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

# Analysis of Anti-Discrimination Case Law

## in Bosnia and Herzegovina for the Period 2018-2021

# ANALYSIS OF ANTI-DISCRIMINATION CASE LAW IN BOSNIA AND HERZEGOVINA FOR THE PERIOD 2018-2021

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# EXECUTIVE SUMMARY

The OSCE Mission to Bosnia and Herzegovina (the Mission) is issuing this report to present its findings based on an analysis of anti-discrimination jurisprudence in Bosnia and Herzegovina (BiH). The paper covers the period from mid-2018 to mid-2021. This report is a continuation of the Mission's monitoring of the work of the judiciary regarding equality and non-discrimination since the adoption of the Law on Prohibition of Discrimination (LPD, "the Law") in 2009.

To assess progress made, as well as current trends and challenges in the application of the LPD, the Mission has already published two reports on this topic; the **2018 Analysis of Judicial Response to Discrimination Challenges in Bosnia and Hercegovna** and the **2019 Assessment of the Work of the BiH Institutions in Combating Discrimination**. In addition, in 2020, the Mission published a report titled **Discrimination in Bosnia and Herzegovina: Public Perceptions, Attitudes, and Experiences**, focusing on real-life experiences of discrimination among the BiH population.

This report focuses on how the BiH courts implemented the LPD as a follow-up to the aforementioned previous analyses of jurisprudence. The report is not intended to serve as an overview of discrimination trends and issues in BiH and does not examine how other BiH institutions respond to discrimination. This report does identify significant new trends in how the BiH legal community is utilizing the LPD before courts and displays the power the LPD can have when properly utilized. The present analysis focuses on the responses of courts in the context of discrimination proceedings initiated under the LPD. It tracks and maps the relevant trends, but also highlights some of the more prominent issues in

the application of substantive aspects of the LPD, identifying weaknesses and inconsistencies in case law while taking into account the totality of judicial output on these cases. These issues are elaborated on in four chapters:

### Chapter I

presents the sources used to collect data and court decisions and the methodology employed to analyse statistical trends in anti-discrimination cases before the BiH courts.

### Chapter II

provides an overview of quantitative analysis on the identified trends in anti-discrimination jurisprudence, including but not limited to the distribution of cases between different courts in the country, types of plaintiffs and defendants, outcomes of proceedings, forms and grounds of discrimination, areas of discrimination, references to international jurisprudence made by courts in their judgements, use and references to the Institution of Human Rights Ombudsman/Ombudsmen of BiH (the Ombudsman Institution) and its mechanisms, and lengths of proceedings.

### Chapter III

focuses on the most contentious issues identified in the anti-discrimination jurisprudence, covering evidence, burden of proof, non-pecuniary damages and systemic discrimination, as well as issues in interpreting the notion of mobbing.

### Chapter IV

offers concluding remarks and recommendations to the courts and other authorities regarding increasing the LPD's level of implementation and its consistent application.[1]

1 Previous analyses of the Mission have been used and cited by the courts in their decisions. See, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 Rs 693900 18 Rs, 14 December 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 541491 15 Rs, 8 July 2020

# INTRODUCTION

Since its adoption in 2009, the LPD[2] has proven to be the most important tool in the BiH anti-discrimination legal framework for combating and preventing discrimination. The Law outlines the duties of the legislative, judicial and executive branches as well as legal persons and individuals exercising public powers to secure, protect, and advocate for equal treatment.[3] The LPD was amended in 2016 to address several recognized shortcomings. The allotted periods for initiating a court procedure in discrimination cases were extended and victimization was defined as a prohibited form of discrimination. In addition, the list of explicitly recognized grounds for discrimination was expanded to include age, disability, sexual orientation, gender identity and sexual characteristics and a clear reference was included to discrimination by association. This final inclusion ensures the protection of not only persons who have or are assumed to have the aforementioned characteristics but also the protection of those who are associated with them. Furthermore, the 2016 amendments explicitly recognized situational testing in discrimination cases as an evidentiary tool for proving discrimination.[4]

A systematic analysis of anti-discrimination case law by the relevant authorities is crucial for the assessment of the effectiveness of the LPD, the broader anti-discrimination legal framework and the design of relevant legal policies in this area. One of the complexities in this field is the lack of a unified data collection system on discrimination cases between the Ombudsman Institution, judiciary and the BiH Ministry of Human Rights and Refugees

2 BiH Official Gazette no. 59/09 and 66/16

3 See Article 1(2) of the LPD. The Law also extends the anti-discrimination duties beyond actors indicated in this provision, namely to private citizens

4 See Article 2(1), Article 4(6), Article 13(1), Article 15(4) and Article 18 of the LPD

(MHRR). Currently, there is poor reporting and statistical collection of instances of discrimination, insufficient research on public needs and a lack of consistency in both the application of the LPD and of consultation between the previously indicated institutions. There is also insufficient co-operation with civil society organizations (CSOs).

The Mission's survey of public perceptions still shows a low level of awareness and understanding of the anti-discrimination legal framework.[5] There is also a lack of trust in the institutions charged with adjudicating discrimination claims.[6] According to the same survey, most individuals who experience discrimination never report it. Nevertheless, in the reporting period, the Mission noted an increase in registered anti-discrimination cases (especially in those brought against public authorities) in terms of submitted lawsuits and rendered judgments. Indeed, data from the case management system (CMS) of the BiH High Judicial and Prosecutorial Council (HJPC) indicates that in the period 2009-2021 more than a thousand decisions on merits were made in the application of the LPD, including at least 973 judgments, with an evident increase over the years (Chart 1).[7]

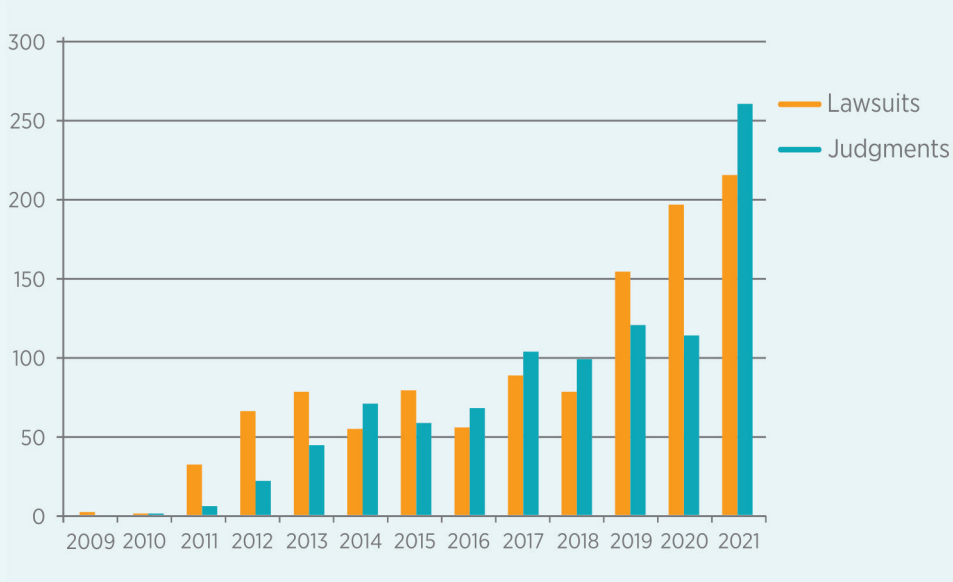



*Chart 1: total distribution of lawsuits and judgments (data from CMS)*

5 See, e.g., OSCE, *Discrimination in Bosnia and Herzegovina - Public Perceptions, Attitudes, and Experiences*, pages 15 - 16 (available at https://www.osce.org/files/f/documents/6/0/448852.pdf)

6 See, e.g., OSCE, *Discrimination in Bosnia and Herzegovina - Public Perceptions, Attitudes, and Experiences*, 20 March 2020; Svjetlana Ramić-Marković, *Rodno zasnovana diskriminacija u oblasti rada u Bosni i Hercegovini* (Helsinški parlament građana Banja Luka, 2022)

7 This is the *minimum* number of judgments, as the CMS database is not complete, particularly for earlier years.

One of the factors driving this increase can be traced to the continuing efforts of various actors and stakeholders in addressing the lack of knowledge regarding the anti-discrimination legal framework.[8]

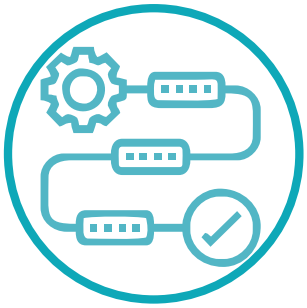
The reporting period was chosen to present a continuation of the Mission's previous analysis of anti-discrimination case law: "Analysis of the Judicial Response to Discrimination Challenges in Bosnia and Herzegovina"[9] (period 1 December 2009 - 31 May 2017) and "Assessment of the Work of BiH Institutions in Combating Discrimination,"[10] (period 1 June 2017 - 30 June 2018). Furthermore, a summary and recommendations from the 2019 conference titled: "10 Years of Combating Discrimination in BiH"[11] is presented.

8 The Mission has played an important role in advocating for the LPD through its awareness raising campaigns and capacity building initiatives. Since 2012, in co-operation with the entity centres for education of judges and prosecutors, the Mission has regularly organized seminars, trainings, workshops and conferences dedicated to the implementation of the LPD. More than 1200 judges and legal professionals attended such events, which were also expanded later to include attorneys. Since 2021, the Mission, together with the OSCE Missions in Serbia and Skopje has initiated regional judicial co-operation in anti-discrimination. The three missions brought together judges and other legal professionals from three countries to discuss the common challenges in application of the anti-discrimination legislation and to identify best practices.

9 *Analysis of the Judicial Response to Discrimination Challenges in Bosnia and Herzegovina*, OSCE, 2018, (available at: https://www.osce.org/files/f/documents/4/e/400550.pdf)

10 *Assessment of the Work of BiH Institutions in Combating Discrimination*, OSCE, 2019, (available at: https://www.osce.org/files/f/documents/3/a/414671.pdf)

11 *Summary, Concluding Remarks, Observations and Recommendations*, OSCE, 2019, available at: https://www.osce.org/files/f/documents/c/d/420146.pdf



# METHODOLOGY

This analysis considers 433 court decisions **on the merits** (focusing on judgments) rendered in the three-year period between mid-2018 and mid-2021 (see Table 1). The aim was to encompass all such decisions rendered in this period which were available to the Mission. This includes judgments rendered pursuant to the special anti-discrimination lawsuits provided for in Article 12 of the LPD. Finally, it also includes the judgments in which the courts decided on the anti-discrimination claims by applying the anti-discrimination provisions of laws other than the LPD, which mostly relates to such provisions in the entities' labour-law legislation along with concurrent references to the LPD. The analysis takes into account all the judgments rendered during the reporting period, not only the cases that have been finalized with the decision of a third-instance court. Due to the length of proceedings, the number of such finalized cases would not be illustrative.

The Mission primarily relied on data from the HJPC to analyse statistical trends in the anti-discrimination cases before BiH courts. This included the data from the electronic database designed for cataloguing court cases known as CMS, which includes a special designation for cases falling under the LPD. As a result of the non-adequate recording of the anti-discrimination cases in CMS during this period, the Mission has noted certain gaps in the process of collecting the decisions: the Mission's field offices collected an additional 67 judgments for the reporting period that were not recorded in the statistics received by the HJPC but were reported to the Mission by other (non)governmental actors.[12] The Mission expects that the latest amendments to the CMS database, which became operational on 1 January 2021, will render future statistics much more reliable.[13]

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12 For the purpose of completeness, the following data-basis were also consulted: *Odjel za sudsku dokumentaciju i edukaciju | Odjel za sudsku dokumentaciju i edukaciju (pravosudje.ba)*; *Baza sudske prakse (pravosudje.ba)*

13 See: "Uputstvo za korištenje dopunjenog šifrarnika Sistema upravljanja predmetima za postupke diskriminacije", BiH High Judicial and Prosecutorial Council, 2021

# QUANTITATIVE ANALYSIS

The following analysis of trends in anti-discrimination jurisprudence for the reporting period focuses on a number of factors and indicators. These include:

- the distribution of cases between different courts in BiH;
- types of plaintiffs and defendants, forms and grounds of discrimination;
- areas of discrimination;
- references to international jurisprudence made by courts in their judgments;
- use of and reference to the Ombudsman Institution and its mechanisms;
- length of proceedings, and;
- outcomes.

As most of these factors were also tracked in the Mission's previous analyses, it is also possible to compare results over a longer period of time.

## 1. Distribution of cases

As evident from the structure of the cases (Table 1 and Chart 2), the largest number of judgments in the reporting period were rendered by the courts in the Federation of Bosnia and Herzegovina (FBiH) (312 cases). This was followed by the courts in Republika Srpska (RS) (104 cases) and the Court of BiH (15 cases). The smallest number of judgments was recorded in Brčko District of BiH (BD) with just 3 cases. This largely follows the trends identified in previous years. Furthermore, there has been an increase in the

number of judgments rendered in anti-discrimination cases (Chart 1), which continued even throughout the early stages of the COVID-19 pandemic in 2020. Case law in the FBiH is much more diverse, and here plaintiffs are more prone to using innovative means of anti-discrimination protection, such as collective lawsuits, or lawsuits for victimization. Nevertheless, one of the consequences of this is that case law in the FBiH is often not consistent, as evidenced in Chapter III.

| LEVEL | COURT | Mid 2018 | 2019 | 2020 | Mid 2021 | Σ | Σ |
|---|---|---|---|---|---|---|---|
| BiH | BiH Court I | / | 2 | 3 | 2 | 7 | 14 |
| | BiH Court II | / | / | 2 | 2 | 4 | |
| | BiH Court III | 1 | / | / | 2 | 3 | |
| FBiH | Supreme Court | 12 | 17 | 14 | 8 | 51 | 312 |
| | Cantonal Courts | 11 | 30 | 24 | 21 | 86 | |
| | Municipal Courts | 16 | 37 | 49 | 73 | 175 | |
| RS | Supreme Court | 3 | 7 | 3 | 15 | 28 | 104 |
| | District Courts | 5 | 11 | 20 | 6 | 42 | |
| | Basic Courts | 3 | 21 | 6 | 4 | 34 | |
| BD | Appeals Court | 1 | / | / | 1 | 2 | 3 |
| | Basic Court | / | / | 1 | / | 1 | |
| | Σ | 52 | 125 | 122 | 134 | 433 | |

*Table 1: total distribution of judgments on merits*

The small number of judgments in the BD in the reporting period does not seem to be an anomaly, as the previous analysis of the case law for the period 2015-2018 shows only one procedural decision in the BD during that entire period.[14] The judgments that were rendered are of exceptional importance as they highlight new developments in BiH in the area of discrimination on the basis of religion (see Chapter II.4). When making such comparisons, it is important to bear in mind that BD is by far the smallest BiH jurisdiction in terms of population.

14 See: Dženana Radončić i dr., *Kvadratura antidiskriminacijskog trougla u BiH: Zakonski okvir, politike i prakse 2016-2018.* (Sarajevo: Analitika, 2018), p. 13. Interestingly, in the short period falling after the one analysed here three further judgments were rendered in Brčko District

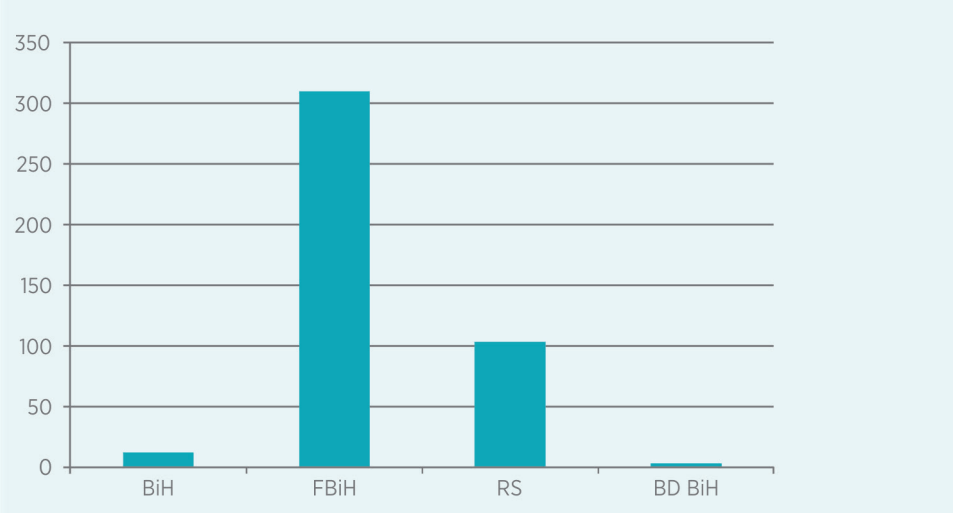


*Chart 2: distribution of judgments in BiH in the reporting period*

As for the FBiH, the largest number of judgments were rendered by the municipal and cantonal courts in Sarajevo, accounting for more than half of the total (Chart 3). This follows the trend from the previous analysed periods.[15] The disproportionally large number of cases before these courts could also account for the fact that, on average, proceedings in these cases last longer before the courts in Sarajevo than before other courts in the FBiH (see Chapter II, 8).

