1 Direct and indirect discrimination

The application of legal definition of discrimination has been highly inconsistent in courts’ practices. There are several decisions by courts that clearly do not meet the purpose of the prohibition of discrimination, or where discrimination is not identified as required by law. These decisions are a good landmark to comprehend intensity of the struggle courts have when they are deciding upon discrimination cases. Judges appear to lack an appropriate background in antidiscrimination law and practice, and they appear mostly to consider discrimination to be a vague and unclear construction, a philosophical entity subjected to the necessity of wide interpretation, rather than regulated by the precise legal rules. There are, on the other hand, judges who appear to be hostage to prejudice and stereotype, and do not perceive that there is anything wrong in discriminatory behavior - thus marking it as permissible, common, or even recommended conduct.

In response to this problem, several appellate courts have issued joint opinions on interpretations of several issues related to judicial protection against discrimination. However, such joint opinions are not necessarily a good solution for this problem. Firstly, because such joint standing sometimes establishes bad practices or bad law and only confirms problematic decisions of judges on some issues. Secondly, there are four appellate courts in Serbia and there is no guarantee that the joint opinions of one of them will correspond to joint opinions of another – thus, joint standings of these courts have to be reaffirmed by the Supreme Court of Cassation, with the help of competent experts in this field.

Failure to identify direct discrimination

For example, a judge of the First Basic Court in Belgrade concluded that an employment procedure in which an employer did not want to hire any male workers was not discriminatory and that there was no violation of the principle of gender equality, because “there is a far greater number of available jobs for men, which is a well-known fact that does not need to be proven”. The same judge further concluded in the same case that there was no discrimination having in
mind “the nature of jobs in question (cooking and serving food, author’s note) and working conditions”\textsuperscript{27}. The very notion of a judge dividing jobs into “male” and “female”, and classifying cooking and similar duties as typically female, raises many reasons for concern.

In the Pfajfer case, the Appellate Court referred to insults that had been inflicted by fellow pilots and other employees in JAT, calling him “General Lehr”\textsuperscript{28}, “Gerry” and other derogatory names related to his German nationality (ethnicity – see footnote 29, as well as explanatory note below in footnote 67). The Appellate Court stated that insults made on the base of plaintiff’s nationality\textsuperscript{29} were not discriminatory per se. Although they were extremely harsh and repetitive, and clearly (combined with other wrongful actions of the employer) intended to be discriminatory, humiliating, degrading and insulting, the Court found that their discriminatory potential depended on the circumstances when and how they were said. Furthermore, Court found that it depended on the system of the moral values of the defendant and whether there was enough evidence to substantiate the claim they were insults or just intended to be a joke.\textsuperscript{30} Clearly, the Court did not have the idea that its purpose of protection was to state that such values were not excepted in society and were wrong regardless of the impact on the plaintiff and/or other employees.

Failure to identify indirect discrimination

Indirect discrimination is generally not identified in courts’ decisions. In reasoning of their decisions/judgments, judges as a rule state all relevant norms to the case. In majority of cases, they stated both definitions of direct and indirect discrimination. However, there are no decisions/judgments in which courts expressively stated that the case was about indirect discrimination. This is mostly because vast majority of analyzed cases are about direct discrimination. However, in very few cases of indirect discrimination, courts failed to recognize it and failed to establish existence of discrimination. This leads to the conclusion that courts do not understand what indirect discrimination is.\textsuperscript{31}

In the case M.P. versus the National Bank of Serbia, the plaintiff claimed that he did not receive the medical attention he needed because his employer did not want to send him to regular medical examination at the same time as some other employees, although the plaintiff specifically asked for it because he was working on the job which worsened his medical condition. The plaintiff was a person with disabilities and he claimed that this was the ground for discriminatory conduct. As direct consequence of employers’ omission to react, the medical condition of the plaintiff worsened and he eventually completely lost his working ability. The Supreme Court of Cassation ruled that there was no discrimination and thus repealed a different ruling by the second instance Appellate

\textsuperscript{27} Judgment of First Basic Court in Belgrade 63.P.16956-12 of March 7, 2013.
\textsuperscript{28} German general of Hitler’s Air Force (Luftwaffe) responsible for bombing Belgrade in 1941.
\textsuperscript{29} Term “nationality” is used in the meaning of “national affiliation and ethnic origin”, which has been stated as one of protected personal characteristics in the Law on the Prohibition of Discrimination (Article 1, Paragraph 1, Point 1). This term does not refer to one’s citizenship.
\textsuperscript{30} Decision of the Appellate Court in Belgrade Gž 381/2013 of March 14, 2013.
\textsuperscript{31} Some simplifications of the notion of indirect discrimination are also noted. Thus the Appellate Court in Niš in one of its judgments simple notes that “indirect discrimination is one that cannot be perceived at first sight” (Judgment 10Gž. 2237/13 of October 8, 2013).
The Supreme Court decision reasoned that the employer did not break the law, more precisely did not violate the Labor Law, by not sending the person with disabilities on medical examination at a time when many other employees were sent. The Supreme Court has established that there was no legal obligation for employer to send this particular employee to testing whether job he was doing could worsen his already damaged health. Formally, this conclusion was true. However, the Court did not take into account that the employee continuously and frequently asked his employer for this kind of examination. He received medical assistance only when his health worsened, and was ignored before that because of his health condition. The mere fact that no legal rule was directly disobeyed by the employer did not mean that there was no discriminatory conduct – Supreme Court judges were obviously unaware of that and unaware of the concept of indirect discrimination.

In another case, an employer ignored the fact that the medical commission determined the reduction of the employee’s ability to work, and nevertheless gave him difficult working tasks (lifting heavy objects) that were not appropriate given his health condition. The Appellate Court in Novi Sad found that there was no discrimination of the employee on the ground of health condition/disability, since the employer offered the employee same labor contract as to all other employees.33

Failure to identify correctly protected personal characteristics

Courts frequently do not understand the notion of protected personal characteristics of the victim of discrimination. In some cases, courts “establish” personal characteristics which are not relevant and cannot be perceived as distinctive features of a person or as the grounds for discriminatory conduct. The Law on the Prohibition of Discrimination expressly prohibits unequal treatment of persons based on their real or presumed personal characteristics. In practice however, courts often “seek” or create personal characteristics even when they do not exist – neither real nor presumed ones – thus practically remodeling cases of common breach of one’s rights as discrimination cases.

For example, the appellate Court in Kragujevac found that “disturbed relations” between plaintiff and defendant were personal characteristics of the plaintiff.34

In another case, plaintiff was working as a conductor in public transport. She was deliberately given a work chart that was impossible for her to realize because she used public transportation to get to work. Public transportation from her house began at 5 a.m. However, the work schedule the employer made did not take into account the objective circumstances of her coming to work, so she was often deployed on the first morning departures at 4:50 a.m. Hence she was not able to come to work in time on those days and suffered termination of labor contract for being late. The Appellate Court in Novi Sad correctly noted that some employees lived outside the city of their work, but then it used this fact as a protected personal characteristic of plaintiff, although it was not such thing. It was, rather, a

circumstance that enabled the employer to harass the employee.\textsuperscript{35} The case of D.M. vs. the General Hospital in Sremka Mitrovica was based on the claims by the plaintiff that he suffered discrimination and that his employer made unjustified omissions from the call duty, thus preventing him from increasing his earnings. The plaintiff claimed that he was removed from call duty after he openly stated his opinion about Croats at a staff meeting. The Appellate Court in Novi Sad stated that personal characteristic of the plaintiff was that he publicly expressed his opinion on one occasion, before his colleagues\textsuperscript{36}. Although stating a personal opinion could be perceived as a ground for latter unlawful conduct of the employer, it was not based on the fact that employee expressed himself but on the fact that his statement was intended to degrade members of certain nationality. Therefore, the plaintiff’s behavior was unlawful and it could not be considered as a protected personal characteristic.

In one case, the Appellate Court in Novi Sad found that the protected personal characteristics of the plaintiff were “tolerance and respect for authority”\textsuperscript{37}.

The notion and perception of discrimination are not entirely known to people, either. Only 10 out of 82 analyzed cases before the Appellate Courts have been concluded with a decision in favor of plaintiffs and with clear determination of discriminatory conduct committed by defendants. It is notable that plaintiffs mostly do not understand concept of protected personal characteristic and do not state any in their claims before courts, or state some characteristics which are not in direct connection with conduct of the defendant. Furthermore, there are a lot of lawsuits based on discrimination according to political affiliation, most of them without any legal grounds. There were cases, as explained in the text below, of simultaneous claims of mobbing and discrimination. Finally, there were some cases in which plaintiffs sued state authorities and claiming “discrimination” for performing duties that they are entitled to by the law (e.g. conducting a search of a flat in a criminal proceeding). In most of these cases, alleged victims of discrimination did not have any grounds or reasons to believe that they were treated differently.

Misconceptions of the right to protection from discrimination seem to be common. Significant efforts will have to be made in order to educate wider population on the content of the legal protection against discrimination, its reach, scope, content and rationale.

\section*{4.2 Victimization}

Victimization is banned by the Law on the Prohibition of Discrimination at Article 9:

“Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment.”

\textsuperscript{35} Judgment of the Appellate Court in Novi Sad Gž1. 1820/11 of October 5, 2011.


However, there were no cases in the analyzed sample that involved allegations of victimization.

4.3 Harassment

Failure to distinguish harassment as a form of discrimination from mobbing as type of harassment at work is probably one of the most common mistakes of courts. Although these two legal standards are regulated by separate laws and different rules apply regarding protection mechanisms, an early practice of plaintiffs (mostly professional lawyers representing people) was to combine discrimination and mobbing in order to specify an alternative or cumulative statement of claim. Courts were not clear on whether they should allow such practice, so in the first judgments some courts established co-existence of discrimination and mobbing in some conduct. After the Law on Prevention of Harassment at Work (2010) was adopted, one would expect that such practice would stop. Nevertheless, there are still numerous examples of courts mixing the two.

Mobbing is defined as “any active or passive behavior toward an employee or a group of employees of an employer that is repeated, which is aimed at or represents a violation of dignity, reputation, personal and professional integrity, health and status of an employee, which also causes fear or creates a hostile, humiliating or offensive environment, deteriorates conditions of work or leads an employee to isolate himself or to terminate the employment contract or other contract on its own initiative.” 38 Harrasment is defined in Labor Law as “any unbecoming conduct on the basis of any reason specified in Article 18 of the present Law (which regulates grounds for discrimination, author’s note), aiming at or amounting to the violation of dignity of person seeking employment, as well as of an employed person, and which causes fear or creates a hostile, degrading or offensive environment.” Labour Law defines harassment and sexual harassment solely as types of discrimination. The Law on Prevention of Harassment at Work uses Serbian term “zlostavljanje” which could be translated as “maltreatment”, “abuse”, “molestation”, even “torture” by some opinions, and clearly is not appropriate for tagging described behavior. Practitioners were aware of this in early stages of the implementation of the Law on Prevention of Harassment at Work, so it became common to use term “mobbing” in practice, even in the courts’ practice. “Harassment”, is not adequate term for mobbing since it is has been regulated as a form of discrimination according to the Labor Law and the Law on the Prohibition of Discrimination. Harassment is also defined as one potential form of “mobbing” in the Law on Prevention of Harassment at Work, which leads to terminological confusion. Although mobbing and discrimination have different legal definitions under Serbian law, judges do not understand difference between the two and especially do not understand when does particular conduct present harassment as a form of discrimination and when it could be classified as mobbing.

There are examples where courts do not distinguish mobbing and discrimination, regardless of different legal grounds and their different nature as acts. In some judgments, courts established the simultaneous

38 Article 6 Paragraph 1 of the Law on Prevention of Harassment at Work.
existence of mobbing and discrimination. Unfortunately, even the Supreme Court of Cassation found in (at least) one case that mobbing and discrimination could exist at the same time. It is unclear how is that possible, from the explanation given by the Court which focuses only on committed acts of mobbing and than concludes that the case is about simultaneous mobbing and discrimination, although there were no personal characteristics or any other element that would point out to discrimination. However, it seems that in this verdict discrimination has been treated as side effect of mobbing. However, it is unclear whether there is an identified personal characteristic of the plaintiff. Such a lack of judgment and knowledge at the highest level of judiciary is of concern.

In two analyzed cases signed by the same judge from the Appellate Court in Novi Sad, mobbing and harassment appear to be elided as legal acts. The first case concerned a clear situation of mobbing since the plaintiff was relieved of her duties without explanation or written decision of the employer, and was not given any working space or work tasks (so-called “empty table mobbing”). The Court ruled that the specific conduct was both discrimination and mobbing, although the judge cited only Law on the Prohibition of Discrimination and there was no personal characteristic identified. The other case concerned the mobbing of an employee who worked as a news editor but did not have the support either from the Management Board or other employees. She was harassed and humiliated and claimed that this was on the grounds of nationality. However, there were no facts that could link nationality with work related incidents and no protected personal characteristic was mentioned in Court’s decision. The same judge established both discrimination and mobbing and cited both Law on the Prohibition of Discrimination and Law on Prevention of Harassment at Work. It was however clear that there was no knowledge on differentiation between discrimination and mobbing – in judge’s decision they had been treated and explained as the same thing, both from legal and sociological point of view.

There were cases where court simply ignored plaintiffs’ claims to establish both discriminatory conduct and mobbing, correctly choosing just one of them. In one case, plaintiff claimed he was a victim of mobbing but stated personal characteristic (political affiliation) as motive for such behavior. The High Court in Pančevo rejected that claim but did not find appropriate to point out that such conduct could only lead to potential discrimination, not mobbing. On the contrary, it used the Law on Prevention of Harassment at Work as the relevant one for the reasoning of its verdict.

The Appellate Court in Kragujevac stated in its judgment that “mobbing differs from

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39 For example: Judgment of the Appellate Court in Novi Sad Gž1. 484/11; Judgment of the Appellate Court in Novi Sad Gž1. 2411/14; Judgment of the Appellate Court in Niš 18Gž1. 403/13; Judgment of the Appellate Court in Niš 18Gž1. 2990/13.
40 Judgment of the Supreme Court of Cassation Rev2 687/12 of December 27, 2012.
41 Judgment of the Appellate Court in Novi Sad Gž1. 361/12.
42 On the term “nationality” as a surrogate for “ethnicity or perceived race”, please see footnotes 29 and 67.
43 Judgment of the Appellate Court in Novi Sad Gž1. 437/14.
45 Judgment of the High Court in Pančevo 1-P1 17/14 of June 27, 2014.
discrimination, although sometimes it could encompass indirect discrimination, if the conduct had been undertaken with the purpose of humiliation or unjustified unequal treatment based on some personal characteristic." The Court thus created an unknown legal mixture of mobbing and discrimination, revealing clear lack of knowledge on both legal standards.

The Appellate Court in Novi Sad in one of its judgments explained the difference between mobbing and discrimination, correctly concluding that the existence of a personal characteristic was the difference that defines them, but incorrectly stating that the fact that both mobbing and discrimination could be committed in similar manner meant that mobbing could be considered as a type of discrimination in some cases.

In some cases, however, courts did have the need to point out the obvious – there is no discrimination without the identification of a protected personal characteristic of the plaintiff as the ground for the discrimination, or by simply stating that mobbing and discrimination are “two different legal categories”. In one case, the Appellate Court in Niš revoked the first instance verdict because the High Court in Niš established existence of discrimination but did not establish personal characteristic of the plaintiff.