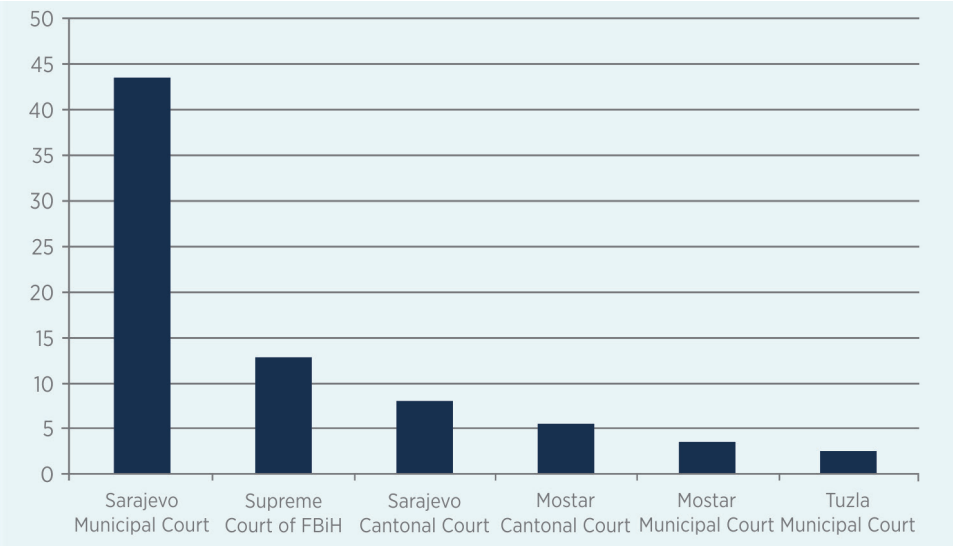


*Chart 3: the first six courts in the FBiH by number of judgments (percentage)*

15 See: *Analysis of the Judicial Response*…, p. 14; *Assessment of the Work of BiH Institutions*…, p. 21

In the RS, such a territorial discrepancy in the distribution of cases between courts is much less pronounced (Chart 4). One possible factor explaining the significant difference in the number of cases between RS and FBiH is the existence of the actio popularis complaint before the RS Constitutional Court (RS CC). This allows any individual to challenge general legal norms for their alleged discriminatory nature (Article 120 (2)of the RS Constitution). This procedure is often used to challenge the constitutionality and legality of statutes and by-laws as discriminatory, either in relation to the anti-discrimination provisions of the RS Constitution (Article 10 of RS Constitution) and/or on the basis of the European Convention on Human Rights (ECHR). This procedural avenue, which does not exist at other levels in BiH, may present a double-edged sword in the cases of systemic discrimination in the RS. Where the RS CC rules that an impugned provision of a statute or a by-law is not discriminatory (in relation to the RS Constitution and ECHR), it could be discouraging for plaintiffs to later attempt to obtain a declaration that the application of such a provision is discriminatory before the regular judiciary on the basis of the LPD. Even though the plaintiffs are not precluded from pursuing such a legal remedy, its effectiveness - in these circumstances - is not evident.[16] This is problematic as the reasoning of the RS CC in the anti-discrimination cases under abstract control jurisdiction is often made in a summary fashion, without any reference to binding international jurisprudence.

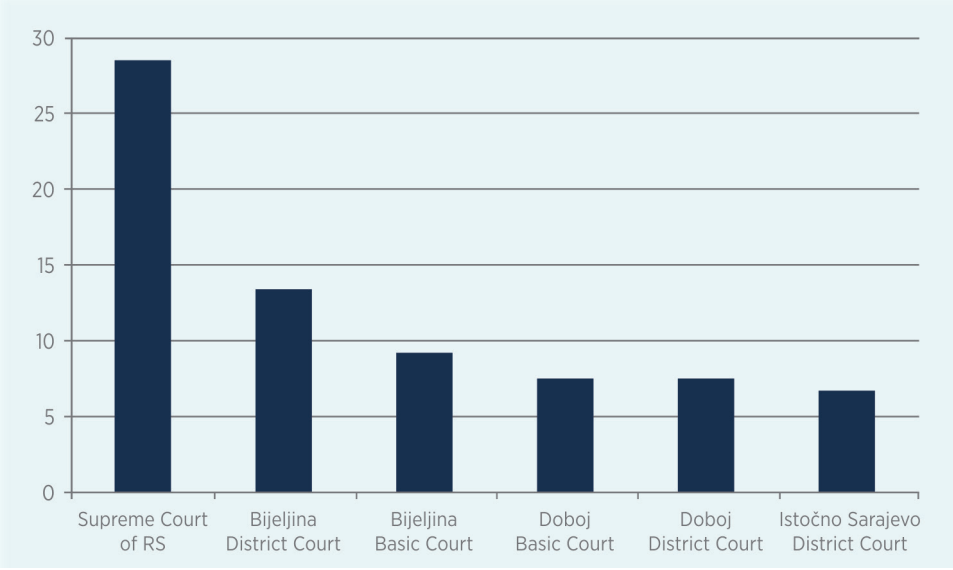


*Chart 4: the first six courts in RS by number of judgments (percentage)*

16 Compare, e.g., decision of the RS Constitutional Court, no. U-31/18, 20 December 2018, and judgment of the Doboj Basic Court, no. 85 0 Rs 072647 18 Rs, 23 October 2019, judgment of the Banja Luka District Court, no. 71 0 Rs 286277 19 Rsž, 6 March 2020, and judgment of the RS Supreme Court, no. 71 0 Rs 286277 20 Rev, 26 January 2021

## 2. Types of plaintiffs and defendants

The provision of the LPD defining the scope of the statute makes clear that it applies to all public bodies at all levels of government, including municipal institutions, legal persons exercising public authority, as well as all legal and natural persons (Article 6). Moreover, the LPD provides for the possibility of protection from discrimination, in relation to all the previously indicated subjects, in the existing (administrative or judicial) proceedings, or through the use of specific anti-discrimination lawsuits in civil proceedings (Articles 11 and 12). Finally, it provides detailed rules on the utilization of collective lawsuits for the protection against discrimination (Article 17).

As can be seen in Chart 5, a majority of the analysed cases concern lawsuits brought by multiple individuals in the same lawsuit (44.9 per cent). This is possible when the cases concern the same legal and factual situation. These lawsuits should not be confused with the collective lawsuits brought under Article 17 of the LPD, which accounted for 1.9 per cent of cases in the reporting period. The lawsuits brought by multiple individuals concern an issue of systemic discrimination (see Chapter III, 1.4). As they stem from the same root cause, the use of collective lawsuits as a procedural vehicle to address many of these cases would have been a more efficient strategy. This would have been particularly useful for the already overburdened courts in Sarajevo as it would have avoided the inconsistencies seen in case law when dealing with the same issues. There have been evident improvements in dealing with collective lawsuits by courts, which do not seem to face the problems noted in earlier reports concerning legal standing.[17]

The two most significant collective lawsuits in the reporting period were brought by the CSO *"Vaša prava BiH"* and the European Roma Rights Center (ERRC), which are indicative of the progress made in applying and understanding collective lawsuits. The former ended in a positive outcome in a school segregation case in the Central Bosnia Canton regarding the so-called *"two schools under one roof"* system after more than 10 years of litigation and the intervention of the BiH Constitutional Court.[18] The second lawsuit concerned discrimination against Roma residing in the Banlozi settlement in Zenica, with respect to the poor condition of their habitation and more precisely the lack of access to running water.[19] Unlike the collective lawsuit of the CSO "*Vaša prava BiH*" which was faced with numerous procedural obstacles and misunderstandings during a time when the courts were only getting acquainted with this new type of litigant, the ERRC did not face any procedural issues in this respect and indeed the whole proceedings

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17 See, e.g., Boris Topić, *Kolektivna tužba u sistemu zaštite od diskriminacije u BiH*, Analitika, 2014

18 See judgment of the FBiH Supreme Court, no. 51 0 P 054522 21 Rev 2, 10 September 2021 (the court ordered immediate establishment of the single integrated multicultural schools for the determined catchment areas with a single curriculum with full respect of the rights of the children to the education on their mother tongue)

19 See judgment of the FBiH Supreme Court, no. 43 0 P 178741 21 Rev, 16 February 2022 (the courts upheld the lawsuit against the public company "Vodovod", but rejected it with respect the city of Zenica)

were finalized - at three judicial instances - after just one year and eleven months.[20] This is worth comparing to the statistics presented in Chapter II, 8. This shows that the courts are improving their understanding of this type of proceeding and are able to more efficiently interpret the law in such cases. Furthermore, when examining judgments where men and women are individual plaintiffs, male plaintiffs (30.5 per cent) are more numerous than female (18.6 per cent) in relation to the total number of judgments, which again confirms previous trends of unequal gender representation.[21] Finally, it can be noted that legal persons appear as plaintiffs in 4.1 per cent of anti-discrimination cases encompassed by this analysis. There are varying views in BiH over the protection of legal persons; the LPD does offer protection of this group, but the anti-discrimination provisions of the RS Constitution do not.[22]

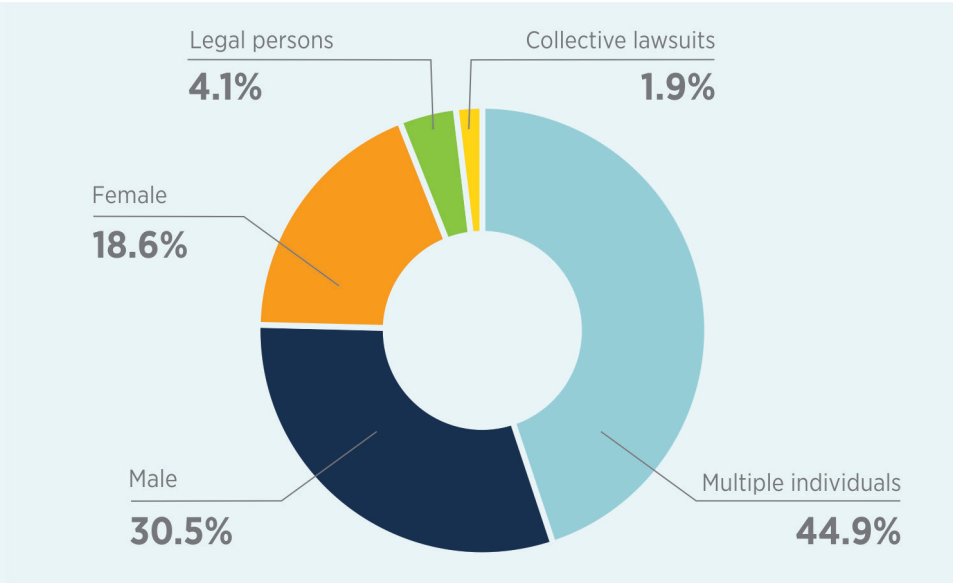


*Chart 5: types of plaintiffs in analysed cases*

20 It should be mentioned that two collective lawsuits in the reporting period did face obstacles for the alleged lack of legal interest in finding of discrimination against a collective agreements not in force anymore. In both cases the second-instance courts quashed and remitted the first-instance decisions, holding that the plaintiffs do have legal interest in the mere determination of discrimination (declaratory judgment), and also emphasized the extended subjective effect of such determinations for possible later lawsuits on (non)pecuniary damages. See judgments of the Sarajevo Cantonal Court, no. 65 0 Rs 686554 19 Rsž, 2 September 2019, and no. 65 0 Rs 692142 19 Rsž, 10 December 2020. See, also judgment of the Sarajevo Municipal Court, no. 65 0 Rs 693900 18 Rs, 14 December 2020

21 See: *Analysis of the Judicial Response*…, p. 16; *Assessment of the Work of BiH Institutions*…, p. 24

22 See, e.g.: decision of the RS Constitutional Court, no. U-10/16, 25 January 2017

Mobbing is one of the most prevalent forms of specific types of discrimination and in line with previously identified trends, men are more frequent plaintiffs than women (Chart 6). There is no reason to believe that women are less susceptible to mobbing than men. Indeed, data from previous analyses indicated that overall women in BiH are more frequently subjected to various types of discrimination than men.[23] The question remains as to why women are less likely to initiate anti-discrimination lawsuits. The reasons identified previously remain valid, namely that it may be more difficult for vulnerable and marginalized categories of women to access the courts, in part due to the structure of the labour market, familial responsibilities, lack of access to transportation, and other economic barriers.[24]

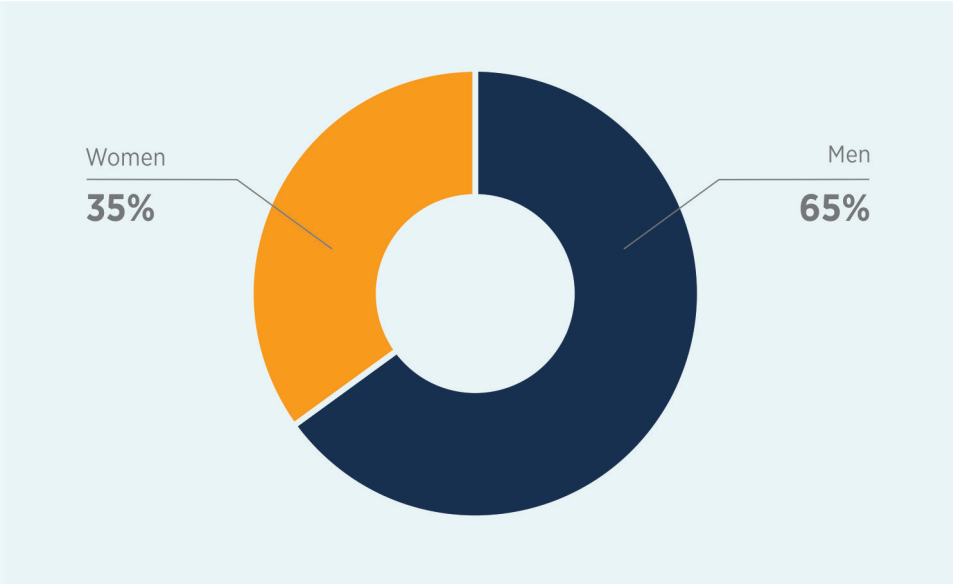


*Chart 6: gender of plaintiffs in mobbing cases*

23 See: *Analysis of the Judicial Response*…, p. 16; *Assessment of the Work of BiH Institutions*…, p. 24 (and sources cited there)

24 The statistics show that the employment gender gap in BiH is 25 per cent in favour of men. See, Statistics Agency of Bosnia and Herzegovina, *Žene i muškarci u Bosni i Hercegovini*, 2022, p. 61

The most numerous defendants in the analysed discrimination cases remain legal persons, which is in line with findings from previous analysed periods (Chart 7). However, a significant increase has been seen in the percentage of such defendants (an increase from 67 per cent to 95 per cent).[25] For the purpose of this overview and unlike the Mission's previous findings, the data concerning defendants has been disaggregated to show if individuals were public or private legal persons. This disaggregation has revealed that public legal persons are the overwhelming majority of defendants in the anti-discrimination cases analysed. The data shows that individuals are much less likely to seek judicial protection against private employers,[26] which may be a result of the structure of the labour market, particularly for employees working under limited duration contracts, where the perceived risks of possible retaliation by the employer may be a significant factor of deterrence. Other factors may contribute to such fears. This includes the systemic underuse (and lack of success when used) of the mechanisms such as interim protection measures under the LPD (Article 14). In addition to this, the lack of established case law with respect to victimization - as a form of discrimination against individuals reporting or participating in discrimination proceedings (Article 18 of the LPD) - combined with problems related to the length of proceedings, particularly in mobbing cases, discourages victims coming forward. This highlights the need for a systemic strengthening of the anti-discrimination infrastructure, such as alignment and clarification of its many interconnected procedural rules, to make the existing legal remedies more effective.