4.4 Hate speech

Hate speech has been noted as a type of discrimination in Article 11 of the Law on the Prohibition of Discrimination:

“It is forbidden to express ideas, information and opinions inciting discrimination, hatred or violence against an individual or a group of persons on account of his/her or their personal characteristics, in public organs and other publications, in gatherings and places accessible to the public, by writing out and displaying messages or symbols, and in other ways.”

Hate speech was at issue in only one of analyzed cases. The Appellate Court in Belgrade rightly and eloquently concluded that: “Special obligations of politicians, and therefore the respondent, are to promote the values of a democratic society, such as pluralism, tolerance and the right to be different. (...) Providing protection to the prosecutor does not constitute censorship, nor constitute a restriction of freedom of speech of the respondent, or the right to his opinion and expression of negative comments, but represents a ban on speech that spreads the ideas that incite discrimination, which may have adverse effects on democratic processes in the society and the development of society as a whole.”

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48 For example: Judgment of the High Court in Smederevo Pž1/14 of August 29, 2014; Judgment of the Appellate Court in Novi Sad Gž1. 245/11; Judgment of the Appellate Court in Novi Sad Gž1. 726/12; Judgment of the Appellate Court in Novi Sad Gž1. 1614/12.
49 Judgment of the Appellate Court in Niš 8Gž1. 342/12 of May 16, 2012.
50 Judgment of the Appellate Court in Niš Gž1. 3045/13.
4.5 Instruction to discriminate

Instruction to discriminate has not been regulated as one of forms of discrimination in the Law on the Prohibition of Discrimination. “Instruction” requires generally a hierarchical relationship and is not the same as incitement. This will happen when the employer (or hierarchically higher positioned employee) issues (oral or written) order/rule to lower employees to conduct in discriminatory manner. In these cases both persons will be held liable for discriminatory practice that occurs as a consequence of such order/rule. Although it is a part of EU Directives, instruction to discriminate has not yet found its place in Serbian antidiscrimination law.

4.6 Denial of reasonable accommodation

Denial of reasonable accommodation does not explicitly constitute an act of discrimination under Serbian law, as explained in the text above. However, there are cases where citizens tried to pursue their rights based on general ban on discrimination and prohibition of certain forms of discrimination.

4.7 Denial of accessibility measures

According to the Law on the Prohibition of Discrimination Against Persons with Disabilities, discrimination on ground of disability is prohibited in terms of availability of services and access to facilities in public use and public areas (facilities in the fields of education, health, social protection, culture, sport, tourism or facilities used for environmental protection, protection against natural disasters, and similar; public parks, green areas, squares, streets, pedestrian crossings and other public roads, and the like).

However, the Supreme Court of Cassation found that City of Novi Sad did not

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52 Incitement has been recognized as one of severe forms of discrimination (Article 13 Paragraph 1 Point 1 of the Law on the Prohibition of Discrimination).


discriminate against the plaintiff (as well as against other persons with disabilities) by not enabling access to all public spaces and buildings to person with disabilities, as proscribed in Article 17 Paragraph 2 of the Law on the Prohibition of Discrimination and Article 13 of the Law on the Prohibition of Discrimination against Persons with Disabilities. The Court stated that the fact that there are no satisfying ways of transport for persons with disabilities in Novi Sad was not discriminatory, because removing architectural obstacles and providing transport and free movement of persons with disabilities “are lengthy processes conditioned by the financial potentials of the community”. Such standing of the Court significantly relativizes norms on the removal of architectural barriers and represents legalization of (unlawful) practices of the state that does not provide equal access to public buildings under the pretext that there are no sufficient funds for implementing such measures. This is why this right has been nothing more than declaration for persons with disabilities in Serbia.

4.8 Genuine and determining occupational requirement

Genuine and determining occupational requirement is regulated by Article 16 Paragraph 3 of the Law on the Prohibition of Discrimination:

“Different treatment, exclusion or giving priority on account of the specific character of a job, for which an individual’s personal characteristic constitutes a genuine and decisive precondition for performing the said job, if the objective to be achieved is justified, shall not be considered to constitute discrimination, nor shall undertaking protective measures towards certain categories of persons referred to in paragraph 2 of this Article (women, pregnant women, women who have recently given birth, parents, underage persons, persons with disabilities and the like) be considered to constitute discrimination.”

There were no cases in analyzed sample that could be referred to usage and/or interpretation of this standard.

As stated in the text above, in one case the judge considered food preparing jobs as typically female – this could be stated only as clear example of wrongful application of this standard based on traditional prejudice and stereotypes.

4.9 Shift/share of burden of proof

Article 45 Paragraph 2 of the Law on the Prohibition of Discrimination introduced legal standard of shifting the burden of proof in discrimination litigation:

“If the plaintiff proves the likelihood of the defendant’s having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant.”


57 See part 3.1, also: Judgment of First Basic Court in Belgrade 63.P.16956-12 of March 7, 2013.
However, courts do not apply rules on shifting the burden of proof in discrimination cases and do not refer to these rules when delivering their decisions. Out of 87 analyzed courts’ decisions, only six of them referred to the evidence process and explained in details shifting the burden of proof by proving the likelihood of unlawful conduct by defendant. In most of these cases courts state that plaintiff did, or did not, proof the likelihood of discrimination, or that plaintiff did not support his/her claims by any evidence whatsoever, without going into further details on how and why shift has/not been done.

In one second instance judgment, the Appellate Court in Novi Sad revoked first instance judgment of the High Court, based on the fact that evidence procedure had not been conducted as required by law (there was no explanation on evidence presented and shifting the burden of proof).

In most other cases, it is evident that second instance courts do not pay attention to evidence procedure. It is also clear that judges are not aware of this rule, or that they ignore it, with just a couple of exceptions. Not one judgment out of analyzed sample had clear and detailed explanation of evidence procedure, shifting the burden of proof and evidence evaluation. Most of them did not refer to evidence at all, just generally stating that court has decided “based on all presented evidence”. In one judgment that certainly presents example of good practice, Appellate Court in Novi Sad states that plaintiff proved the likelihood of defendant’s discriminatory conduct just by pointing out certain facts in the lawsuit, while defendant did not present any evidence that would prove that his behavior was lawful.

In one case before the Appellate Court in Novi Sad judges clearly did not understand how the procedure was done, tried to make their own mix of rules of the Law on Litigation and Law on the Prohibition of Discrimination, not knowing which rules rule took precedence and prevail, which lead them to building the unusable theoretical construction. Judges explicitly state that “plaintiff did not prove discrimination in accordance to the Article 8 of the Law on Litigation”. Judges specifically refer to Law on Litigation, with explanation that it prevails over the rule of shifting the burden of proof from the Law on the Prohibition of Discrimination: “Article 45 Paragraph 2 of the Law on the Prohibition of Discrimination does not relieve the plaintiff of the duty to present all facts and provide evidence in accordance with the Article 7 of the Law on Litigation”... However, when it comes to definition of discrimination and legality of the claims of the plaintiff, Court uses both material and procedural norms from Articles 6 and 43 of the Law on the Prohibition of Discrimination. Finally, when it decides upon the rights of the plaintiff, it applies definitions of discrimination from the Article 18 of the Labor Law. There is no explanation how did the judges conclude that in one point the Law on Litigation derogates the Law on the Prohibition of Discrimination, and in another point the situation is completely reversed – rules of the Law on the Prohibition of Discrimination


60 Judgment of the Appellate Court in Novi Sad Gž1. 813/12.
apply regardless from the Law on Litigation.

The Supreme Court of Cassation does not appear to pay attention to the fact that plaintiff does not need to prove discrimination, but only to prove the likelihood of discriminatory conduct. For example, in one of its judgments Supreme Court of Cassation clearly states that plaintiff “did not prove” that admission procedure to work has been discriminatory on the basis of nationality.61

4.10 Right to an effective remedy

Regarding mechanisms of protection, plaintiff has several options. Article 43 of the Law on the Prohibition of Discrimination stipulates:

Through a lawsuit referred to in Article 41 paragraph 1 of this Law, the plaintiff may demand:

1. imposing a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity;
2. that the court should establish that the defendant has treated the plaintiff or another party in a discriminatory manner;
3. taking steps to redress the consequences of discriminatory treatment;
4. compensation for material and non-material damage;
5. that the decision passed on any of the lawsuits referred to in items 1-4 of this Article be published.