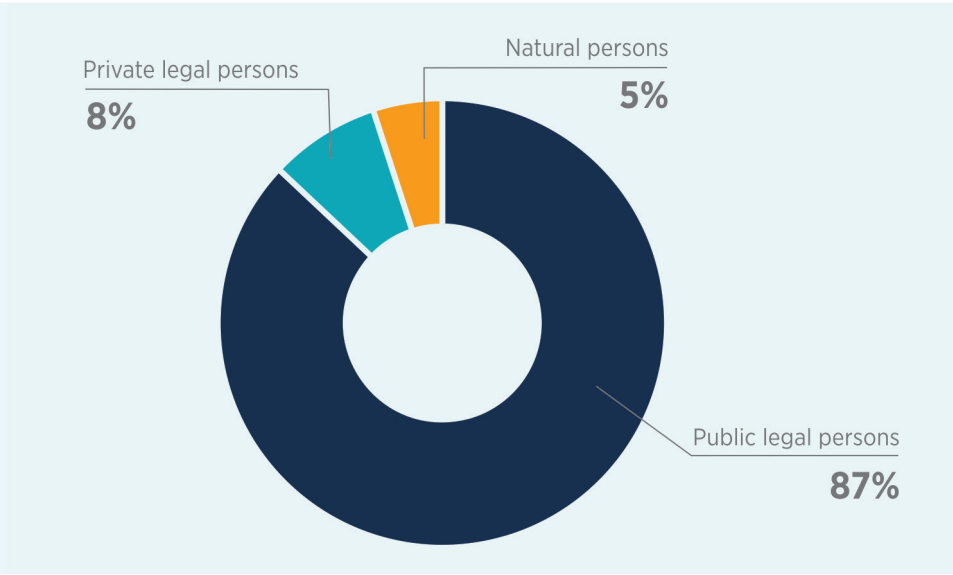


*Chart 7: defendant structure*

25 See: *Analysis of the Judicial Response*…, p. 17; *Assessment of the Work of BiH Institutions*…, p. 25 (legal persons accounted for 67 per cent of defendants)

26 See, e.g., Ramić-Marković, *op.cit.*

## 3. Forms of discrimination

At the time of its adoption in 2009 the LPD envisaged two basic forms of discrimination; direct and indirect discrimination. Other forms of discrimination including harassment, sexual harassment, mobbing, segregation, and incitement to discrimination (including orders to discriminate, and aiding and abetting discrimination) were also mentioned. The 2016 amendments added aggravated discrimination as a form of discrimination if committed under several grounds (multiple discrimination), several times (repeated discrimination), or over certain periods of time (protracted discrimination). Moreover, significant amendments were made concerning the provision on protection from retaliation by introducing victimization as a new form of discrimination perpetrated against individuals who had reported or participated in the anti-discrimination proceedings (Article 18 LPD). It is thus clear that the LPD has established an anti-discrimination system of a very wide scope. This is shown by the inclusion of mobbing and victimization as special forms of discrimination even though neither require the showing of a nexus to the protected ground of discrimination (see Chapter II, 4.).

The analysis of the forms of discrimination featured in the judgments indicates the continuation of the previous trend. For example, the prevalence of direct discrimination and mobbing (Chart 8). Direct discrimination is often viewed as the most serious form of discrimination. One might expect that more than a decade after the adoption of the LPD, the instances of alleged discrimination would not be as blatant as public awareness of the Law grows and society progresses. It could be expected that with the development of understanding of discrimination as a concept, citizens in BiH would cease explicit direct discrimination and therefore the number of cases would reduce. However, this has not been seen; rather the number of cases of direct discrimination grows while the number of cases of indirect discrimination remains small. [27] One could anticipate indirect discrimination cases growing as citizens are made aware of their right to protection under the LPD but indirect discrimination remains complex and is less obvious to detect than its direct counterpart. The analysed instances of indirect discrimination included cases where seemingly neutral provisions of local authorities had the effect of unjustifiably favouring local undertakings or sports clubs.[28] There is a noticeable decrease in cases where the form of discrimination has not been indicated at all. This is a positive development, possibly implying a greater familiarity of plaintiffs and their legal representatives with the LPD.

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27 Compare: *Analysis of the Judicial Response*…, p. 22 (direct discrimination accounted for 68 per cent of cases)

28 See, e.g., judgment of the Konjic Municipal Court, no. 56 0 P 063396 19 P, 25 July 2019 (positive judgment upheld by the FBiH Supreme Court in 2022); judgment of the Široki Brijeg Municipal Court, no. 64 0 P 053541 19 P, 30 June 2020

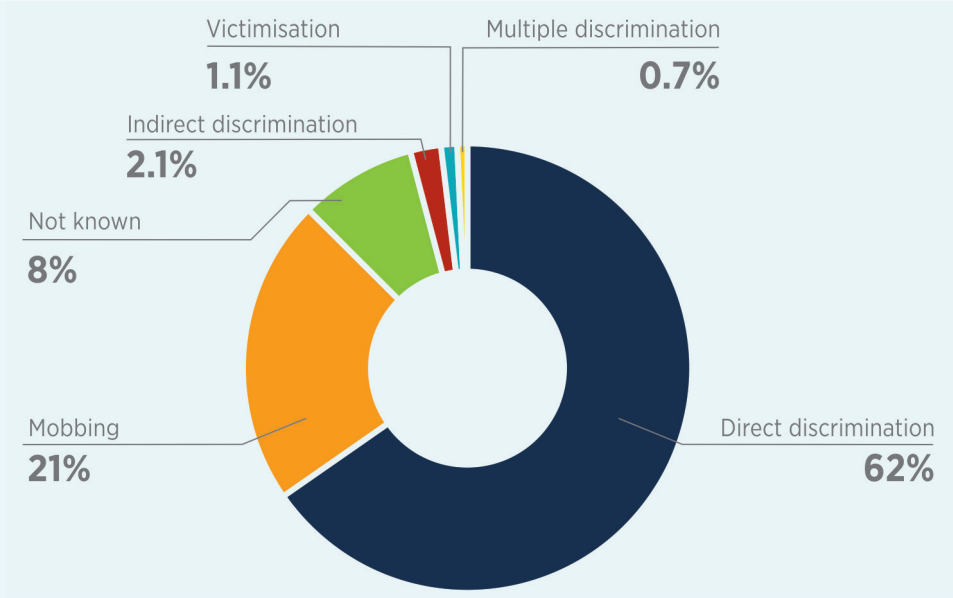


*Chart 8: types and forms of discrimination*

As noted in the previous analysis, some special forms of discrimination are either never raised in anti-discrimination civil lawsuits (such as sexual harassment) or are raised but are always subsumed under another form.[29] This is the case with harassment, when it is raised with a mobbing claim. It has been noted that there has been an increase in the number of mobbing cases in relation to the previous analysed periods.[30] There have been four cases alleging victimization in the reporting period with one of the cases finalized with a positive judgment.[31] During the reporting period there was one instance of aggravated discrimination (Article 4 (6) LPD), in the context of unlawful actions of public authorities in respect of "Justice for David" activists in Banja Luka. The Basic Court found the existence of direct and extended discrimination, as well as harassment and segregation.[32]

29 *Analysis of the Judicial Response… p.20*

30 Compare: Analysis of the Judicial Response…, p. 22 (mobbing accounted for 14 per cent of cases).

31 See judgment of the FBiH Supreme Court, no. 43 0 Rs 160655 20 Rev, 15 July 2021

32 See judgment of the Banja Luka Basic Court, no. 71 0 P 323323 20 P, 10 December 2020

Non-enforcement of judgements remains an issue for the BiH legal system. For example, as mentioned earlier in the report, one case concerning segregation in education was finalized in 2021,[33] although the judgment is yet to be implemented.[34]

## 4. Grounds of discrimination

The 2009 Law defined discrimination by including a number of protected grounds and completing the list in an open-ended manner ("any other status…"). The 2016 amendments to the LPD explicitly included a number of further protected grounds (discrimination by association, disability, age, sexual orientation, gender identity and sexual characteristics), while retaining the open-ended "other status" clause. The combination of the forms and grounds of discrimination, as defined in the LPD, makes it one of the more advanced statutes of its kind in the region.

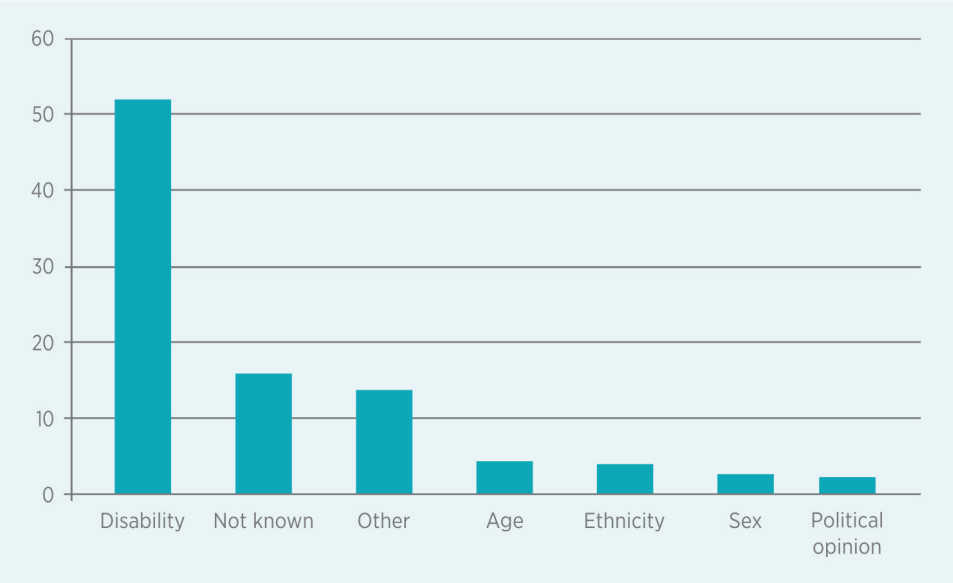


*Chart 9: grounds of discrimination (percentage)*

33 See judgment of the FBiH Supreme Court, no. 51 0 P 054522 21 Rev 2, 10 September 2021

34 The enforcement proceedings in school segregation cases in the Herzegovina-Neretva Canton are still pending, eight years after the judgment of the FBiH Supreme Court. The Mostar Municipal Court rendered the initial enforcement decision in this case in 2015 (decision no. 58 0 Ip 085653 15 Ip 2, 16 September 2015). This decision was appealed, and it took the same court six years to decide on the appeal, even though the enforcement proceedings are urgent. See: Decision of the Mostar Municipal Court, no. 58 0 Ip 085653, 19 May 2021 (upheld the enforcement request against the Hercegovina-Neretva Canton, but rejected it in respect of schools, finding it did not have local competence. It transferred the enforcement to the Čapljina Municipal Court. The plaintiffs appealed this decision.)

In the reporting period, the number of judgments dealing with disability (52.1 per cent) and age (4.2 per cent) as grounds of discrimination are notable (Chart 9).[35] The analysed jurisprudence in BiH shows that both of these grounds are usually litigated as direct forms of discrimination. The relative novelty of age-related discrimination can be seen in the difficulties the courts have in dealing with it conceptually, with all ten lawsuits brought during the reporting period being rejected, usually through the finding that there is in fact no difference in treatment based on age.[36] This may not be the best frame for the issue as plaintiffs normally complain of allegedly problematic difference in treatment between individuals of different ages, usually to the detriment of the older persons. In other words, the focus in these cases should normally be on the question of *justification* of such different treatment on the basis of age where the state may enjoy a substantial margin of appreciation.[37]

There has also been an increase in the number of cases dealing with alleged discrimination on the basis of religion, such as cases dealing with the prohibition of hijabs and beards in the armed forces and the judiciary. All of these are complex issues that have not yet been fully settled before the European Court of Human Rights (ECtHR),[38] and the complaints under consideration here were all rejected on their merits.[39] It is expected that these cases will be appealed to the BiH CC.[40]

There is still a large number of cases where the protected ground cannot be identified, either because the plaintiff has not made a clear nexus to it in the lawsuit, and/or because it cannot be read from the holding or the reasoning of the judgment, which is even more problematic if it concerns decisions on merits.[41] Improvements in this area are expected

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35 Even though mobbing is one of the most prevalent forms of discrimination (*Table 9*), it does not require the proof of nexus to a protected ground, so it is not included in any of the indicated grounds, including "Other / not known"

36 See, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 P 807667 19 P, 19 October 2020; judgment of the RS Supreme Court, no. 85 0 Rs 072708 21 Rev, 29 September 2021

37 See, e.g., *Šaltinytė v. Lithuania*, no. 32934/19, § 63, 26 October 2021

38 See *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, 5 December 2017 (the ECtHR explicitly limited the scope of the case before it, namely the punishment of *witness* for refusing to comply with court order to remove religious skullcap when giving evidence, adding: "The public debate now taking place in Bosnia and Herzegovina about the wearing of religious symbols and clothing by judicial officials… are therefore irrelevant to the present case")

39 See: judgment of the Sarajevo Municipal Court, no. 65 0 P 652414 17 P, 31 October 2018; judgment of the Brčko District Appeals Court, no. 96 0 Rs 128286 21 Rsž, 19 March 2021; judgment of the BiH Court, no. S1 3 P 035228 21 Gž, 19 April 2021

40 The BiH Constitutional Court has also recently dealt with similar complaints as part of its abstract control of constitutionality, although solely in the context of Article 9 of the ECHR (freedom of religion and belief), and has upheld the requests. See: decision of the BiH Constitutional Court, no. U-8/17, 30 November 2017; decision of the BiH Constitutional Court, no. U-9/21, 2 December 2021

41 See, e.g., judgment of the RS Supreme Court, no. 80 0 Rs 085075 20 Rev 2, 9 February 2021 (the court determined the existence of unjustifiable difference in treatment between individuals, but did not clarify the nexus to any protected ground in respect of which such different treatment was undertaken). See, also: judgment of the Kozarska Dubica Basic Court, no. 79 0 P 008348 20 P, 22 April 2021; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 768258 19 Rs, 12 January 2021. Compare: *Analysis of the Judicial Response*…, p. 19 (in 30per cent of cases the ground of discrimination could not be identified)

following the implementation of reforms to the CMS system and the accompanying training and awareness raising planned for the judiciary and judicial clerks, mentioned previously.

## 5. Areas of discrimination

In line with its general approach, the LPD defines the scope of its application broadly (Article 6). They list 15 general areas of application as examples, while leaving the scope of applicability theoretically open in relation to all the subjects to which it applies. Moreover, in any interpretation of the LPD, the courts have to take into account Protocol no. 12 of the ECHR,[42] which provides that the enjoyment of *any right* set forth by law shall be secured without discrimination, and that no one shall be discriminated against by any public authority, without limiting the scope of the provision to a specific area. With a possible exception of "participation in creative activities in the area of culture and art",[43] the judgments from the reporting period cover cases from all the areas indicatively listed in the LPD, although litigation continues to predominate in some areas (Chart 10).

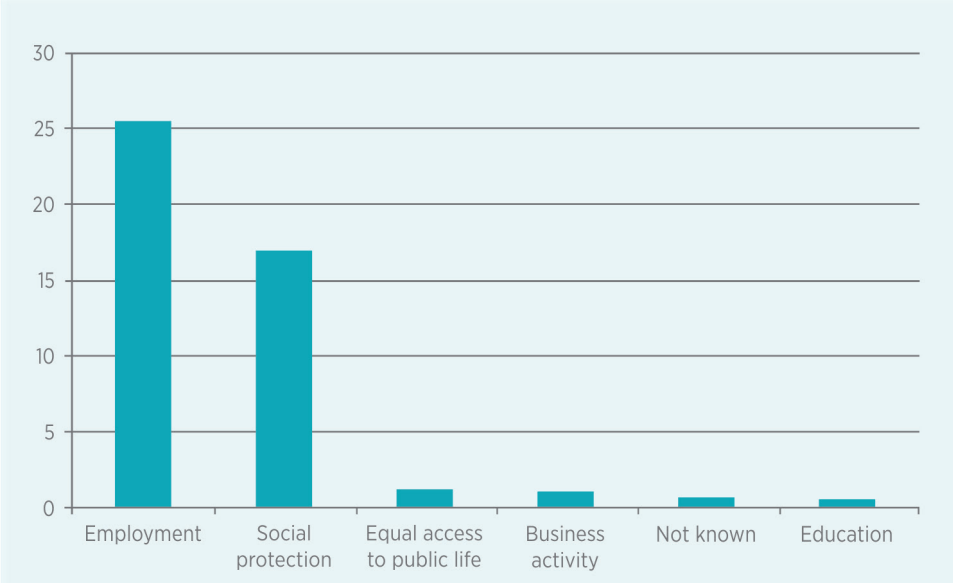


*Chart 10: first six areas of discrimination (percentage)*

42 See, e.g., *Pudarić v. Bosnia and Herzegovina* [Committee], no. 55799/18, § 27, 8 December 2020 ("[N]o legal provision of domestic law should be interpreted and applied in a manner incompatible with States' obligations under the Convention")

43 See, however, judgment of the Sarajevo Municipal Court, no. 65 0 P 567722 16 P, 21 March 2019 (not entirely clear in the lawsuit or reasoning of the court)

The analysis of this reporting period, as in the previous reporting period, shows that the area in which discrimination is most prevalent - or perhaps the one where it is most likely to be litigated - is employment and labour, which accounts for 51 per cent of all judgments (Chart 10).[44] As previously indicated, the reasons for this - namely the relative lack of habituation in the initiation of anti-discrimination cases, but substantial experience in the protection of labour rights before courts[45] - are still valid, as seen in the fact that the judgments under analysis very often combine ordinary labour complaints with discrimination complaints, with the former usually being predominant. A significant increase of cases can be noted in the broad area of social protection, including the provision of social benefits, which account for 34 per cent of all judgments. Unlike almost all other cases, these are connected to a systemic issue concerning direct discrimination of persons with disabilities (see Chapter III, 1.3).

An area that is still in some flux concerns the specific contexts of discrimination among private individuals. One notable case concerns the barring of a CSO representing LGBT interests from organizing a street action on a privately owned prominent city square. This was despite the fact that the square in question is otherwise open to the public and has been used for the organization of assemblies of CSOs representing other interests.[46] The later complaint to the Ombudsman Institution by the affected CSO was rejected, as the Ombudsman Institution gave a clear primacy to property rights.[47] In light of this, an important ruling of the RS Supreme Court from 2 July 2021 should be noted, which held that the general exclusion of certain identified individuals, on the basis of their alleged violent nature, from a number of buildings in *private* ownership of a single company in one locality (e.g. shopping mall, hotel, hospital and similar), does not fall outside of the scope of the LPD. Thus, it held that "even if all the buildings are in the ownership of the first defendant… they are in public use, meaning they are accessible to everyone under equal conditions and their access and use cannot be limited in the manner done by the defendants".[48] It remains to be seen how this position will be applied in other similar contexts.

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**44** See: *Analysis of the Judicial Response*…, p. 14 (judgments in area of employment accounted for 64,4per cent of all cases)

**45** See: *Analysis of the Judicial Response*…, p. 15

**46** See: OSCE, *The enjoyment of Freedom of Peaceful Assembly in BiH: monitoring observations of the OSCE Mission to Bosnia and Herzegovina*, 2021, p. 18 (the situation concerned an attempt of Sarajevo Open Center to hold a street action marking the International Day of Visibility of Transgender Persons on a square in front of the BBI Center - a shopping mall in downtown Sarajevo)

**47** See, Institucija Ombudsmana za ljudska prava, *Specijalno izvješće o pravu na slobodu mirnog okupljanja* (Banja Luka: 2020), p. 35 ("The right to ownership guarantees to its holder the right to dispose of its property as it wills and to exclude everyone else from it, if that is not contrary to the rights of others or legal limitations. By prohibiting the use of its property for the promotion of rights and values that it does not support, the [defendant] was using the power conferred by the ownership over the impugned property")

**48** See judgment of the RS Supreme Court, no. 92 0 P 045967 21 Rev 2, 2 July 2021

One notable development in this area concerns possible incidents of discrimination in the context of legislative assemblies.[49] The complex nature of the BiH constitutional system entails a number of power-sharing arrangements, including, under certain conditions, a requirement for the representation of the three constituent peoples in legislative and other assemblies in the position of Speaker or Deputy Speaker. When the only member of a constituent people present in the assembly is not appointed to the position that must be occupied by a member of that constituent people, a question arises as to the applicability of the LPD in such instances. The courts initially accepted to consider such claims under the LPD,[50] however, it now appears that this position has been reversed.[51] Instead, courts have held that protection should be sought from the assembly itself and the FBiH CC through the use of mechanisms for the protection of vital national interest. It is, however, not clear how these particular plaintiffs could use such mechanisms themselves or to what extent the duties under Protocol no. 12 to the ECHR affect this conclusion as neither the plaintiffs nor the courts have considered its relevance.

## 6. Reference to international jurisprudence

Taking into account the particular position of the ECHR in the legal system of BiH, being directly applicable and having priority over all other laws,[52] and the fact that it contains anti-discrimination protections in the main body of the Convention (Article 14) and in Additional Protocol no. 12, one might expect to see references to the rich jurisprudence of the ECtHR in the judgments under analysis. Similarly, even though it is not yet formally binding,[53] references could be anticipated being made to the jurisprudence of the Court of Justice of the European Union (CJEU) considering the direct influence that the EU anti-discrimination legislation had on the drafting of the LPD, which contains many identical

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49 See also judgment of the Sarajevo Municipal Court, no. 65 0 Rs 347422 13 Rs, 2 October 2014 (discrimination of the plaintiff in non-appointment to the FBiH Constitutional Court due to discriminatory behaviour of the members of the FBiH Parliament House of Peoples). The request for reopening of the proceedings was subsequently accepted in this case. See: decision of the Sarajevo Cantonal Court, no. 65 0 Rs 347422 16 Rsvl, 16 September 2020

50 See judgment of the Gradačac Municipal Court, no. 28 0 P 061436 17 P, 12 February 2018 (only elected Croat in municipal assembly not appointed as a speaker, even though a Bosniak was a mayor). This judgment was later reversed - see, judgment of the Tuzla Cantonal Court, no. 28 0 P 061436 18 Gž, 15 December 2021

51 See judgment of the FBiH Supreme Court, no. 25 0 P 050855 20 Rev, 29 September 2020

52 See Article II/2 of the BiH Constitution. Most of the other major international human rights instruments are also expressly listed in the Annex I to the Constitution, and are directly applicable when they are applied in discriminatory manner (Article II/4 of the Constitution of BiH)

53 Nevertheless, there are examples where the courts expressly indicated the existence of a *legal duty* for courts in BiH to interpret domestic law, and to decide cases on the basis of domestic law, by interpreting such law in compliance with the EU law. See: judgment of the Sarajevo Municipal Court, no. 65 0 Rs 830307 20 Rs, 15 June 2021; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 830346 20 Rs, 30 June 2021; judgment of the Sarajevo Municipal Court 65 0 Rs 830329 20 Rs, 26 May 2021

formulations.[54] However, the analysis of the jurisprudence in the reporting period shows that even in judgments made on merits, there are very few references to the jurisprudence of the ECtHR, or indeed other international courts or bodies (Chart 11).

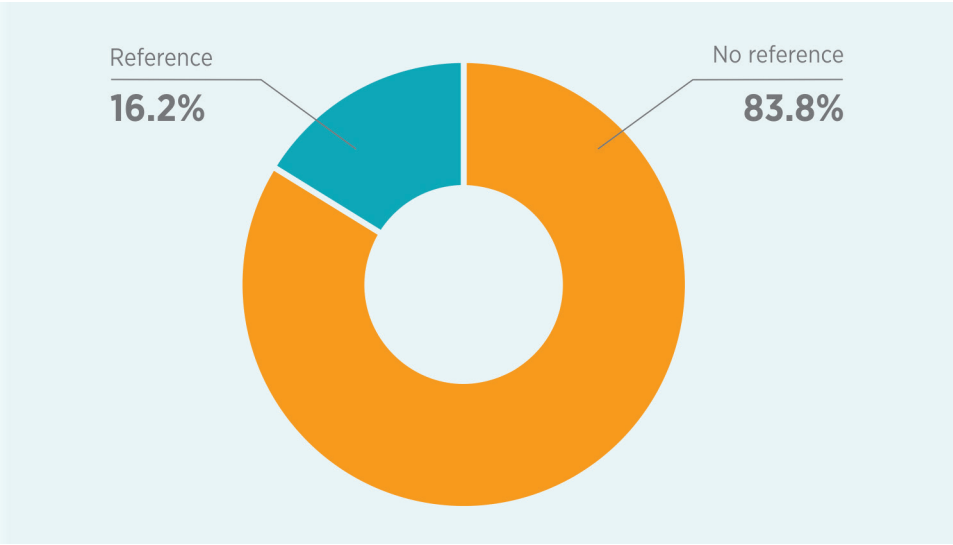


*Chart 11: reference to case law of ECtHR or CJEU before courts in BiH*

Reference to such case law is made in only 16.2 per cent of cases. Of those, five references were made to the case law of CJEU,[55] although in one instance the case was misattributed to the ECtHR.[56] Of the cited case law of the latter court, most references are to older jurisprudence,[57] and the cases are usually referred to in a rather perfunctory manner for the purpose of indicating general principles, rather than focusing on cases more relevant to the facts considered. There are some notable exceptions,[58] namely

54 See: Faris Vehabović *et al, Komentar Zakona o zabrani diskriminacije (Centar za ljudska prava Univerziteta u Sarajevu: Sarajevo, 2010), p. 18*

55 The cases cited: judgment of 11 May 1999, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse and Wiener Gebietskrankenkasse*, C-309/97, ECLI:EU:C:1999:241; judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C54/07, ECLI:EU:C:2008:397; judgment of 19 November 1991, *Francovich and Bonifaci*, C-6/90 and C-9/90, ECLI:EU:C:1991:428

56 See: judgment of the FBiH Supreme Court, no. 17 0 Rs 075491 19 Rev, 11 November 2020

57 The cases sited are: *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23; *Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87; *Lithgow and Others v. the United Kingdom*, nos. 9006/80 and 6 others, 8 July 1986; *Glor v. Switzerland*, no. 13444/04, ECHR 2009

58 See, e.g.: judgment of the Municipal Court in Sarajevo, no. 65 0 P 801036 19 P, 26 March 2021; judgment of the Municipal Court in Sarajevo, no. 65 0 P 836039 20 P, 30 April 2021

several judgments that made reference to a recent ECtHR judgment against Serbia,[59] concerning discrimination of different categories of persons with disabilities, which was directly relevant to the case under consideration. This incidentally created fragmentation in the case law before the same court (the Sarajevo Municipal Court), as other judges who were not aware of this recent jurisprudence of the ECtHR, but dealt with very similar cases at the same time, reached completely different conclusions. Furthermore, a more careful analysis of international jurisprudence might aid courts in drawing disputable conclusions, such as the position that there cannot be discrimination by association,[60] or aid them in applying correct analysis in some context, such as that of discrimination on the grounds of age as mentioned previously.

Furthermore, it bears mentioning that an overview of the content of the analysed judgments indicates that the distribution of references to international jurisprudence is not uniform before courts in BiH, as the vast majority of such references are made by judges working in the Sarajevo Municipal Court. This can be explained by the larger number of judgments rendered by the aforementioned court (Chart 3).

While judges are responsible for being aware of and familiar with the law, the representatives of the plaintiffs also hold some responsibility for the lack of references to international jurisprudence as they have the right to invoke it throughout the case. This would be beneficial for plaintiffs, as there is a special duty assigned to courts under Article 6 of the ECHR to examine such pleas with "particular rigor and care" when explicit references have been made to the case law of the ECtHR.[61] However, such arguments of the plaintiffs should be stated clearly and should not remain merely implicit.[62]

## 7. References to the mechanisms of the Ombudsman Institution

The Ombudsman Institution has a special position in the anti-discrimination legislative framework of BiH. This is demonstrated by its denomination as a central institution for the protection against discrimination in BiH by the LPD (Article 7). In that respect, it has

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59 *Popović and Others v. Serbia*, nos. 26944/13 and 3 others, 30 June 2020. There is no implication here that the outcomes of the judgments making this reference are considered correct, but only that the careful consideration of such pertinent case law would be expected. Indeed, in the cases under consideration the courts may have relied on the ECtHR case law uncritically, not taking into account peculiarities of the Serbian context that the Strasbourg court itself emphasized ("[T]he Court notes, in this context and as regards the Concluding observations of the United Nations Committee on the Rights of Persons with Disabilities, that the committee's views, despite a detailed analysis of the situations in Serbia, Bosnia and Herzegovina and Croatia only identified potential issues in respect of the latter two countries", § 79)

60 See, e.g.: judgment of the FBiH Supreme Court, no. 36 0 Rs 041722 19 Rev, 22 August 2019. See, to the contrary, e.g., *Guberina v. Croatia*, no. 23682/13, ECHR 2016

61 See, e.g., *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 96, 28 June 2007

62 See, e.g., *Svit Rozvag, TOV and Others v. Ukraine*, nos. 13290/11 and 2 others, § 96, 27 June 2019

a number of competences, including the possibility of receiving individual and collective complaints and the issuance of recommendations, as well as the competence to prepare general and individual reports on discriminatory practices.[63]

One of the challenges noted previously[64] is the precise obligations stemming from the LPD, namely the duty of courts to "consider the recommendation of the Ombudsman" in accordance with the rules of proceedings when the party had presented them as evidence in the proceedings.[65] At a minimum, this would require the courts to directly engage with such recommendations rather than ignore them.[66] But more than that, courts would be required to provide reasons for rejecting or accepting the findings of the Ombudsman Institution if they are presented during proceedings as evidence and in accordance with the reasoned decision requirements of Article 6 of the ECHR.[67] However, there are strong grounds to believe - taking into account a systemic interpretation of the LPD and the important role explicitly accorded to the Ombudsman Institution - that their recommendations should be taken as decisive for shifting the burden of proof in anti-discrimination cases. As this would not affect the final outcome of proceedings, such interference with judicial independence in judicial decision-making would be proportionate to the goals of the LPD and the establishment of an anti-discrimination regime. Nevertheless, the shifting of the burden of proof on the basis of such recommendations is very rarely seen in practice.[68]

Furthermore, a court recently issued a judgment which, for the first time, explicitly denied the Ombudsman Institution's jurisdiction regarding discrimination in particular contexts. In the 2020 BiH Court Judgement, it was held that the Ombudsman Institution has no jurisdiction with respect to *private* companies (in this case the Ombudsman Institution issued a recommendation), but may only act in relation to *public* bodies.[69] This legal conclusion is clearly false from the viewpoint of the LPD, which must in any case be taken as *lex specialis* in this case.

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**63** See also, Adrijana Hanušić, *Ombudsmen u sistemu zaštite od diskriminacije u BiH: Analiza situacije i karakteristični problem*, Analitika, 2012; Radončić, *op.cit*., pp. 48-53

**64** See: *Analysis of the Judicial Response*…, pp. 48-50; *Assessment of the Work of BiH Institutions*…, pp. 34-51

**65** Article 15(9) of the LPD

**66** This is also seen in the reporting period. See, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 Rs 753816 19 Rs, 30 April 2020; judgment of the Sarajevo Municipal Court, no. 65 0 P 803199 19 P, 24 September 2020; judgment of the Sarajevo Municipal Court, no. 65 0 P 807667 19 P, 19 October 2020

**67** Generally on this requirement, see, e.g.: *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017

**68** See: judgment of the Travnik Municipal Court, no. 51 0 P 122504 17 P, 1 October 2018. The shifting of the burden of proof in this case was done *primarily* because of the recommendation of the Ombudsman Institution. At the same time, the outcome of the case was still negative for the plaintiff, as the defendants were able to prove that they had not discriminated her. See, also: judgment of the Novi Travnik Cantonal Court, no. 51 0 P 122504 18 Gž, 12 February 2019. However, the FBiH Supreme Court in the same case held that the plaintiff did not even show the likelihood of discrimination. See: judgment of the FBiH Supreme Court, no. 51 0 P 122504 19 Rev, 5 December 2019

**69** See, e.g., judgment of the BiH Court, no. S1 3 P 031618 19 P, 9 January 2020

In view of the important position of the Ombudsman Institution in the overall anti-discrimination protection system in BiH, an important factor to be considered is to what degree such a mechanism was used by the plaintiffs - before or during the judicial proceedings - and to what effect.[70] The use of such a mechanism is not a prerequisite for the initiation of judicial proceedings in anti-discrimination cases. Still, having in mind the relatively long windows of time allocated for initiation of judicial proceedings,[71] the plaintiffs could, in theory, use these mechanisms alternatively or sequentially and, in the latter case, there could be an indication of the use of such a mechanism in the court's judgment. The conclusions in that respect can be made regarding the references to such a mechanism made by the plaintiffs in their lawsuits and later references made by the courts in part of the judgments listing the proposed evidentiary tools.