Also, Article 44 establishes possibility of court establishing temporary measures:

The plaintiff may demand, when initiating a lawsuit, in the course of the proceedings and after the termination of the proceedings, until the court decision is enforced, that the court should pass a temporary measure in order to prevent discriminatory treatment, with a view to eliminating the danger of violence or some major irreparable damage.

The proposal for passing a temporary measure must prove the likelihood of the necessity of doing so in order to eliminate the danger of violence or irreparable damage.

The court shall be obligated to decide on a proposal for passing a temporary measure forthwith, or within three days of the day of receiving the proposal at the very latest.

Based on the data from analyzed cases, temporary measures are not common in litigation in Serbia, since plaintiffs do not appear keen to request them.

On the other hand, in cases where courts established discrimination, courts used the possibility to take steps to redress the consequences of discriminatory treatment as complementary measures on imposing a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity and/or rewarding compensation for material and non-material damages. There are only few examples of

such courts’ decisions:
In case 21Gž 865/13, the Appellate Court in Niš obliged the defendant to renew the hunting club membership to members who were excluded from membership by applying discriminatory provisions and provide them with all the rights that belong to other members of the hunting club. Previously, hunting club excluded from membership all persons who did not have a place of residence on the territory of the municipality where the club was located.

In case I 15 P1.345/10, the Basic Court in Pančevo revoked decision on dismissal which defendant-employer adopted against plaintiff-employee, because it was based on discriminatory reasons.

It has to be noted that apology as a type of remedy is not being used. However, in a small number of cases, defendants themselves expressed regret and apologized to plaintiffs during the procedure, before courts adopted any kind of decision. In one case, Court obliged respondent to publish the judgment in daily newspaper “Politika”, at its own cost.

Litigation regarding discrimination has

62 These measures are not taken in all cases where courts find existence of discrimination, because in some cases the very nature of the case did not allow applying such measures (for instance, such measures were not possible in the case of denial of services of public transportation to handicapped person or the case of discrimination in the form of harassment by vulgar remarks based on sexual orientation). Furthermore, in analyzed sample of judgments of Appellate Courts, there were only few with positive outcome for the plaintiff, which greatly relativize this conclusion.

63 Judgment of the Appellate Court in Novi Sad Gž. 4656/11 of January 18, 2012. In several other judgments, courts along with deciding that there had been discriminatory conduct obliged respondents to “publicly publish the judgment”, without any precise instructions how this obligation will be done.

64 Article 41 Paragraph 4 of the Law on the Prohibition of Discrimination.

65 Law on Civil Procedure, Article 426 Point 12), Article 429 and Article 433a.
law, and that some of its judges have issued problematic judgments in discrimination cases.

4.11 Statistics and other modes of documenting a claim

Statistics as a way of proving the existence of discrimination has not been stipulated by the law. One direct consequence of this is that they have not been used in practice. In several lawsuits, plaintiffs had general and vague insinuations that they were not treated “as everybody else”. These were, as a rule, never backed up by any evidence or statistical data. Although statistics are often an effective tool to document discrimination claims, especially to prove discriminatory policies or indirect discrimination, it seems that without an explicit legal rule this kind of evidence may never begin its life in courts’ practices in Serbia.

Situation testing is on the other hand a legitimate way of gathering evidence on discriminatory practices. However, it is subjected to certain formalities. According to the Law on the Prohibition of Discrimination:

“A person who had deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case may initiate a lawsuit referred to in Article 43 paragraphs 1, 2, 3 and 5. of this Law.

“The person referred to in paragraph 3 of this Article shall be obliged to inform the Commissioner of what he/she intends to do, unless the circumstances do not allow it, and to inform the Commissioner in writing of the action undertaken.”

In one known case of situation testing, the court failed to realize that the existence of discrimination was not dependent on the manner in which the victims exposed themselves to potentially discriminatory practices. The employer announced vacancies, in which he expressly forbade men to apply. Two testers, male and female, applied for these jobs. The female tester was admitted to work, while the male tester was rejected with the explanation that employer was not hiring males. The Commissioner for Protection of Equality started strategic litigation against employer, because of the act of direct discrimination. The First Basic Court in Belgrade rejected the claim of discrimination, stating (among other things) that the testers did not inform the Commissioner for Protection of Equality of their intentions on time, and that consequently their experience could not be used as evidence in a litigation procedure. The Court however failed to see that discrimination existed in any case, because it had been done by the act of publicly announcing job vacancies for women only, and that experience of testers is discrimination no matter if they obliged legal procedure for testing, or not.

The Decision of Basic Court was overturned by an Appellate Court and the Supreme Court of Cassation affirmed decision of the Appellate Court. It is however indicative that situation testing is not being used frequently – only three of 87 analyzed cases involved testers.

66 Judgment of the First Basic Court in Belgrade 63.P. 16956/12.
4.12 Actio popularis

Courts in Serbia have had problems when faced with actio popularis and when asked to recognize the right to sue against discriminatory practices in general.

In the high-profile case of the Commissioner for Protection of Equality versus McDonald’s fast food chain franchise owner, the court was puzzled whether the Commissioner had the right to sue. The victims of the discriminatory behavior of one security guard in the restaurant were two Roma children. However, since denial of services has been common against Roma in Serbia, including in restaurants and other catering facilities, swimming pools and public rest/play areas, and other services and public facilities, the Commissioner decided to start strategic litigation and file actio popularis encompassing the entire Romani community affected by general practice of denial of service as a result of being Roma.67

Acting on the lawsuit of the Commissioner,

67 The ground on which the discrimination claim was raised was “nationality”, a term not synonymous with its international law meaning as the external face of citizenship. The term “nationality” as a stand-in for “ethnicity” has its genealogy in minority theory as applied throughout countries of the Communist and Socialist blocks pre-1989, in particular as a mode of endeavouring to realize rights of self-determination within Communist Federations. Subsequent to the Commissioner’s petition in the McDonald’s case, the European Court of Justice ruled in 2015 on a case concerning Roma and discrimination in the placement of electrical metres, ruling that the matter fell within the ambit of Directive 2000/43 concerning discrimination based on ethnicity or perceived race. This ruling follows extensive United Nations Treaty Body approaches, as well as the settled case law of the European Court of Human Rights, to the effect that discrimination against Roma is the internationally proscribed phenomenon of racial discrimination, banned inter alia under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

the First Basic Court in Belgrade claimed that Commissioner did not have the right to sue, since it did not have permission of the legal representatives of the potential victims of discriminatory conduct – the Romani children concerned - and thus the court dismissed the suit.68 The Court did not find the fact that Commissioner filed lawsuit before the Roma community as a whole, not as representative of specific Roma children, to be relevant. The Commissioner filed complaint but the second instance High Court in Smederevo rejected it, based on the same reasoning.69 Finally, the Supreme Court of Cassation, acting on revision, decided to repeal first and second instance decisions and to return the case to First Basic Court for trial.70 The Supreme Court stated that lawsuit was filed in order to protect a group of people, not specific, named people, so that written authorization was not needed.


5. OTHER ISSUES ARISING IN THE COURSE OF EFFORTS TO SEEK APPLICATION OF ANTI-DISCRIMINATION LAW IN THE DOMESTIC SYSTEM

5.1 Problem with the right to sue and the ability to sue the employer

Besides the analyzed problem with actio popularis, there was also misconception of the ability to sue the employer. This became problematic only because courts mixed application of regulation on mobbing and discrimination, as explained in the text above. This led to the unique position of the Appellate Court in Niš that in cases of “simultaneous mobbing and discrimination”, only employer can be sued and the victim cannot sue direct mobber/discriminator.\(^{71}\) Such a practice is not only wrong because of the unsustainable perception of existence of mobbing and discrimination at the same time, but also of the fact that court applies a rule from the Article 29 Paragraph 1 of the Law on Prevention of Harassment at Work on this “mixed situation”. This rule specifies that only employer can be sued for mobbing. However, it has been interpreted very widely in mobbing cases and in many cases courts allowed plaintiffs to sue both employer and mobber. It has, however, nothing to do with discrimination and protection from discrimination at work, so it is unclear what was the rationale of the Court to adopt such a position.

Finally, in one case,\(^{72}\) the defendant pointed out that he could not be sued for employment discrimination, since he did not have the legal status of the employer. The plaintiff had applied for the job of raspberry picker but was denied because of her nationality.\(^{73}\) The High Court in Belgrade correctly concluded that the fact that there was no contract between the candidate and the employer had no influence on the case, since Article 2, Paragraph 1, Point 2 of the Law on the Prohibition of Discrimination clearly stipulated that the Law applies to any individual present on the territory of the Republic of Serbia, regardless of nationality, as well as any legal entity registered or operating on the territory of the Republic of Serbia. Therefore, the responsibility for discriminatory conduct will be establish in all cases it existed, regardless of legal or other relations between the victim and the perpetrator.


\(^{72}\) Judgment of the High Court in Belgrade 1P. 519/14 of October 22, 2015.

\(^{73}\) On the term “nationality” as a surrogate for “ethnicity or perceived race”, please see footnotes 29 and 67.
5.2 Competence issues

In 2014, a new Law on Courts came into force and competence for discrimination cases was transferred from Basic to High Courts. The relevant provision is Article 23 paragraph 1 point 7: “The High Court is competent for: ..... cases of discrimination and harassment at work” ....

Although the words “at work” are specifically connected to the word “mobbing”, there were interpretations of this norm that expression “at work” implies both to cases of discrimination and mobbing. Thus, the High Court in Belgrade, acting in first instance in discrimination case regarding denial of service (the security guard did not permit Romani children accompanied by an adult to enter the fast food restaurant)74, dismissed the lawsuit with rationale that it is not competent for cases other than discrimination at work. However, the Appellate Court in Belgrade, acting on the complaint, decided to revoke decision of the High Court but only on the procedural grounds75, without explicit statement that interpretation of the Article 23 by High Court was wrong. Such decision of the Appellate court does not give certainty and the question of jurisdiction could be potentially reaffirmed in future, although this is unlikely since the interpretation of the High Court was clearly artificial and not correspondent to the nature and spirit of the legislation, neither consistent with its purpose, nor can it be rationally deduced from existing text of the norm.

Another question that arose in relation to the judicial protection from discrimination and courts’ jurisdiction is one on simultaneous protection of person in proceedings on discrimination and other proceedings before a court or state authority. Courts decided in several cases that the protection in the administrative procedure and administrative dispute is possible in parallel with court protection on discrimination on the same matter, since the jurisdiction of courts in these proceedings clearly separated76, that proceedings on discrimination do not exclude protection of the Constitutional Court over other violations of constitutionally guaranteed rights that are based on same circumstances as acts or omissions involving discrimination.77

Courts interpret their competencies in proceedings on discrimination narrowly. It is a correct finding of some courts that the court of general jurisdiction cannot assess the legality of general acts of employers, which is competence of the Constitutional Court, but only if a right of an employee has been injured with their adoption or implementation.78 However, this cannot be used as a “standard of irresponsibility” of employers’ actions and conduct, as the Appellate Court in Niš suggests in its incorrect interpretation of the law in a case where plaintiff was the employee who lost his job in local self-government. In that case, the plaintiff claimed that other employees who were in the same position as he did not suffer same consequences and therefore he was victim of discrimination. The

74 See below: 5.3. Commissioner for Protection of Equality vs. N.F.R.
75 Decision of the Appellate Court in Belgrade R.19/15 of February 25, 2015.
Court stated: “The adoption of the general act on systematization of jobs is at the discretion of the employer, and it is necessary that the first instance court assesses whether one could even consider such a general act and dismissal decision as discriminatory behavior.” Without going into the question of the justification of the claim in the specific case, it must be noted that such simplification is not in accordance with the law and the nature of norms for protection against discrimination. The practice of courts on this issue is inconsistent, and the Appellate Court in Kragujevac gave the best possible argument against this standing in one of its judgments, stating that employer is bound by the law and the Constitution at all times, regardless of its legal authority to decide on the rights, duties and responsibilities of its employees.

5.3 “Complex litigation”

There is no rule on the relation of antidiscrimination law to other legal rules; therefore, judges are sometimes forced to take actions based on mixed rules of the Law on the Prohibition of Discrimination and other relevant laws (giving advantage to one or the other), which leads to legal uncertainties and peculiar/unjust outcomes.

In early years of practice, courts applied deadline of 90 days for the submission of a lawsuit under the Labor Law when the case was about labor discrimination. Since there was no deadline in the Law on the Prohibition of Discrimination, such practice led to problematic rejections of lawsuits. In later years such practice stopped and there had not been a single judgment based on such standings in the analyzed sample. However, in one decision of the Supreme Court of Cassation, the Court rejected the claim of defendant that the lawsuit had been submitted after deadline proscribed by the Labor Law, but only for formal reasons; the lawsuit was filed by the Commissioner for Equality, not the employee. This raises concerns as to how the Supreme Court would proceed in similar cases when an employee files a lawsuit. It is quite possible that it would reject claims connected to Labor Law – i.e. it would not annul the unlawful dismissal and order a return to work - and decide only whether there was discriminatory conduct of the employer.

Judges in some discrimination cases apply other deadlines from general legal regimes as well, such as ones for statute of limitations for damage compensation for discriminatory conduct from the Law on Obligations, although there is no obsolescence of the act of discrimination by the Law on the Prohibition of Discrimination. This means that a person can sue someone for discriminatory act without limitations but he/she cannot claim damages after certain period of time.

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81 This deadline is nowadays set to 60 days, since the Labor Law was amended in 2014.
83 This standing has been confirmed as official interpretation by Appellate Courts. Cited by: N. Šolić, K. Golubović, op. cit., p. 52.
5.4 Inconsistencies in courts’ practices

There are noted inconsistencies in application of antidiscrimination law, even within same court.

In the case of S.A. versus T.M., the Basic Court in Kikinda was asked to review the same factual situation as in the case of T.J. versus T.M. before the same Court (both employees were fired simultaneously on the ground of pregnancy). However, two completely different outcomes were reached in these two cases. In the case of S.A., the Court found that there was no discrimination, while in the case of T.J. versus T.M., the Court found that actions of the employer T.M. were discriminatory.\textsuperscript{84} Even more disturbing was the later outcome of these cases before the Supreme Court of Cassation – while employee T.J. won the case, employee S.A. found herself in the opposite. She lost her case before the same Court, despite a different ruling by the same court in a decision on manifestly identical circumstances just few weeks previously.\textsuperscript{85}

One of the most notable difficulties of Serbian judiciary over last decade was inconsistent practice. So examples such as these are not surprising. However, it seems that antidiscrimination law is fertile ground for some very imaginative interpretations – as it was shown in the text above, regarding the notion of discrimination. Practices differ in many segments of the procedure. For example, one case can have a completely different outcome if the standard of shifting the burden of proof was properly applied. If not, it could be mission impossible for the plaintiff to prove existence of discrimination. All this sends the strong message that both education of judges, and measures towards unification of the application of antidiscrimination norms and standards, are needed as soon as possible.