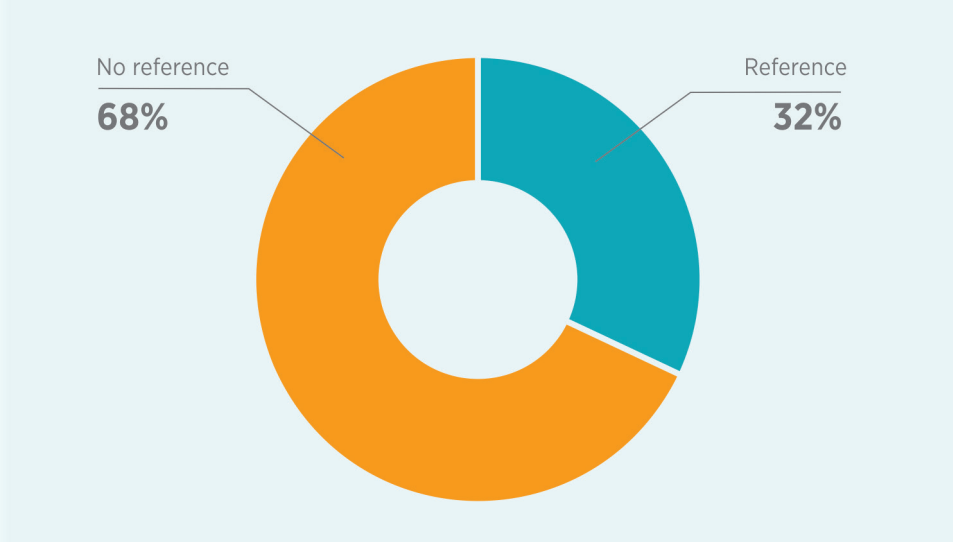


*Chart 12: reference to the Ombudsman Institution mechanisms in first-instance judgments*

When examining all the first-instance judgments rendered in the three-year reporting period (in total 220), references to the Ombudsman Institution's mechanisms were seen in 69 (Chart 12). The absence of references to such mechanisms could indicate that the plaintiffs had not considered it useful to use this type of protection, in addition (or prior) to the judicial mechanism, or that they used them unsuccessfully, thus having no incentive to indicate such results in subsequent proceedings before the courts[72] Evidently, the use of such recommendations was less common in the reporting period, but in cases

70 The substantive analysis is undertaken in section IV.4 below

71 See Article 13(4) of the LPD (subjective deadline of three years, and objective deadline of five years)

72 Recent empirical analysis in the area of gender based discrimination in labour indicate a falling level of confidence in the Ombudsman Institution. See, Ramić-Marković, *op.cit.*, pp. 31 and 33

where they have been used, the courts have recognized their duty to consider them in the proceedings.[73]

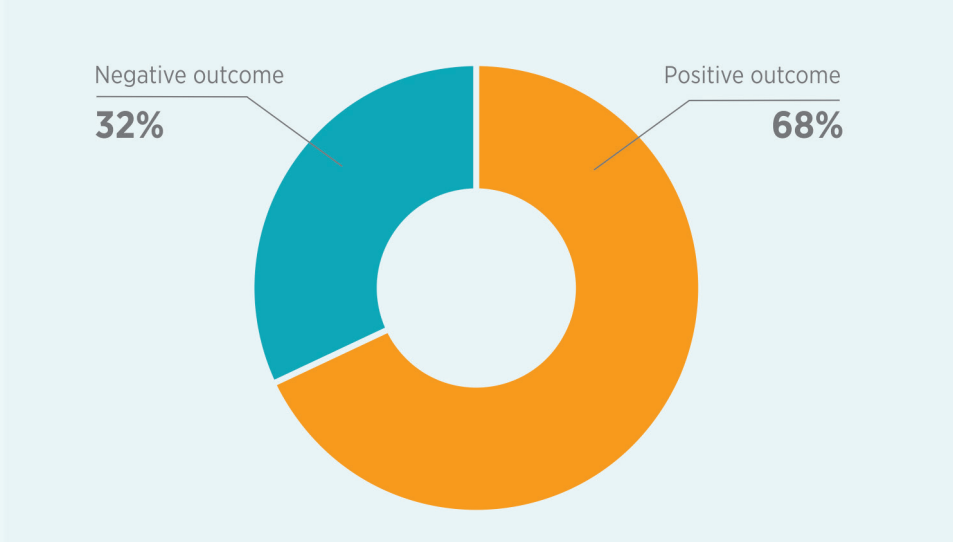


*Chart 13: outcome of cases where the IO mechanism was referenced*

In analyzing all of the judgments where such references were made, there is a notable *correlation* between references made to this mechanism and positive outcomes of the proceedings (Chart 13). Even though no conclusions can be drawn as to a causal relationship between the use of the Ombudsman Institution's mechanisms (broadly understood to include reports) and their reference in judgments - particularly because the reasoning of the courts is not always adequate - the correlation is still notable. It is particularly significant that in 93 per cent of such cases with a positive outcome, the reference was not made to a recommendation issued by the Ombudsman Institution in an individual case, but rather to one of its special reports.[74] This may provide an indication for the plaintiffs to pay more attention to this aspect of the work of the Ombudsman Institution, but also to the latter to put more emphasis on this type of activity (including

73 See: judgment of the Sarajevo Cantonal Court, no. 65 0 Rs 222746 18 Rsž 3, 22 March 2019; judgment of the FBiH Supreme Court, no. 58 0 Rs 092150 18 Rev, 7 May 2019. It is not problematic, however, if the courts duly consider the recommendation of the Ombudsman Institution, but ultimately reject it as wrong. See, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 P 671754 17 P, 4 July 2018

74 Most of the cases in the sample are first-instance judgments. In the cases under consideration the references were made to the *Special Report on the Rights of Persons with Disabilities*, Institution of Ombudsman of BiH, 2010, available at: https://www.ombudsmen.gov.ba/documents/obmudsmen_doc20130204063035O6bos.pdf, and the *Special Report on (Non)respect of Human Rights and Labour Rights in Company "Boksit" Milići*, Institution of Ombudsman of BiH, 2016, available at: Final Report (ombudsmen.gov.ba). For general comments of the Mission on such reports, see: *Assessment of the Work of BiH Institutions*…, p. 45-46

its advocacy) which may be relatively complex and time intensive, but may have more authority and concrete impact.[75]

## 8. Length of proceedings

Excessively lengthy proceedings are likely to bring into question the effectiveness of the remedy, which is relevant when examining anti-discrimination cases. For example, cases concerning alleged discrimination in education and types of discrimination directly affecting the physical and mental integrity of individuals, such as harassment (sexual and/or work related), are frequently extraordinarily lengthy. In such instances, the excessively long periods of proceeding can lead to ultimately ineffective procedure. One way to alleviate this concern could be through the use of interim measures under Article 14 of the LPD, but as noted, this mechanism is used very rarely. Even when used, it is seldom successful. Indeed, this was one of the reasons why the LPD explicitly defines proceedings in the anti-discrimination cases as "urgent", stating that the courts are under obligation to finalize these proceedings "in the shortest period possible" (Article 11(4) and (5)).

It is challenging to make a general conclusion on this point when focusing solely on the reporting period. The standards set out under the ECHR dictate that the proper calculation of the length of proceedings would have to take into account their *total* length, from the moment of the submission of the lawsuit to the court to the moment of rendering judgment from the last regular court considered an effective legal remedy. In BiH this is a third-instance court, as the revision is always admissible under the LPD (Article 13(2)). Taking this into consideration, and having in mind that there have not been many cases finalized in such courts during the reporting period, the sample was broadened to include the 67 most recent cases resolved on merits in the FBiH, and 31 such cases in RS. From this sample, we can see that the average length of the proceedings in anti-discrimination cases in the FBiH was **4 years and 3 months** while the average length of such cases in RS was **3 years and 2 months**. This shows that the length of proceedings in anti-discrimination cases varies significantly between entities which is also a result of the number of cases tried in each entity (Chart 2). It is also an indication that in many such cases the right to a trial within a reasonable time will not be satisfied.[76] Of course, such

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75 This would also require certain improvements as regards the methodology of drafting such reports, but also more efforts on their promotion, particularly with the judiciary. For general comments of the Mission on such reports, see: *Assessment of the Work of BiH Institutions*…, p. 45-46

76 Thus, for example, we see cases in FBiH resolved on the merits, at three instances, after 1 year and 2 months (see judgment of the FBiH Supreme Court, no. 43 0 Rs 155123 19 Rev, 18 February 2019), but also cases finally resolved only after more than 10 years (see, e.g., judgment of the FBiH Supreme Court, no. 65 0 P 106515 19 Rev, 2 July 2019; judgment of the FBiH Supreme Court, no. 51 0 P 054522 21 Rev 2, 10 September 2021)

a conclusion would have to be made in each individual case, taking into account the factors relevant for the determination of the possible violation of this right.[77]

The *average* length of proceedings in all anti-discrimination cases before the first-instance courts in BiH, during the reporting period was **1 year and 4 months**. This is an increase from the previous analysed three-year period where the average length was estimated at around **1 year and 1 month**.[78] However, this general statistic is likely to be misleading from the perspective of individual courts as it does not disaggregate data depending on the type of case or the location of the court, thus taking into account their potential overload. This statistic includes, for example, a case resolved on the merits after 5 months and 20 days, before the Konjic Municipal Court,[79] but also a case resolved on the merits after 4 years and 7 months before the Sarajevo Municipal Court.[80] The latter length could be attributed to the fact that the Sarajevo Municipal Court has the highest number of anti-discrimination cases in the FBiH (and, indeed, in the country), while the Konjic Municipal Court is not among the top six (Chart 3).[81]

Significant differences are evident amongst the type of anti-discrimination cases under consideration. The *average* length of mobbing cases before the first-instance courts in BiH, in the reporting period, is 2 years and 2 months.[82] These are indeed the type of anti-discrimination cases which take the longest time to be processed, since they are often factually the most complex cases, usually requiring the hearing of many witnesses, procurement of expert opinions, etc. At the same time, these are the cases where, due to their nature (continuous non-physical harassment in the work place), the urgency of the

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77 The BiH Constitutional Court has indicated, in an anti-discrimination case, that the *total* length of proceedings of 2 years and 5 months (see decision no. AP-1742/14, 16 March 2016) and 3 years and 5 months (see decision no. AP-3174/17, 19 September 2019) did not violate the right to trial within a reasonable time. In the latter example the particular complexity of the case was highlighted as a justification for finding of no violation. However, it has found that the proceedings that have lasted 4 years and 10 months, 5 years and 9 months (see decision no. AP-4474/20, 23 September 2021, for both cases), and 7 years and 4 months (decision no. AP-2390/17, 25 October 2017; decision no. AP-2443/18, 11 March 2020) did lead to a violation. In the first two cases, cited in the previous sentence, the proceedings were still pending, while in the last one they were finalized

78 See: *Analysis of the Judicial Response*…, p. 18

79 Judgment of the Municipal Court in Konjic, no. 56 0 P 063396 19 P, 25 July 2019

80 Judgment of the Municipal Court in Sarajevo, no. 65 0 Rs 541491 15 Rs, 8 July 2020

81 It should, however, be noted that this is not a factor that the state can use in its defence in length of proceedings cases, as it has an obligation to organize its judicial system in such a way so as to process all the cases within a reasonable time, regardless of where the case is initiated. See, e.g.: *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 24, ECHR 2000IV

82 The cases featuring reversals were *not* taken into account for the purpose of this statistic. This would require that several periods before one instance be combined for the purpose of determining the total length of proceedings before that instance. Needless to say, these are the most problematic cases from the aspect of the length of proceedings. For example, in one mobbing case (with one reversal) the first-instance judgment was rendered 6 years and 4 months after the submission of the lawsuit. See: judgment of the Municipal Court in Sarajevo, no. 65 0 Rs 222746 18 Rs 2, 9 February 2018. As the judgment of the FBiH Supreme Court was rendered in 2020, the total length of these proceedings was 8 years and 5 months

proceedings would in particular have to be taken into account. It appears that the *total* length of many of these proceedings will very often lead to the violation of the plaintiff's right to trial within a reasonable time.

The problem with the length of proceedings is systematic and structural in BiH. It inevitably affects anti-discrimination cases as well. Its resolution will require the adoption of a relevant legal framework offering an effective legal remedy against this violation of the right to fair a trial, as well as changes in the management of cases in order to urgently process these cases.[83]

## 9. Outcomes

One of the important questions concerning the efficacy of legal remedies in anti-discrimination cases concerns outcomes. If the vast majority of the lawsuits in such cases are rejected and in view of public perceptions showing that discrimination is widespread, it could indicate the existence of structural problems in the way lawsuits are processed by the courts, in the applicable legal framework or ultimately in the way the plaintiffs (and their attorneys) (mis)understand such legal frameworks. The problem could also lie in the combination of all of the previous factors.

An examination of the statistics on this point is challenging. The best indicator would only cover ultimate outcomes, namely cases that have gone through the whole chain of legal remedies. However, such cases account for only 22.5 per cent of the total number of judgments under consideration. As seen in the previous subsection, it is rare that a case would go through all the stages in three years (which is the period covered here). Indeed, most of the analysed are first-instance judgments, and there is no guarantee that their outcome would remain the same on appeal. For that reason, the Mission has analysed the outcomes in the cases before the first and third instances for the period under consideration (Chart 14 and Chart 15).

83 The European Court of Human Rights has already determined the existence of a structural problem in this respect, whose rectification will require the adoption of general measures in the form of the relevant legislative framework. So far, only Republika Srpska and Brčko District BiH have adopted the laws addressing the issue of the length of proceedings. See: *Delić v. Bosnia and Herzegovina*, no. 59181/18, 2 March 2021. Republika Srpska and Brčko District have adopted the relevant legislation. See: the RS Law on the Protection of the Right to a Trial within a Reasonable Time (Official Gazette of RS, no. 99/20); the BD BiH Law on the Protection of the Right to a Trial within a Reasonable Time of BD (Official Gazette of BD, no. 2/21)

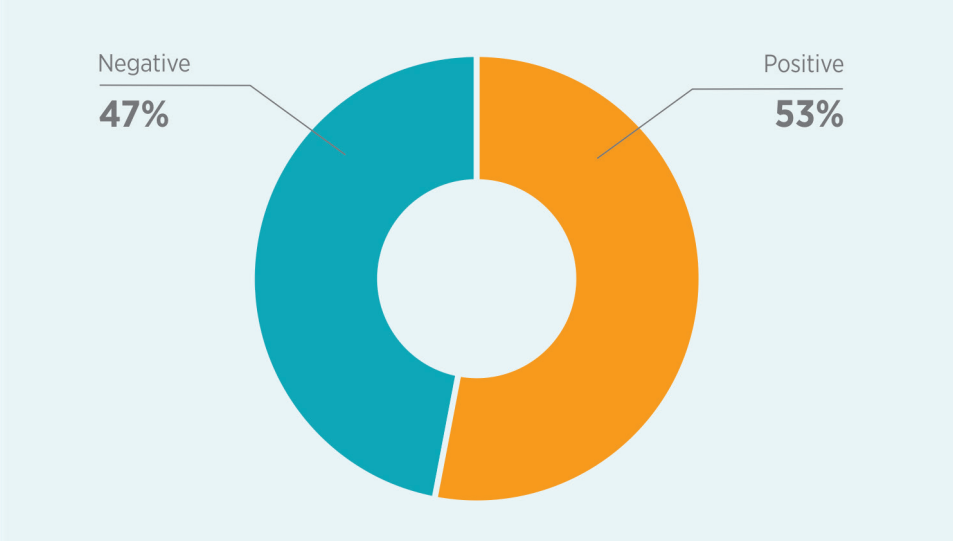


*Chart 14: the outcome of cases before first-instance courts*

The information in Chart 14 shows a high percentage of positive first-instance outcomes in anti-discrimination cases in BiH for the reporting period.[84] This also shows an increase in judgments with positive outcomes compared to the previous analysed periods.[85] It should be mentioned that this statistic is heavily influenced by the trend noted in period from 2020 to mid-2021 of a large number of (positive) judgments rendered before the Sarajevo Municipal Court. These cases deal with the same issue, namely the alleged discrimination existing between different categories of beneficiaries under FBiH Law on Social Protection, Protection of Civilian Victims of War, and Protection of Families with Children.[86] It remains to be seen how these cases will be dealt with at the appeal.