5.5 Length of procedures

Although cases of discrimination are considered particularly urgent by the Law on the Prohibition of Discrimination\textsuperscript{86}, their flow and decision-making processes do not differ from the general rules of litigation. However, it could be said that courts are more efficient in discrimination cases comparing to other procedures. In analyzed sample, two following patterns were determined:

In discrimination cases, the period from delivering first instance decision up to delivering second instance decision was an average of 6.5 months.\textsuperscript{87} Most cases were decided in the timeframe of 2-9 months (79.2% of cases). There were significant deviations (15-20 months) in 8.3% of cases and slight deviations (9-15 months) in 12.5% of cases.

Although it is proscribed by the Law on the Prohibition of Discrimination, temporary

\textsuperscript{84} Judgment of Basic Court in Kikinda 6P1.84/12 of February 4, 2013 and Judgment of Basic Court in Kikinda 4P1.83/2012 of July 27, 2012.


\textsuperscript{86} Article 41 Paragraph 3: “The proceedings shall be conducted urgently.”

\textsuperscript{87} Statistics are based on 72 judgments of appellate courts. Sample for first instance courts (basic and high courts) was too small for statistical analysis, but it can be concluded based on partial data that in majority of processes court adopt decisions within the timeframe of 12-15 months, which is faster than average in labor disputes and other types of litigation.
measures are not common practice in discrimination cases. That is probably mostly because plaintiffs do not use the chance to ask court for them.

In some cases however, courts are solely responsible for procedures lasting too long. In one case, Commissioner versus I.C., the High Court in Belgrade was determined to hear all the witnesses that the defendant proposed, even though he had previously admitted that there had been discriminatory conduct committed by him, and had apologized for it. Furthermore, most of these witnesses were not eyewitnesses of discriminatory conduct, but so-called “character witnesses” who confirmed that defendant was not a person prone to discrimination and violation of law in general. Since the case was about direct discrimination against Roma, the testimony of these “character witnesses” was not needed at all, because the existence of direct discrimination did not depend in the given case on the guilt of the defendant. Furthermore, it could be argued that the practice of summoning “character witnesses” for one ethnic group was itself discriminatory.

5.6 Tracking of discrimination cases and their statistics

Discrimination cases do not have particular judicial tag, so it is extremely difficult to track them. All litigation cases regarding discrimination are tagged either with the letter “P” (general litigation) or “P1” (labor disputes). It is not possible to determine whether some case is about discrimination only by looking at their tags and/or reference numbers. Cases with tag P could be any kind of general litigation; cases with tag P1 could be any type of labor dispute, including discrimination and mobbing, as well as other matters. There is (unofficial) separation of cases regarding mobbing and labor discrimination as subsections within P1 category. However, these are not official, not dependable and not uniformly applied in all courts. In many cases, mobbing is marked as discrimination, or there are cases of simultaneous discrimination and mobbing although that is not possible by the law.

These circumstances make tracking of discrimination cases impossible. Tracking is however important for several reasons: determination of the existence, qualitative and quantitative elements of discrimination in society; the quality of implementation of legal antidiscrimination mechanisms, their efficiency and expediency; the education of the judiciary; and the education of the public regarding implementation of antidiscriminatory norms. This is why court rules should be amended in order to enable clear tracking and statistical analysis.

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88 Judgment of the High Court in Belgrade 1P. 519/14 of October 22, 2015.

89 See for further details: M. Reljanović et alia, Kvadratura antidiskriminacijskog trougla u BiH: zakonski okvir, politike i prakse 2012-2016, Sarajevo, 2016, p. 80-82.
6. SOME EXAMPLES OF COURT PRACTICE

6.1 Commissioner for Protection of Equality vs. MMM Pizza Group - employment discrimination based on gender

This is the case of employment discrimination based on gender. As stated before, it is of particular interest for the analysis because of the poor quality of first instance judgment and excellent quality of Appellate Court deciding on appeal of the plaintiff, the Commissioner for Protection of Equality.

The case involved situation testing. The testers were students of the Union Law Faculty in Belgrade. They saw advertising for job openings in fast food restaurants of the defendant, especially restricted to women, and decided to do field research on gender discrimination based on situation testing. One male and one female student applied for the job openings. The male student was rejected and the female student accepted. The explanation for the rejection of the male student openly acknowledged the discriminatory character of the proceedings. The employer explained that it was business policy that no males were to be employed and that they did not trust males to sell food, all based on previous bad experience. Both students submitted their findings to the Commissioner, and she decided to file a lawsuit for direct discrimination and to start litigation.

The first instance court, the First Basic Court in Belgrade, decided that there was no discrimination in this case. In her decision, the judge stated that there were two reasons for rejection of the claims: The first was procedural: the testers did not inform the Commissioner on their situation testing before testing has been done, as the Law on the Prohibition of Discrimination stipulates. Therefore, their findings were not relevant for the case. The second was fundamental: the judge concluded that the employment procedure was not discriminatory and that there was no violation of the principle of gender equality, because “there is a far greater number of available jobs for men, which is a well-known fact that does not need to be proven” and that there is no discrimination having in mind “the nature of jobs in question (cooking and serving food, author’s note) and working conditions”.

The Commissioner appealed the decision, stating that both reasons were faulty. Firstly, there was discrimination of testers. Discrimination is an objective fact that exists regardless of procedural rules. Secondly, the discriminatory behavior of the defendant could not be considered “positive action” towards employing more women.

The Appellate Court in Belgrade reversed the First Basic Court judgment and stated several important facts: There is discrimination regardless of the way the evidence of discrimination was collected. The standard of shifting the burden of proof was not implemented, and the defendant did not prove why was gender decisive fact on employment, and why job openings were not suitable for men.

90 Judgment of First Basic Court in Belgrade 63.P.16956-12 of March 7, 2013.
It cannot be said that the conduct of the employer was in accordance with the measures of positive discrimination, as the first instance court argued, since there were clear rules how employers could access the affirmative action programs, but it certainly could not be done arbitrarily and independently, without the involvement of public authorities.

Ruling on a further appeal for revision, the Supreme Court of Cassation confirmed the decision of the Appellate Court.92

6.2 S.A. vs. T.M. - employment discrimination based on gender/marital status/family obligation

S.A. was employed by T.M. over the National Employment Service program, for the period of one year. Although she was well accepted and awarded for her work during that year, the her employer decided not to extend her labor contract after she became pregnant. The employer stated explicitly admitted in written document to the National Employment Service (NES) that “he needs someone to work, not someone who will go to maternity leave”. Two female employees were let go at the same time on the same reasoning. Both of them decided to sue their employer. The case of S.A. is presented below, while case of T.J. vs. T.M. will be referred to where necessary.

The first instance court, the Basic Court in Kikinda, rejected the plaintiff’s claims based on the fact that her employment was finished with the last day of fixed-term labor contract. The court further ruled that the conduct of employer, including reasons why he did not want to extend it, could not be subject to the court’s decision, because employer had discretion rights to find another person to hire regardless of the fact that S.A. was pregnant.93 This happened in 2012, so the plaintiff was not protected by special clause of automatic extension of labor contract for pregnant women, which was introduced into Serbian Labor Law in 2013. The Basic Court does not examine letter of the employer to NES and considers it irrelevant, although employer confirms its content during the litigation procedure. In a very similar or even identical case, T.J. received a first instance judgment with a different outcome and different reasoning.94 Although the first instance court, the Basic Court in Kikinda, did not specifically determine there was discrimination in conduct of the employer, it found that non-extension of the labor contract was contradictory to the contract between employer and NES, and repealed termination of employment decision.

The Appellate Court, acting as the second instance court in the complaint procedure of the S.A. case, confirmed the judgement of the first instance court.95 In its judgment, the Appellate Court practically rewrites reasoning of the Basic Court in Kikinda. Again, the fact that discrimination is not connected to terminated employment but to opportunity to get employment extension, is not a matter of court’s analysis. Letter of employer to NES with confession of discriminatory conduct is not mentioned as relevant proof.

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93 Judgment of Basic Court in Kikinda 6P1.84/12 of February 4, 2013.
95 Judgment of the Appellate Court in Novi Sad Gž1. 1121/13 of September 23, 2013.
The Appellate Court in Novi Sad adopted similar decision regarding the case of second employee, T.J.\textsuperscript{96}

Only a few days after the decision of the Appellate Court, the Misdemeanor Court in Kikinda, proceeding on a misdemeanor warrant submitted by the Commissioner for Protection of Equality, adopted a decision ruling that the employer was guilty of misdemeanor conduct as a result of acts proscribed by the Law on Protection of Discrimination. The judge reasoned that the employer admitted that it did not extend labor contract of S.A. only because of her pregnancy and thus found that the fact the labor contract had expired was not relevant for the question of whether antidiscrimination law had been violated.

Acting on appeal, the Supreme Court of Cassation confirmed the previous judgments of Basic and Appellate courts.\textsuperscript{97} The Supreme Court recapitulated the arguments of the lower courts against recognition of discrimination. The Supreme Court’s judicial council even goes deeper into the analysis and states, among other reasons, that plaintiff has not named other employees to whom the employer’s behavior could be determined as comparative. Without a comparator employee, in the view of the court, the plaintiff does not have the right to claim the employer’s conduct as discriminatory.

However six weeks before this decision, another judicial council of the Supreme Court deciding upon an appeal of the lower court ruling in her case by T.J., adopted a diametrically different decision, reversing the judgment of the Appellate Court and confirming the judgment of the Basic Court in that case.\textsuperscript{98} The reasoning of this judgment is similar to that of the Misdemeanor Court in Kikinda, mentioned above. There was discrimination, it was direct and obvious discrimination, because there was a breach of the right to equal employment opportunities. The fact that the previous labor contract had expired was not relevant. There is no excuse for such behavior of the employer, nor it tried to provide one, so discrimination was established.

S.A. submitted constitutional complaint, stating that her right to fair trial and right to equality (non-discrimination) was violated. The Constitutional Court adopted her constitutional complaint and repealed Supreme Court’s decision.\textsuperscript{99} The case is still open, and S.A. is awaiting a new decision by the Supreme Court.

6.3 Commissioner for Protection of Equality vs. N.F.R. - denial of service to Roma

The core of this case is discrimination against Roma. A woman tried to buy a meal for Romani children in McDonald’s restaurant in Novi Sad. Security stopped her at the entrance to the restaurant and explained that she could come in, but the children could not. She bought them meals and they all ate in the garden outside the restaurant. The woman filed a complaint to the Commissioner for the Protection of Equality

\textsuperscript{96} Judgment of the Appellate Court in Novi Sad Gž1. 1308/13 of July 18, 2013.
\textsuperscript{97} Judgment of the Supreme Court of Cassation Rev2. 1460/2013 of April 10, 2014.
\textsuperscript{98} Judgment of the Supreme Court of Cassation Rev2. 1544/2013 of February 27, 2014.
and the Commissioner started litigation against the franchise owner for denial of services. Since the defendant claimed that Commissioner does not have the right to sue and some other competence issues have arisen, the process is still ongoing before the first instance court (it started in 2012). Meanwhile, the misdemeanour procedure in the case has been finished.

Misdemeanor procedure
The first instance Misdemeanor Court in Novi Sad found that conduct of security guard of the restaurant was discriminatory, since he did not let Romani children into the premises solely because of they were Romani.\(^{100}\) The court found that discrimination in providing public services was established, and noted that it was “gross violation” of antidiscrimination norms.

A second instance court, the Appellate Misdemeanor Court (department in Novi Sad) reversed decision of Misdemeanor Court.\(^{101}\) According to its reasoning, there was no discrimination in conduct of security personnel of the restaurant, because the security guard did not ban access to children because they were Romani, but because he thought they were beggars. The decision of the Appellate Misdemeanor Court was final, so that no discrimination has been determined in misdemeanor proceedings.

Procedure regarding the right to sue
Acting on the lawsuit of the Commissioner against N.F.R., the First Basic Court in Belgrade claimed that Commissioner did not have the right to sue, since it did not have permission of the legal representatives of the potential victims of discrimination -- the Romani children concerned -- and it thus dismissed the lawsuit.\(^{102}\) The court did not find the fact that Commissioner filed lawsuit on behalf of the Romani community as a whole, not as representative of specific Romani children, to be relevant. The Commissioner appealed, but the second instance High Court in Smederevo rejected it, based on the same reasoning.\(^{103}\)

Finally, Supreme Court of Cassation, acting on revision, decided to repeal the first and second instance decisions and to return the case to First Basic Court for trial.\(^{104}\) The Supreme Court stated that the lawsuit was filed in order to protect a group of people, not specific, named people, so that written authorization was not needed.

Competence procedure
In 2014, a new Law on Courts came into force and competence for discrimination cases was transferred from Basic to High courts. Interpretation of the new Law by the High Court in Belgrade, acting in this case as a court of first instance, was that it is not competent to decide in cases of discrimination, except for employment discrimination, so it dismissed the lawsuit. However, the Appellate Court in Belgrade, acting on the complaint, decided to revoke the decision of the High Court but only on procedural grounds\(^{105}\), without explicitly ruling that the interpretation by the High Court of the Article 23 of the Law on Courts was wrong.

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\(^{100}\) Judgment of Misdemeanor Court in Novi Sad PR 4-5069/12 of February 28, 2014.

\(^{101}\) Judgment of Misdemeanor Appellate Court (department in Novi Sad) III-312 GPŽ 1323/14 of April 23, 2014.

\(^{102}\) Decision of the First Basic Court in Belgrade 23P.16041/2012 of October 30, 2012.

\(^{103}\) Decision of the High Court in Smederevo GŽ 480/13 of October 2, 2013.


\(^{105}\) Decision of the Appellate Court in Belgrade R.19/15 of February 25, 2015.
6.4 M.P. vs. National Bank of Serbia - employment discrimination based on health condition/disability

M.P., a person with disability, sued his employer, the National Bank of Serbia, because it did not send him for medical examination as it did for all other employees who were candidates for the same position/job as the plaintiff. The National Bank of Serbia, as the employer, transferred the plaintiff to his new position of “money counter”, which is a job where an employee comes into contact with various chemicals. Therefore, it was mandatory for employer to send employee for medical examination so that it could be determined whether he was eligible for the job in question. He performed these duties for more than three years before the competent health institution carried out an examination and decided to send him to the competent committee to determine percentage of disability. During that period, M.P.’s health significantly worsened. After these events led to his total disability and loss of working capacity, M.P. decided to sue his former employer. Since the events in question took place between 2005 and 2009, M.P. could not invoke the norms of Law on the Prohibition of Discrimination, but only to Labor Law.

A first instance court, the Basic Court in Pančevo, found that there was no discrimination, and that the defendant provided all measures for the protection of the plaintiff that were stipulated by Labor Law. The Appellate Court in Novi Sad, however, found that first instance court did not take into account all the evidence and did not fully determine the facts of the case. One of the important facts that the Appellate Court emphasized and the first instance court was not interested in, was that during the period in which M.P. worked on the job that was harmful to his health, many other employees had undergone regular medical check-ups. Therefore, the Appellate Court reversed the judgment to the extent that the compensation was to be awarded to the employee. It found that there was an unjustified difference in treatment to the employee with disability, compared to other employees.

Ruling on further appeal, the Supreme Court of Cassation found that there was no discrimination. It repealed the second instance judgment and confirmed first instance judgment. The Supreme Court rejected all of the arguments of the Appellate Court, but did not address the fact that M.P. was unable to go to medical examination similar to other employees. Instead, the Supreme Court ruled that the employer had no obligation to transfer M.P. to another job until the competent health authority had determined that he could not perform his tasks without risks for his health. The Supreme Court builds its argumentation on that of the Basic Court and fully confirms it, interpreting facts that second instance court perceived as proof of discrimination as ones that proof that there was no discrimination.