84 The vast majority of the cases under examination feature the combination of different lawsuits. The judgment is counted as having a positive outcome if at least one such lawsuit is positive (e.g. if the declaratory claim is upheld, but the compensatory is rejected)

85 See: *Analysis of the Judicial Response*…, p. 17 (31.8 per cent of lawsuits were upheld)

86 Official Gazette, no. 36/99, 54/04, 39/06, 14/09, 40/16 and 45/18

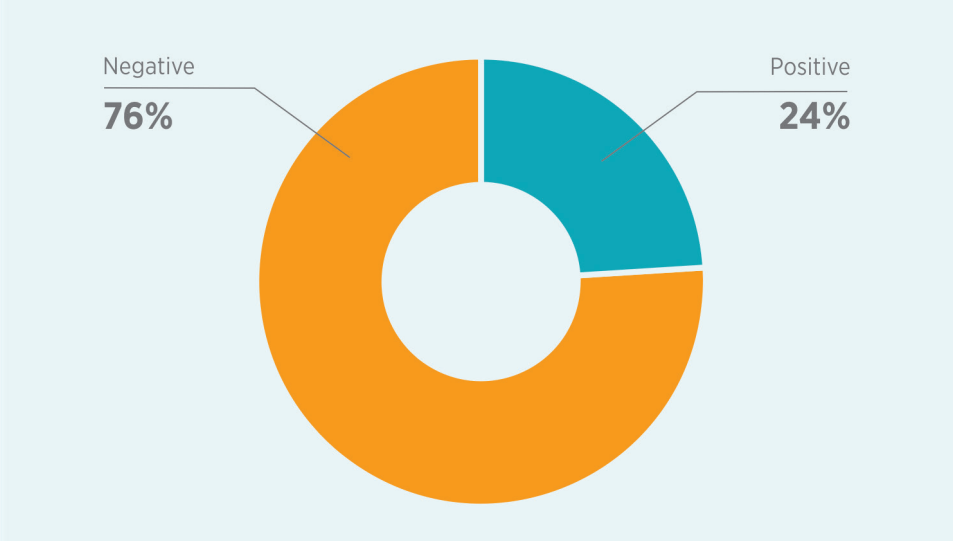


*Chart 15: the outcome of cases before third-instance courts*

Significantly different trends are noted before the third-instance courts (Chart 15).[87] This confirms previous trends that the vast majority of the discrimination complaints before the courts in BiH are ultimately rejected.[88] It is hard to assess precisely whether this is indicative of any systemic issues possibly affecting the effectiveness of the remedy, potential unrealistic expectations of the plaintiffs or misunderstanding of the anti-discrimination standards under the LPD. It would require deep qualitative analysis to discern any concrete rationale. However, some contributing factors may be obtained from the analysis in the following section, such as a large discrepancy between the perception of discrimination in society, as indicated in various empirical analyses, and the judicial assessment of the complaints as presented by the plaintiffs.

87 In this context an outcome is counted as positive if the court upholds the positive judgment of the lower court, or if it reverses the negative judgment of the lower-court

88 Another recent analysis of the anti-discrimination case law similarly highlights the very law level of positive outcomes in these cases at the final level, which is there estimated to be less than 20 per cent. See: Slavica Čindrak and Zvjezdana Antonović, *Sudska praksa u predmetima diskriminacije*, High Judicial and Prosecutorial Council, 2022, p. 10

# QUALITATIVE ANALYSIS

In this analysis of the available case law for the three-year period from mid-2018 to mid-2021, the Mission focuses only on the most contentious issues identified in the anti-discrimination jurisprudence. It does so, without going into detail regarding other problematic aspects of the practice as many have already been highlighted in the previous reports of the Mission or other actors.[89] Thus, the analysis will focus on the main identified issues concerning the procedure (issues of evidence, burden of proof, non-pecuniary damages and systemic discrimination) and the issues in the interpretation of the notion of mobbing.

## 1. Procedural issues and developments

The detailed analysis of the judgments from the reporting period indicate both a number of important procedural developments and also complications in practice which create challenges for courts in their effective application of the LPD. The points of interest to be focused on here concern the: 1. management of cases and treatment of evidence, 2. treatment of the non-pecuniary damages, 3. application of the burden of proof, and 4. treatment of cases of systemic discrimination.

### 1.1 Management of cases and treatment of evidence

One of the challenges that are often evident in more complex cases of discrimination is the frequent poor management of cases by courts in the early stages of the proceedings, including initial analysis of the lawsuit. Namely, confusing and incoherent claims are allowed

89 See, e.g., for Mission reports: *Analysis of the Judicial Response*…; *Assessment of the Work*… See, also: Radončić, *op.cit*.; Čindrak and Antonović, *op.cit*.

to proceed, only to be struck down by the highest courts for procedural irregularities stemming from the earliest stages of the proceedings.[90] It is inimical to the effectiveness of court proceedings if plaintiffs have to consolidate their lawsuits after years of litigation, after having gone through several levels of courts, and then have to initiate proceedings from the beginning. Although perhaps more contentious, as it brings into apparent tension the duty of effective management of cases and the neutral role of the court in civil proceedings, one might argue that the same conclusion could apply to the decision of the courts that the lawsuit is rejected. This is because it is clear to any objective observer that the plaintiffs have not even shown the *likelihood* of discrimination, a standard lower than that normally required in civil cases (see next subsection). Indeed, most judgments with negative outcomes do not contain the detailed proportionality analysis one would expect after the shifting of the burden of proof, but rather a conclusion stating that the likelihood of discrimination was not shown. Such a conclusion, being drawn after many years of litigation, could be avoided by more detailed scrutiny of the lawsuits in the initial phases of the proceedings, where the non-satisfaction of this low standard is sometimes evident in the most obvious cases.[91] It may also be indicated to plaintiffs that their duty under Article 15, is to make it probable that discrimination has occurred.[92]

The treatment of evidence by the courts in anti-discrimination cases is an issue of greatest importance. The position of the courts is that some types of evidence, in particular the testimony of the victim, either is seriously diminished in importance or have no value in the proceedings.[93] Sometimes, such evidence is completely ignored by the courts.[94] Under civil proceeding laws, each item of evidence presented by the plaintiff should be subject to careful scrutiny by the courts and to substantive evaluation. In some cases, the evaluation is not properly performed and evidence is excluded

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**90** See, e.g.: judgment of the RS Supreme Court, no. 92 0 P 045967 18 Rev, 20 September 2018; judgment of the RS Supreme Court, no. 92 0 P 045948 18 Rev, 22 May 2019; judgment of the RS Supreme Court, no. 92 0 P 046082 19 Rev, 2 October 2019; judgment of the Bijeljina District Court, no. 80 0 P 097102 19 Gž, 8 June 2020; judgment of the RS Supreme Court, no. 80 0 P 052394 21 Rev, 12 May 2021. See, also, discussion in: judgment of the Sarajevo Municipal Court, no. 65 0 Rs 698842 18 Rs, 30 April 2021

**91** This will not always be the case, particularly where the conclusion of the likelihood of discrimination will depend on the testimony of the alleged victim or the witnesses, since in most lawsuits there is very little indication of the purposes to which the alleged witnesses are being called, or indeed the nature of their testimony

**92** It has also recently been noted by two prominent practitioners that the law quality of lawsuits and the inattentiveness of courts in their adequate scrutiny in the early phases of the proceedings leads to later protracted proceedings. See: Čindrak and Antonović, *op.cit.*, pp. 60-61

**93** See, e.g.: judgment of the Sarajevo Municipal Court, no. 65 0 Rs 732951 18 Rs, 17 October 2019; judgment of the Zenica Municipal Court, no. 43 0 Rs 165528 18 Rs, 17 May 2019; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 181396 19 Rs 2, 15 July 2020

**94** This was one of the reasons for the BiH Constitutional Court in quashing the judgment of the RS Supreme Court, no. 71 0 P 184192 17 Rev, 22 November 2018. See: decision of the BiH Constitutional Court, no. 1198/19, 23 June 2021, para. 46

without proper justification.[95] In these types of cases, plaintiffs do not have to prove discrimination, but only show its likelihood. The Mission notes that traditional evidentiary tools are predominantly used in anti-discrimination proceedings, rather than statistics or situational testing.

### 1.2 Treatment of non-pecuniary damages

The LPD provides for special anti-discrimination lawsuits allowing for compensation of pecuniary or non-pecuniary damages arising from discrimination (Article 12(1)(c)).[96] A number of complexities can be noted in this context, *inter alia* the manner of determining the scope and amount of damages, whether different forms of discrimination require different approaches, and whether expert opinions are needed in every case of determination of such damages. In practice, there is little consistency in this regard, which leads to uncertainty in the application of the LPD. Because of the low number of final judgments awarding non-pecuniary damages in the current reporting period, judgments made during the previous reporting period (i.e. from the adoption of the LPD in 2009 to mid-2018), have also been taken into account for this analysis.

An issue that is proving to be particularly challenging concerns the determination of the courts on the issue of non-pecuniary damages. Especially concerning is the position of some courts that discrimination as such does not imply any damage to the victim and that the existence of concrete harm (of non-trivial severity) must always be proven by victims, generally through expert testimony and reports.[97] This position stands in tension with the human rights standards stemming from the ECHR. Namely, the ECtHR has consistently held that finding that discrimination has taken place, in any of its forms, *always* presents an attack on equality and human dignity. The findings of courts that such discrimination occurred should *automatically* presuppose the existence of (non-trivial) harm.[98] There is no conceptual space here for the determination that discrimination occurred but that this was without harmful consequences, or the effects were too trivial to warrant non-pecuniary damages. Whether the plaintiff should further have to prove the scope of such harm is an issue that is also a subject of contention. The use of expert

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**95** For examples of good practice, see: judgment of the Sarajevo Municipal Court, no. 65 0 Rs 697329 18 Rs, 6 January 2021; judgment of the Sarajevo Cantonal Court, no. 65 0 Rs 497933 19 Rsž, 10 March 2020 (quashing lower-instance judgment for this reason); judgment of the FBiH Supreme Court, no. 65 0 Rs 494073 21 Rev, 28 October 2021

**96** This lawsuit may be made individually (see, e.g., judgment of the FBiH Supreme Court, no. 64 0 P 040340 17 Rev, 19 July 2018), combined with others (particularly one declaratory one), or be used subsequent to the determination of discrimination (see, e.g.: judgment of the FBiH Supreme Court, no. 58 0 P 101740 19 Rev 2, 17 October 2019)

**97** For typical cases, see: judgment of the BiH Court, no. S1 3 P 000681 18 Rev, 22 May 2018; judgment of the Sarajevo Municipal Court, no. 65 0 P 796066 19 P, 7 January 2021; judgment of the BiH Court, no. S1 3 P 032745 21 Rev, 8 June 2021; judgment of the Sarajevo Municipal Court, no. 65 0 P 828375 20 P, 16 July 2021

**98** See, e.g.: *Konstantin Markin v. Russia* [GC], no. 30078/06, § 168, ECHR 2012 (extracts); *Hulea v. Romania*, no. 33411/05, § 45, 2 October 2012; *Guberina v. Croatia*, no. 23682/13, § 112, ECHR 2016

opinions in some types of discrimination (such as mobbing) may serve the purpose of proving the extent of harm, but not its very existence.[99] The resort to such experts for proving the extent of harm in other forms of discrimination does not always seem warranted. Thus, the practice of some courts awarding non-pecuniary damages on the basis of their own assessment of harm, which is presupposed to exist, should be commended.[100] Indeed, the FBiH Supreme Court has held that in cases concerning non-pecuniary damages for direct discrimination "the existence and amount of harm are not proven with expert opinions, but rather the circumstances of each case are taken into account for its evaluation and amount."[101]

Naturally, these considerations would not apply to the question of pecuniary damages.[102]

Among available cases (see *Annex*), one notable trend is a general lack of thorough reasoning when it comes to the question of just satisfaction. There is often a vague reference to court practice, but without provision of details. On occasion a reference is made to court practices in cases dealing with defamation or the death of a close relative,[103] but without further elaboration on the relation of such case law to the specific harm arising from the violation of the principle of equality and human dignity in (different types of) discrimination. This is seen in the practice of some courts[104] when applying standard analysis for non-pecuniary damages to discrimination cases - with separate findings and awarding of non-pecuniary damages with respect to mental anguish due to diminution of living activity, harm to reputation and honour, and experienced fear - with other courts taking a more holistic approach in cases of discrimination having in mind its specific features.[105] Such a divergent approach also leads to a varying focus of court experts in their submitted opinions when they are employed in discrimination cases.

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**99** See, e.g., judgment of the RS Supreme Court, no. 71 0 Rs 275020 20 Rev, 11 March 2021

**100** See e.g.: judgment of the Mostar Cantonal Court, no. 58 0 Rs 161030 17 Rsž 2, 24 April 2019; judgment of the Zenica Cantonal Court, no. 43 0 Rs 160655 20 Rsž, 25 February 2020; judgment of the Basic Court in Banja Luka no. 71 0 P 323323 20 P, 10 December 2020; judgment of the Municipal Court in Sarajevo, no. 65 0 P 800192 19 P, 30 October 2020; judgment of the Sarajevo Municipal Court, no. 65 0 P 869508 20 P, 15 June 2021. See, also: Čindrak and Antonović, *op.cit.*, p. 103 (approving the application of the principle of decision by equity in these cases)

**101** See, judgment of the FBiH Supreme Court, no. 17 0 Rs 075491 19 Rev, 11 November 2020. As noted by the previous cited cases this position is not followed by all the courts

**102** See, e.g., judgment of the FBiH Supreme Court, no. 56 0 P 063396 20 Rev, 10 February 2022

**103** See, e.g. judgment of the Mostar Municipal Court, no. 58 0 Rs 092150 14 Rs 2, 4 November 2016 (upheld on revision)

**104** See, e.g., judgment of the Tuzla Municipal Court, no. 32 0 Rs 179659 13 Rs, 19 October 2015 (upheld on revision in 2017); judgment of the Tešanj Municipal Court, no. 39 0 Rs 044374 16 Rs, 15 May 2017 (upheld on revision in 2018)

**105** See, e.g., judgment of the Mostar Municipal Court, no. 58 0 Rs 092150 14 Rs 2, 4 November 2016 (upheld on revision in 2019); judgment of the BiH Court, no. S1 3 P 022056 17 Gž, 15 December 2017 (final); judgment of the RS Supreme Court, 71 0 Rs 275020 20 Rev, 11 March 2021

The recognition of the existence of harm of discrimination and the awarding of adequate non-pecuniary damages should not be viewed in isolation, but instead, as a part of a wider effort of the LPD to secure the purposes for which it has been established, namely the *"framework for the realization of equal rights and opportunities to all persons in Bosnia and Herzegovina"* (Article 1(1) LPD). Thus, the position of some courts that the *primary* purpose of the LPD is the provision of legal protection through declaratory judgments, and not the reparation or publication judgments under the LPD (Article 12(1)(c) and (d)), does not seem founded.[106] This must be viewed in light of the duty outlined under the relevant EU law - which has proven a basis for the framing of the LPD, and is in any case something with which the BiH anti-discrimination legal framework should be harmonized, given the BiH's goal of the EU integration - that the Member States should prescribe sanctions in cases of discrimination which must be *effective, proportionate*, and *dissuasive* even where there is no identifiable victim (such as in cases of collective lawsuits).[107]

It is certainly clear that a purely symbolic sanction cannot be regarded as being compatible with EU anti-discrimination law.[108] Moreover, that would not be compatible with the ECtHR jurisprudence which, in addition to the acknowledgement of a human rights violation by the State, requires the awarding of adequate just satisfaction for the removal of a plaintiff's victim status. The noted practice of the courts in BiH - to adjudicate no awards at all or very low awards - questions the effectiveness of the discrimination proceedings as a whole.