106 Judgment of the Basic Court in Pančevo judgment P1 497/12 of January 28, 2013.
107 Judgment of the Appellate Court in Novi Sad Gž 1252/13 of July 18, 2013.
6.5 Pfajfer vs. Republic of Serbia – employment discrimination

Mr. Aleksandar Pfajfer was a pilot of Yugoslav Air Transport (JAT) and was exposed to discrimination practices on the ground of his German nationality. It is the first case ever according to the Law on the Prohibition of Discrimination. Mr. Pfajfer claimed that he was exposed, over a long period of time, to harassment and ostracism from colleagues in his the working environment, to insults and sabotage of his working performance, which also influenced his professional development and advancing in his career. This case is of concern regarding the length of the procedures. The original lawsuit was filed in 2009. However, case is still ongoing. A lawsuit was filed on June 29, 2009, at the First Basic Court in Belgrade. A first hearing was conducted after almost nine months (on March 10, 2010). It took as long as two and a half years for the first instance court to adopt a decision, which it did on January 5, 2012. However, after 15 months of proceedings before the Appellate Court in Belgrade, the first instance decision was repealed and the case was returned for a new trial, this time before the High Court in Belgrade, since the competence of the courts was changed in 2014. The case was returned on May 13, 2013. A first hearing before this court was set for October 31, 2013. The trial judge thus violated Article 389, Paragraph 1, of the Law on Civil Procedure, which stipulates that first hearing has to be scheduled within 30 days. Meanwhile, the case was assigned to another judge, which further prolonged the procedure. Since 2013, only four hearing have been held.

In 2016, the Appellate Court found that plaintiffs right to a trial within a reasonable time was violated. This was confirmed by the decision of the Supreme Court of Cassation. However, the Appellate Court has no effective instruments to speed up the proceedings. As a result of the Appellate Court decision, the High Court in Belgrade has to finish “as soon as possible”, thus leaving no concrete directives as to how will that be done. Furthermore, it took as long as 15 months for Appellate Court to consider the request of the plaintiff.

Developments in the Pfajfer case could be used as a warning of possible stalling of discrimination cases – after seven years of procedures, plaintiff still awaits first instance decision. Since a three-stage trial is provided for discrimination cases, it will take at least several more years for this case to be finally and legally decided. Meanwhile, Mr. Pfajfer does not exercise his employment rights and his career has been brought to a standstill. JAT as the original employer no longer exists. This case was inherited by its legal successor, Air Serbia. During the procedure so far, Mr. Pfajfer and his legal representatives have presented as many as 137 items of evidence of discrimination, which makes existence of discrimination undisputable but also stultifies evidence procedure proscribed by the Law on the Prohibition of Discrimination. All these facts combined point to the absurdity of situation that is inevitable in cases of significant prolonging of decision on discrimination conduct. If a court cannot act on these matters as urgent, any subsequent decision will, even when be fair

109 On the term “nationality” as a surrogate for “ethnicity or perceived race”, please see footnotes 29 and 67.

110 Decision of the Appellate Court in Belgrade R 308/15 of July 8, 2016.

111 Decision of the Supreme Court of Cassation Rž r 193/2016 of September 21, 2016.

112 Request was filed on April 1, 2015.
and consistent with the facts of the case, not be enough to eliminate the consequences of discrimination.

7. CONCLUSIONS AND RECOMMENDATIONS

The normative framework is generally conducive to justice in discrimination cases. Some changes are necessary, especially in domain of the notion of indirect discrimination. Further harmonization with EU law should be done in next few years. The primary conclusion of this study however is that, as yet, the judicial system – including both judges as well as actors in the wider judicial field such as advocates – do not yet fully grasp and are not yet making effective use of anti-discrimination law in Serbia. As such, as of now, anti-discrimination law as a system for securing legally guaranteed rights in the field of equality, is not yet fully viable in Serbia.

One key problem is a lack of norms which could provide clear determination of the position of antidiscrimination laws to other laws. It is often unclear which law constitutes general legal regime, and which law is lex generalis to it.

Also, judges appear generally unfamiliar with the concept of discrimination and legal notion of discrimination. They do not understand the goal of antidiscrimination law. Core legal definitions – including the fundamental items of direct and indirect discrimination – are not grasped accurately and correctly by a wide swath of actors in the system including, crucially, judges. They evidently lack knowledge in distinction of discrimination from mobbing, harassment and other similar legal and social categories. They are not aware of the concept of protected personal characteristics as a crucial element for the identification or existence of discrimination. Judges in most cases avoid direct application of international instruments, although they are integral part of the Serbian legal system.

People in Serbia are not often familiar with notion of discrimination, as well. The same goes for lawyers. Cases from major social domains (education, housing, healthcare, etc.) have for the most part not yet been brought to court, despite regular reports of discrimination in these areas. Litigants in discrimination cases appear to come predominantly from social categories less likely to experience extreme exclusion based on discrimination. Persons from groups regularly named as experiencing extreme forms of exclusion, such as Roma, persons with mental or intellectual disabilities, and migrants, to name only three, are very underrepresented among persons endeavoring to take legal action to enforce the rights at issue in anti-discrimination law.

One of the most striking impressions is the domination of labor disputes when it comes to the areas of discrimination that are resolved before the courts. It seems that courts’ practice so far has only confirmed that discrimination cases are for the being only a kind of technical subset for labor disputes.

Lack of knowledge and practice in antidiscrimination law, brought up several serious issues in early stages of its implementation. The right to sue, competence
of the court and some procedural issues (such as the role of testers) have been noted.

One considers shifting the burden of proof, which is clearly not applied in the vast majority of cases, while the other is inconsistent courts’ practice – sometimes, as shown above, even within the same courts. These are serious issues that will not be resolved easily. This implies that systematic and long-term action plan must be drafted in order to give judges deeper training level on antidiscrimination law.

Simultaneously, there is great need for the establishment of a system for tracking courts’ practice in antidiscrimination cases, as well as for resolving issues appearing in cases. One precondition for such a case law database is that courts label and track discrimination cases as a special type of litigation (for example, by giving them mark “P-D”). Without such a system, judges will continue to fail to clearly divide discrimination from other unlawful conduct and will not have the opportunity to get familiar to good practices. Joint standings of appellate courts are not a good solution for this problem. Firstly, because such joint standing is sometimes established on bad practices and only confirm irrational decisions of judges on some issues. Secondly, there are four appellate courts in Serbia and there is no guarantee that joint standings of one of them will correspond to joint standings of another – thus, joint standings of these courts have to be reaffirmed by the Supreme Court of Cassation, with the help of out-of-judiciary experts in this field.

It is notable that the length of procedures is fairly satisfying. However, education of judges will most certainly lead to their even more efficient work. Three-level judicial process is a good solution and revision as extraordinary legal remedy must remain an option, especially because this would give a greater role to the Supreme Court of Cassation in the implementation of antidiscrimination law.

If anti-discrimination law is to live up to its promise as the legal form in which exclusion is challenged, then there is still a long way ahead in its understanding and application, so that whole classes of victims (Roma, persons with psycho-social disorders or intellectual disabilities, people in institutions) could to benefit at all from the range of this area of law – law designed precisely to level the inequality playing field. Anti-discrimination law is the legal expression of the global commitment to equality. The fact is that cases concerning most excluded groups are not even making it to court and this is a kind of practice that has to be changed in the near future.

Recommendations flowing from the conclusions of this study include: Reform of the antidiscrimination legal framework is still needed in some areas; Discrimination cases should be explicitly tracked and case law harmonized; Judges should receive further training on the law of the ban on discrimination and application of antidiscrimination law; It is important to include, support and encourage, members of vulnerable groups and discriminated individuals and groups in areas other than labor relations, to seek and use their right to judicial protection of the right to equality.
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