This shows that anti-discrimination law is not just a subsection of tort law concerning individual plaintiffs, but is directed towards the protection and realization of wider community goals and interests.[109]

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**106** See, judgment of the FBiH Supreme Court, no. 17 0 P 072167 21 Rev, 2 November 2021 (the plaintiff complained that the rejection of his request for non-pecuniary damages and publication of the judgment robed him from effective legal protection from discrimination). The plaintiffs must, however, expressly make a request for non-pecuniary damages under Article 12(1)(c) - see: judgment of the FBiH Supreme Court, no. 51 0 P 114969 18 Rev, 24 April 2018

**107** See: judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C54/07, ECLI:EU:C:2008:397, §§ 39-40. Article 15 of Directive 2000/43 thus imposes on Member States the obligation to introduce into their national legal systems measures which are *sufficiently effective* to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective

**108** See: judgment of 25 April 2013, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, C81/12, ECLI:EU:C:2013:275, § 64. We can thus take as problematic, if not even contradictory, the position of a court that the awarded non-pecuniary damage of a low amount is indeed symbolic, but still deterrent. See, judgment of the Goražde Municipal Court, no. 45 0 P 030377 15 P, 29 July 2016 (upheld on revision in 2017)

**109** The previously cited case law of CJEU shows that the adequateness of sanctions can be determined not only in respect of damages awarded, but also though the publication and dissemination of the judgments. Under the LPD, however, publication requests are very limited (Article 12(1)(d)), so that the importance of damages for the adequacy of anti-discrimination sanctions takes on particular significance

### 1.3 Application of burden of proof

One of the ways of realizing the systemic goals of the LPD, mentioned in the previous subsection, is through the reconceptualization of different procedural rules in anti-discrimination cases, including those regarding the burden of proof. Very soon after the adoption of the LPD in 2009 this proved to be one of the most contentious issues in the implementation of that legislation, which also necessitated amendments to the relevant provision of Article 15. The latter now provides that the burden of proof is shifted to the other party when the plaintiffs, "with the evidence available to them, show the likelihood of discrimination". As the previous reports indicated,[110] this provision is similarly creating confusion and problems in implementation, as the reference to "evidence" in the cited provision was often taken to require plaintiffs to prove discrimination at the initial stages of proceedings pursuant to the general rules on burden of proof under the entity codes on civil procedure. The retention of a reference to "facts" (as was the case in the 2009 legislation) rather than "evidence" (as added in the 2016 amendments) might have contributed to the avoidance of such confusion in implementation and may have brought the provision closer to the understanding under the relevant EU law and the ECtHR jurisprudence, which use the terminology of *'prima facie'*.[111] Indeed, one might expect with these plaintiff-friendly procedural rules that most decisions with negative outcomes would focus on the justification of difference in the treatment of persons in similar situations and not on the preliminary question of whether the likelihood of discrimination was demonstrated. However, this is still not the case.[112]

The Mission notes a more consistent invocation of standards concerning the burden of proof from the LPD during the reporting period. Still, instances where standards of the LPD are effectively ignored or are not properly considered persist.[113] Moreover, there is still some inconsistency in formulating a single, coherent approach across the country, as is evident with the Supreme Courts where different councils are often not harmonized. Some councils of the FBiH Supreme Court can be seen imposing a combination of references to the general approach to the burden of proof used in ordinary civil suits

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**110** See: *Analysis of the Judicial Response*…, pp. 44-48; *Assessment of the Work of BiH Institutions*…, pp. 28-30

**111** See, e.g.: judgment of 10 March 2005, *Vasiliki Nikoloudi v. Organismos Tilepikinonion Ellados AE*, C196/02, ECLI:EU:C:2005:141, §§ 74-75; judgment of 17 July 2008, *S. Coleman v. Attridge Law and Steve Law*, C303/06, ECLI:EU:C:2008:415, § 54

**112** Looking only at the negative judgments of the third-instance courts it can be noted that in 68per cent of such cases the courts rejected the revision since they held that plaintiffs had not even shown the likelihood of discrimination. For an exception, see: judgment of the FBiH Supreme Court, no. 46 0 Rs 077157 19 Rev, 18 November 2019 (the plaintiff managed to shift the burden of proof, but the defendant proved there was no discrimination)

**113** See, e.g.: judgment of the Zenica Cantonal Court, no. 43 0 Rs 139960 17 Rsž, 7 March 2018 (the court insists that the plaintiff had not proven discrimination pursuant to Article 123 of FBiH Code of Civil Procedure), upheld by the judgment of the FBiH Supreme Court, no. 43 0 Rs 139960 18 Rev, 7 August 2018; judgment of the Travnik Municipal Court, no. 51 0 Rs 166168 19 Rs, 11 June 2021; judgment of the RS Supreme Court, no. 71 0 Rs 287219 20 Rev, 20 May 2021; judgment of the RS Supreme Court, no. 85 0 Rs 072179 20 Rev, 23 November 2021

- in some cases requiring from the plaintiff the positive proof of discrimination - along with subsequent references to the wording of the LPD noting that "probability" of discrimination was not demonstrated.[114] In other cases, judgements of the same court adopt a more coherent approach requiring the plaintiff to prove "prevailing probability" of discrimination, after which the burden of proof is shifted to the defendant, who must then prove that discrimination was not committed "with the degree of certainty".[115] However, the aforementioned position was not fully clear and was applied inconsistently.

There was an attempt to rectify this with a new standard noted in one of the recent judgments of the FBiH Supreme Court. Thus, the issues that must be proven with *certainty* are that the plaintiff "possesses characteristics on the basis of which he considers that he has been discriminated" and that "the acts of the defendants, for which the plaintiff lodged the lawsuit, had indeed occurred, namely, the defendant's action or measure exists and adversely affected the plaintiff". The issues that must be proven with the level of *prevailing probability* are the "discriminatory ground and different treatment in relation to the comparator".[116] This position is problematic, particularly the expectation that the plaintiff is supposed to prove discrimination with "certainty". Even though "certainty" is an evidentiary level that seems to be too high for any civil case, let alone an anti-discrimination case, the proposition that the plaintiff must prove with certainty that the alleged discriminatory act has occurred is hard to reconcile with the wording of Article 15 of the LPD, or the general purpose behind the standard concerning the shifting of the burden of proof in the anti-discrimination cases. Indeed, in two recent cases in which the BiH CC quashed the judgments of the RS Supreme Court, the BiH CC emphasized that according to Article 15 of the LPD "the facts should not be proven at the level of certainty, as is usually the duty of the one bearing the burden of proof".[117] Furthermore, it is unclear why the qualification of "prevailing" (or even "great"[118]) probability was adopted, having in mind the formulation in the LPD only referring to "probability" without any qualifiers as

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**114** See, e.g., judgment of the FBiH Supreme Court, no. 32 0 P 309011 18 Rev, 31 July 2018; judgment of the FBiH Supreme Court, no. 68 0 Rs 040884 18 Rev, 7 February 2019; judgment of the FBiH Supreme Court, no.58 0 Rs 161030 19 Rev, 5 December 2019; judgment of the FBiH Supreme Court, no. 17 0 Rs 072157 20 Rev, 19 May 2020. For a similar position in RS, see: judgment of the RS Supreme Court, no. 92 0 Rs 026821 19 Rev 2, 9 June 2020

**115** See, e.g., judgment of the FBiH Supreme Court, no. 64 0 Mal 037350 18 Rev, 6 March 2018; judgment of the FBiH Supreme Court, no. 65 0 P 235888 18 Rev, 19 July 2018; judgment of the FBiH Supreme Court, no. 53 0 Rs 062542 18 Rev, 20 November 2018; judgment of Supreme Court of FBiH, no. 65 0 P 106515 19 Rev, 2 July 2019; judgment of the FBiH Supreme Court, no. 56 0 Rs 055091 21 Rev, 27 August 2021. Nevertheless, even here there is inconsistency. Thus, in one case the FBiH Supreme Court held that, after the shifting of the burden of proof, the defendant had to show with "prevailing probability" that there was no discrimination. See: judgment of the FBiH Supreme Court, no. 39 0 Rs 044374 18 Rev, 5 April 2018

**116** See: judgment of the FBiH Supreme Court, no. 43 0 P 171233 21 Rev, 9 March 2022

**117** See: decision of the BiH Constitutional Court, no. 1198/19, 23 June 2021, para. 46; decision of the BiH Constitutional Court, no. AP-190/19, 23 June 2021, para. 40

**118** See: judgment of the Supreme Court of FBiH, no. 43 0 P 178741 21 Rev, 16 February 2022

well as the requirement of the ECtHR which refers to *prima facie* cases.[119] However, it should be mentioned that these qualifications have so far been employed only by the Supreme Court of FBiH, or rather some of its councils, and are not employed by other courts in BiH. The practice of these latter courts should be commended but they do indicate a certain fragmentation in practice in the application of the LPD.

A particular challenge that has arisen in this context is the treatment of provisions dealing with shifting the burden of proof when discrimination is alleged to have been contained in the provisions of statutes and other general legal acts. Courts in FBiH and RS have adopted an unacceptable level of formalism and have resisted the invitation to shift the burden of proof after considering that statutes or by-laws themselves are likely to be discriminatory. Indeed, in the reporting period, the BiH Constitutional Court quashed four judgments of the supreme courts of FBiH and RS because of the incorrect application of Article 15 of the LPD relating to the burden of proof in this particular context.[120] The supreme courts of both entities promptly acted after these decisions of the BiH Constitutional Court and properly applied the relevant provisions of the LPD.[121] Indeed, one may consider the developments with respect to systemic discrimination, discussed in the next subsection, as related to this new sensitivity to discrimination stemming from the general legal acts themselves.

### 1.4 Treatment of cases of systemic discrimination

During the reporting period, the treatment of systemic discrimination represents a major development in anti-discrimination jurisprudence. This refers to a situation where there is a complaint of alleged discrimination stemming from a statute. This particularly relates to cases alleging express differentiation between individuals with the same types of disabilities on the basis of the origin of such disabilities (such as war veterans and civilian victims of war, whose disability originated as a result of war, and individuals whose disability originated in other contexts), pursuant to the FBiH Law on Social Protection, Protection of Civilian Victims of War, and Protection of Families with Children.[122] The plaintiffs alleged that the statute itself puts them in a worse position with respect to the scope and amount of benefits, namely those related to disability, the right to assistance

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**119** See: *Oršuš v. Croatia* [GC], no. 15766/03, § 150, 16 March 2010. Similar position is adopted by the EU courts. See, e.g.: judgment of 25 April 2013, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, C81/12, ECLI:EU:C:2013:275, §§ 55-58

**120** See: Decision of the BiH Constitutional Court, no. 3174/17, 19 September 2019; decision of the BiH Constitutional Court, no. AP-166/18, 15 July 2021; decision of the BiH Constitutional Court, no. AP-190/19, 23 June 2021; decision of the BiH Constitutional Court, no. 1198/19, 23 June 2021

**121** See: judgment of the RS Supreme Court, no. 71 0 P 184192 21 Rev 2, 27 September 2021; judgment of the RS Supreme Court, no. 82 0 P 012368 21 Rev 2, 11 August 2021; judgment of the FBiH Supreme Court, no. 51 0 P 054522 21 Rev 2, 10 September 2021

**122** Official Gazette, no. 36/99, 54/04, 39/06, 14/09, 40/16 and 45/18. The issue arose with the 2009 amendments

and care, and the right to orthopedic care. After a number of lawsuits alleging this type of discrimination were submitted before the Sarajevo Municipal Court, a request was issued for the FBiH Supreme Court to resolve the disputed legal questions that arose, namely: a) whether courts in civil proceedings have the competence to rule on the existence of systemic discrimination; b) whether the courts in such proceedings can make determinations with respect to the claimed benefits (pursuant to the rules of administrative proceedings), and c) whether the court in civil proceedings can determine the rights and benefits not regulated by the impugned Statute.[123]

The first question is the most important for the present purposes, as it concerns the very scope of the LPD and the competences of the courts in its application. Ordinarily, cases alleging that provisions of the statutes are discriminatory would argue that the impugned provisions are, for that reason, also unconstitutional.[124]. The determinations of unconstitutionality are, however, a competence that belongs solely to the constitutional courts, which can make such determinations either through abstract or concrete control of constitutionality. Claiming abstract control of constitutionality is very restricted at the level of BiH and FBiH and is not open to individual plaintiffs. This is not the case in RS, where *actio popularis* is allowed before the RS Constitutional Court. In the case of concrete control of constitutionality, every court, upon the request of the parties or at its own initiative, can (and arguably must) suspend proceedings and ask the competent constitutional court to rule whether the provision it has been asked to apply is unconstitutional.[125] There is also a group of cases where the plaintiffs allege they have been discriminated against, usually in the context of other proceedings, due to the application of discriminatory statutory provisions, but the courts do not make a request for the concrete control of constitutionality. If the plaintiffs' complaints are not successful and they maintain their claims later in an appeal to the Constitutional Court of BiH, the latter may make a determination of unconstitutionality of the discriminatory provision in the appeals procedure and ask the relevant legislative bodies to harmonize the impugned legislation with the Constitution of BiH.[126] In the cases under consideration, the civil division of the FBiH Supreme Court ruled that the courts had the competence to determine the existence of systemic discrimination in civil proceedings under the LPD (and thus to make a declaratory judgment under Article 12(1)(a)). Moreover, they could also order the

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**123** See, Article 61 of the FBiH Code of Civil Procedure (Official Gazette of FBiH, no. 53/03, 73/05, 19/06 and 98/15)

**124** Indeed, since BiH Constitution, and the ECHR which is part of it (Article II/2 of BiH Constitution), clearly provide for the prohibition of discrimination, it is not possible for a statute itself (or its provisions) to be discriminatory, but not at the same time unconstitutional

**125** It is not clear whether such a decision could be used as a basis for obtaining damages. See: Article 65 of the Rules of BiH Constitutional Court (Official Gazette of BiH, no. 94/14). See, however, discussion in the judgment of the Court of BiH, no. S1 3 P 003293 12 Rev, 24 December 2012 (application of Article 67 of the Rules valid at that time)

**126** See, e.g., decision of the BiH Constitutional Court, no. AP-369/10, 24 May 2013. However, under its appeals jurisdiction the BiH Constitutional Court does not have the power to nullify such provisions, which remain in force until they are eventually changed

adoption of measures to remove discrimination or its effects or to order the payment of damages (under Article 12(1)(b) and (c)). The court underscored, however, that in such proceedings regular courts may not rule on the compatibility of the impugned statute or its provisions with the BiH Constitution or ECHR, for this competence belongs solely to the BiH CC.[127] This, in effect, allows individual plaintiffs to obtain the determination of discriminatory character of the statute (or its provisions) and to obtain damages without the validity of that statute being brought into question in relation to others.

It remains to be seen if this manner of confronting the systemic discrimination stemming from the statutes themselves is the most efficient way of achieving the purposes of the LPD. In the reporting period, the Sarajevo Municipal Court rendered 130 judgments in cases alleging discrimination under the impugned statute and there appear to be even more cases pending. Even though all the lawsuits stem from the same source and essentially contain the same or similar complaints, the individual judgments are not uniform and there is evident divergence in case law with respect to the same issues. Most importantly, the discriminatory provisions of the statute are still fully valid, even though in some judgments the courts adopted the request from Article 12(1)(b) of the LPD and ordered the FBiH to undertake steps to remove discrimination in the statute under consideration.[128] As noted previously, a collective lawsuit may have been a more efficient avenue, having in mind the possibility of the extended subjective effect of judgments in such a case (see discussion in Section III). Finally, this approach to the interpretation of the LPD has so far been adopted only in the FBiH, and it seems to face challenges in RS.[129]

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**127** See: Legal ruling of the FBiH Supreme Court, no. 65 0 P 829615 20 Spp, 15 December 2020. The Court also gave a negative answer to question b), as the regular courts in civil proceedings cannot make rulings that would ordinarily be made in administrative proceedings. There are however evident problems in the interpretation of this holding between different judges of the Sarajevo Municipal Court. Compare, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 P 816224 19 P, 20 May 2021 and judgment of the Sarajevo Municipal Court, no. 65 0 P 797645 19 P, 28 April 2020

**128** See, e.g., judgment of the Sarajevo Municipal Court, no. 65 0 P 869508 20 P, 15 June 2021 (not yet final)

**129** Similar attempt to obtain the determination of the discriminatory nature of a provision of the Law on Railways of RS (discrimination on basis of age) was rejected by the courts in RS, considering that it is not within their competence to make such a determination (they did consider whether the provision, such as it is, was differentially and arbitrarily applied in individual cases, which is a separate question). See: judgment of the Banja Luka District Court, 71 0 Rs 286277 19 Rsž, 6 March 2020. See, however, the discussion of the decisions of the BiH Constitutional Court in Section IV.1. on the burden of proof

## 2. Mobbing

> Mobbing shall be considered to be any form of non-physical harassment at a workplace, manifested in repetitive actions that have a humiliating effect on the victim and aim at or result in degradation of the employee's working conditions or professional status. (Article 4 (3)).

Mobbing remains one of the most frequently litigated forms of discrimination before the courts in BiH (Chart 8). Nevertheless, its application shows various challenges for the courts both with respect to its material and procedural aspects. This appears to be the area with a notable level of fragmentation in practice. With respect to the former, this is evident in conflating the analysis applied in respect to general forms of discrimination to mobbing as a special type of discrimination, analysis of its constitutive element of "repetition", and the question of standing. Regarding the latter, the main challenges concern the application of the LPD or relevant labour legislation of the entities in cases of mobbing which may affect the application of different procedural rules, such as deadlines for appeals.

### 2.1 Analysis of mobbing as a specific form of discrimination

Being a specific type of discrimination (Article 4 of the LPD), mobbing does not conceptually fit with the standard forms of discrimination. This creates problems in its application in court. It does not require a proof of nexus to one of the protected grounds of discrimination.[130] Similarly, it does not require proof of the existence of difference in treatment. Despite the fact that this is a necessary element for a typical discrimination case, it does not apply in practice to some special types of discrimination. For instance, in cases of sexual harassment it would not be a legitimate defence for the defendant to claim that there was no difference in treatment, and thus no discrimination, as all other employees were also sexually harassed. Even though the proof of the existence of such difference in treatment would be legitimate and indeed a necessary conceptual step prior to the analysis of the justification of general types of discrimination, it would not be necessary in such special cases.

This same logic should apply to cases of mobbing, but what is evident in many such cases is that the courts apply the normal analysis used for other forms of discrimination,

130 See, however, judgment of the Supreme Court of FBiH, no. 46 0 P 077695 20 Rev, 3 March 2020, where the court specifically required the showing of both nexus (but also motive!) in a mobbing case. See, also judgment of the Sarajevo Municipal Court, no. 65 0 P 800192 19 P, 30 October 2020

including the need for proof (or rather the likelihood) of difference in treatment.[131] Thus, in a typical case, the fact that the defendant used vulgar language towards all employees, and not only and specifically towards the plaintiff, was seen as crucial for the finding that no mobbing can be identified.[132] It is clear from the above that the difference in treatment must not be seen as a constitutive element of this type of discrimination and a clear rejection of such a requirement by some courts should be commended.[133] Nonetheless, taking this into account could inform the analysis of the court as to the qualification of particular impugned acts as potential acts of mobbing.

### 2.2 Interpreting the notion of "repetition"

Another challenge worth mentioning relates to the constitutive element of this type of discrimination, namely the necessity of its repetition. Neither the LPD, nor entity labour legislation, provide guidance as to the interpretation of this notion, which has led to a fragmentation in case law and the adoption of problematic notions. One of such contentious legal understandings is that the acts of mobbing must last: a) *at least six months* and occur b) *at least once a week* (for some courts),[134] or *at least twice a week* (for other courts).[135] It is instructive in this context to refer to a recent judgment of the ECtHR in the case against Montenegro where the applicant did not receive protection against harassment at work (defined as "mobbing" in Montenegrin domestic law) because the courts in Montenegro required the proof of incidents occurring every week for six months. After finding that acts of mobbing may fall under the scope of Article 8 of the ECHR (right to respect for private and family life), as they may affect a person's physical and psychological integrity, the Court noted the following:

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131 See, e.g., judgment of the Supreme Court of RS, no. 92 0 Rs 045650 17 Rev, 17 May 2018; judgment of the Novi Travnik Cantonal Court, no. 46 0 Rs 077157 17 Rsž, 13 February 2019; judgment of the RS Supreme Court, no. 92 0 Rs 050479019 Rev, 9 October 2019; judgment of the RS Supreme Court, no. 95 0 Rs 050479 19 Rev, 9 October 2019; judgment of the Zenica Municipal Court, no. 43 0 Rs 165528 18 Rs, 17 May 2019; judgment of the Novi Travnik Cantonal Court, no. 51 0 P 122504 18 Gž, 12 February 2019; judgment of the FBiH Supreme Court, no. 51 0 P 122504 19 Rev, 5 December 2019; judgment of the FBiH Supreme Court, no. 17 0 Rs 072157 20 Rev, 19 May 2020; judgment of the Bihać Cantonal Court, no. 22 0 Rs 042773 20 Rsž, 4 September 2020

132 See, e.g. judgment of the Sarajevo Municipal Court, no. 65 0 Rs 733140 18 Rs, 20 October 2020.

133 See e.g., judgment of the Banja Luka District Court, no. 71 0 Rs 275020 19 Rsž, 7 May 2020; judgment of the FBiH Supreme Court, no. 65 0 Rs 494073 21 Rev, 28 October 2021

134 See, e.g. judgment of the Zenica Municipal Court, no. 43 0 Rs 160655 18 Rs, 15 November 2019; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 732951 18 Rs, 17 October 2019; judgment of the Zenica Cantonal Court, no. 43 0 Rs 160655 20 Rsž, 25 February 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 803624 19 Rs, 9 December 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 733140 18 Rs, 20 October 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 541491 15 Rs, 8 July 2020; judgment of the Sarajevo Municipal Court, no. 65 0 652912 17 Rs, 9 November 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 181396 19 Rs 2, 15 July 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 761289 19 Rs, 15 February 2021

135 See, e.g. judgment of the Bijeljina District Court, no. 83 0 Rs 036815 19 Rsž, 10 March 2020; judgment of the Bijeljina District Court, no. 80 0 Rs 107264 21 Rsž, 2 April 2021

*"Despite the margin of appreciation enjoyed by Contracting States in devising protection mechanisms in respect of acts of harassment at work, the Court finds it difficult to accept the adequacy of such an approach in the instant case. The Court considers that complaints about bullying should be thoroughly examined on a case-by-case basis, in the light of the particular circumstances of each case and taking into account the entire context. In other words, there may be circumstances in which such incidents are less frequent than once a week over a period of six months and still amount to bullying, or circumstances in which such incidents are more frequent and yet do not amount to bullying."*[136]

This position is undoubtedly correct and must inform the interpretation of the LPD and the relevant provisions of labour legislation in BiH.[137] Indeed, it already has a basis in the jurisprudence of the highest courts, despite not being heeded. In a recent decision by the BiH Constitutional Court, in upholding the reasoning of the FBiH Supreme Court, the following was decreed:

*"In respect of the appeal claims that there is no continuity in the alleged discrimination against the plaintiff, the Constitutional Court notes that the Supreme Court has also dealt with this question, and that it follows from its reasoning that in accordance with the legal definition (Article 4 paragraph 3 of the Law on Prohibition of Discrimination) it is not determined how many times or in what time period the acts of mobbing need to be repeated, so that in every individual case it has to be assessed if there is a continuing treatment that has caused some of the indicated consequences that have to be characterised as mobbing during work…"*[138]

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**136** Špadijer v. Montenegro, no. 31549/18, § 95, November 2021

**137** In that context see: *Pudarić v. Bosnia and Herzegovina* [Committee], no. 55799/18, 8 December 2020 ("[The Court] reiterates that no legal provision of domestic law should be interpreted and applied in a manner incompatible with States' obligations under the Convention… particularly if that would be inconsistent with the prohibition of discrimination and more broadly with the principles underlying the Convention")

**138** Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-577/20, 5 October 2021, § 53, referring to the judgment of the FBiH Supreme Court, no. 17 0 P 044231 19 Rev, 21 November 2019

### 2.3 Questions of standing

As to the question of standing, there is a lack of consistency between courts as to whether the direct perpetrator of mobbing may be sued or whether the party deemed responsible in such a case may only be the employer. The conflict is a result of some inconsistency between the LPD and the entity labour legislation, where the latter is usually interpreted as precluding the passive standing of the direct perpetrator,[139] while the former is considered to be more permissive.[140] One of the reasons for this inconsistency is the apparent uncertainty regarding the relationship between the LPD and other legislation. Having in mind that the LPD is not framework legislation and considering the duties of harmonization stemming from its Article 24, the application of anti-discrimination legislation should always prevail, which would also imply the priority in the application of the LPD in any cases of conflict. This will be relevant also in cases of application of deadlines for lawsuits, which are different in labour legislation and the LPD, as well as the potential need to exhaust internal remedies with the employer before using the LPD protection mechanisms.[141]

Evidently, case law in BiH is not harmonized and thus is prone to creating legal uncertainty. The adoption of new legislation in RS dealing specifically with workplace harassment[142] is likely to create further confusion in its application as several of its components stand in tension with existing protections against such harassment in entity labour legislation and the LPD.[143]

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**139** See, e.g.: judgment of the RS Supreme Court, no. 92 0 Rs 050479019 Rev, 9 October 2019 (LPD has priority over entity labour legislation on this point); the Banja Luka Basic Court, no. 71 0 Rs 275020 17 Rs, 26 September 2019; judgment of the Banja Luka District Court, no. 71 0 Rs 275020 19 Rsž, 7 May 2020; judgment of the RS Supreme Court, no. 71 0 Rs 275020 20 Rev, 11 March 2021. There are however cases where it is held that only direct perpetrators may be sued. See: judgment of the Travnik Municipal Court, no. 51 0 Rs 166168 19 Rs, 11 June 2021

**140** See, e.g.: judgment of the Sarajevo Municipal Court, no. 65 0 Rs 723211 18 Rs, 8 June 2020; judgment of the Municipal Court in Sarajevo, no. 65 0 652912 17 Rs, 9 November 2020; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 698842 18 Rs, 30 April 2021; See also: judgment of the RS Supreme Court, no. 85 0 Rs 057239 17 Rev, 15 March 2018 (LPD has priority over contrary legislation)

**141** See, e.g., judgment of the Mostar Municipal Court, no. 58 0 Rs 171070 15 Rs, 21 May 2018; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 662455 17 Rs, 10 September 2019; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 805760 19 Rs, 12 February 2021; judgment of the Sarajevo Municipal Court, no. 65 0 Rs 726681 18 Rs, 12 February 2021. In all cited cases the LPD was given priority over the conflicting labour legislation with respect of timeliness of lawsuit

**142** The RS Law on Protection against Work Harassment (Official Gazette of RS, no. 90/21)

**143** For a more permissive case law in this respect see: judgment of the Cantonal Court in Zenica, no. 44 0 Rs 026000 17 Rsž, 30 October 2018; judgment of the Municipal Court in Sarajevo, no. 65 0 Rs 662455 17 Rs, 10 September 2019; judgment of the Municipal Court in Sarajevo, no. 65 0 Rs 805760 19 Rs, 12 February 2021

# CONCLUDING REMARKS

The analysis of case law from the reporting period indicates an increase in the number of lawsuits and rendered judgments pursuant to the LPD. The jurisdiction with the most cases invoking the LPD remains the FBiH entity. More precisely, the municipal and cantonal courts in Sarajevo process a large majority of BiH's anti-discrimination cases. This significant burden in the number of cases is reflected in their comparatively slow processing. At this point, it should be mentioned that the need for improved case processing remains and that the CMS features should be fully used in order to obtain accurate statistical information about the latest developments with the anti-discrimination case docket.

The noted trends show obvious growth in awareness of this legal instrument. However, empirical data continues to suggest that most discrimination victims do not resort to judicial protection against discrimination. A number of structural issues are potentially lowering the confidence that citizens place in this legal remedy. For example, individuals may be put off seeking legal proceedings in regards to discrimination due to the continued longevity of cases and, consequently, due to historically low proportions of judgements in favour of the plaintiffs. There is also a general underutilization of interim measures or procedures for protection against victimization.

The limited references in the reasoning of the courts to the rich and binding jurisprudence of the ECtHR, or authoritative jurisprudence of the CJEU, highlight the need for further education of judges. This could be done through the development of new educational tools. Similarly rare references to Ombudsman Institution mechanisms in judicial proceedings may indicate falling confidence in this institution as evidenced by the cited empirical data. However, the positive consideration of the special reports of the Ombudsman Institution indicates that perhaps a greater emphasis should be made in

relation to such outputs as well as the need for greater advocacy of such reports with potential plaintiffs and attorneys.

Certain trends in anti-discrimination practice remain stable, such as the dominance of discrimination cases in connection with employment, or the greater incidence of male than female plaintiffs. This may indicate a need for further action, notably advocacy for existing legal remedies as well as increasing the capacities of providers of free legal aid. The positive outcomes in several high-profile collective lawsuits indicate the great potential of this instrument but also its continuing underutilization. This is particularly evident with respect to the hundreds of almost identical cases brought in relation to the structural problem of discrimination of persons with disabilities that could have potentially been addressed through collective lawsuits. Indeed, case law concerning systemic discrimination is one of the most important developments in anti-discrimination law in this period, yet it also highlights ongoing problems.

Divergence in court practice is evident in several areas, notably those concerning mobbing, differing approaches to the determination of the existence of harm in discrimination cases and the awarding of non-pecuniary damages, and continuing inconsistent approaches to the question of the burden of proof.

Discrimination remains a challenge in the society of Bosnia and Herzegovina. Despite both institutional and legislative developments in the anti-discrimination framework, a lot remains to be done. This holds particularly true regarding the implementation of the LPD, its consistent application, and the addressing of practical issues identified in this report. The Mission shall continue to monitor anti-discrimination case law, support the education of legal professionals and disseminate international standards and best practices relating to equality and non-discrimination.

# ANNEX

The anti-discrimination case law on the awards of non-pecuniary damages (focusing on cases finalized at the third-instance) is scarce, even when we do not limit analysis to the reporting period (2018-2021). As indicated in Section III.9, there is a low incidence of positive outcomes in anti-discrimination cases, but even among cases where the lawsuits were upheld (in part), plaintiffs often did not make a request or were rejected under Article 12(1)(c) of the LPD.

| No. | Case | Type | Amount |
|---|---|---|---|
| 1. | FBiH Supreme Court, 43 0 Rs 113133 16 Rev, 15 August 2016 | Direct discrimination | 2,000 BAM |
| 2. | FBiH Supreme Court, 68 0 P 017561 17 Rev 2, 11 July 2017 | Direct discrimination | 4,000 BAM |
| 3. | FBiH Supreme Court, 45 0 P 030377 17 Rev, 14 December 2017 | Mobbing | 1,000 BAM |
| 4. | FBiH Supreme Court, 32 0 Rs 179659 17 Rev, 23 October 2017 | Mobbing | 13,910 BAM |
| 5. | BiH Court, S1 3 P 022056 17 Gž, 15 December 2017 | Mobbing | 9,600 BAM |
| 6. | FBiH Supreme Court, 65 0 Rs 400752 17 Rev, 15 March 2018 | Mobbing | 4,000 BAM |
| 7. | FBiH Supreme Court, 39 0 Rs 044374 18 Rev, 5 April 2018 | Mobbing | 3,100 BAM |
| 8. | FBiH Supreme Court, 58 0 Rs 092150 18 Rev, 7 May 2019 | Mobbing | 5,000 BAM |
| 9. | FBiH Supreme Court, 17 0 P 044231 19 Rev, 21 November 2019 | Mobbing | 3,000 BAM |
| 10. | FBiH Supreme Court, 65 0 P 106515 19 Rev, 2 July 2019 | Mobbing | 5,000 BAM |
| 11. | FBiH Supreme Court, 58 0 P 101740 19 Rev 2, 17 October 2019 | Direct discrimination | 10,000 BAM |
| 12. | FBiH Supreme Court, 17 0 Rs 075491 19 Rev, 11 November 2020 | Direct discrimination | 2,500 BAM (2x) |
| 13. | FBiH Supreme Court, 65 0 Rs 494073 21 Rev, 28 October 2021 | Mobbing | 5,000 BAM |
| 14. | RS Supreme Court, 71 0 Rs 275020 20 Rev, 11 March 2021 | Mobbing | 3,000 BAM |
| 15. | FBiH Supreme Court, 65 0 Rs 315819 20 Rev, 10 June 2021 | Mobbing | 5,000 BAM |
| 16. | FBiH Supreme Court, 43 0 Rs 160655 20 Rev, 15 July 2021 | Victimization | 2,000 BAM |