

Proposal

Pursuant to the Article IV 4 a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina- House of Representatives, at the session of _____ 2008 and at the session of House of Peoples of _____ 2008 adopts the following:

LAW ON PROHIBITION OF DISCRIMINATION

CHAPTER I: GENERAL PROVISIONS

**Article 1
(Subject of the Law)**

- (1) This Law shall provide a framework for implementation of equal rights and opportunities to all persons in BiH and shall define a system of protection from discrimination.
- (2) In compliance with the BiH Constitution, Constitutions of both Entities, Brcko District Statute and international standards related to human rights and fundamental freedoms, responsibilities of legislative, judicial, executive authorities in BiH and legal persons and individuals with public authorities in BiH, (*hereinafter "competent authorities in BiH"*) shall ensure protection, promotion and creation of conditions for equal treatment.

**Article 2
(Discrimination)**

- (1) Discrimination, in terms of this Law, shall be considered as putting a person or group of persons into a less favorable position on grounds of race, skin color, language, religion, ethnic background, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status, marital or family status, pregnancy or motherhood, age, health condition, disability, genetic heritage, gender identity or expression, sexual expression or orientation, as well some other real or assumed features, by the competent BiH authorities, and private legal or natural persons.
- (2) Every form of discrimination shall be prohibited.

**Article 3
(Forms of Discrimination)**

- (1) Every act or failure to act, when one person or group of persons, is or has been, or could be put in a less favorable position than another person or group of persons in comparable situations, shall be considered to be direct discrimination.
- (2) If there is an apparently neutral provision, criteria or practice that puts a person in a less favorable position, comparing to others in a similar situation, unless such provision, criteria or practice can be objectively justified by a legitimate aim and its

means for achieving it are appropriate and necessary, it is considered to be indirect discrimination.

Article 4 (Other Forms of Discrimination)

- (1) Harassment shall be considered discrimination in every situation when there is unwanted behavior based on grounds prescribed by Article 2 of the Law by which one or more persons, is psychologically harassed, humiliated with the aim of jeopardizing status, honor, human dignity and integrity which harms their dignity and creates intimidating, hostile, humiliating, threatening or similar situation.
- (2) Sexual harassment shall be considered every verbal, non- verbal or physically unwanted behavior of sexual nature which aims to or represent violation of dignity of a person, causes fear, hostile, degrading or offensive environment.
- (3) Mobbing shall be considered as every form of a psychological harassment at working place with repetitive actions aiming to degrade working conditions of an employee or professional status, which can cause violation of human rights and human dignity, damage to physical or mental health or compromise victim's professional future.
- (4) Segregation shall be considered as every form of forced and systematic separation of persons or group of persons manifested through application of legal or factual measures and on grounds prescribed by Article 2 of the Law.
- (5) Victimization shall be considered discrimination, and represents less favorable treatment caused by reporting discrimination, witnessing discrimination, disobeying instruction to act discriminatory, or participation in a procedure initiated because of discrimination.
- (6) Discrimination shall also be considered instruction to discriminate and incitement to discrimination.
- (7) Discrimination, in context of this Law, shall be considered a failure to act to enable use of publicly available resources, participation in public and social life, access to work and appropriate working conditions, by adjusting infrastructure and premises, using equipment and any other way that shall not represent unreasonable burden for a person who has a duty to enable that.

Article 5 (Exceptions from Discrimination)

Legal measures and actions of competent authorities in BiH shall not be considered discriminatory but interpreted proportionally to the aim or purpose for which they are prescribed:

- a) If treatment is based on provisions of a law, bylaw, program, measures or decisions made in order to improve position of persons or groups of persons when equal access and equality in realization of guaranteed rights needs to be ensured, and especially for members of vulnerable groups

such as persons with disabilities, members of national minorities, women, pregnant women, children, youth, elderly and other socially excluded persons, civil victims of war, victims in criminal procedures, displaced persons, refugees and asylum seekers;

- b) If more favorable legal measures are aiming to protect certain national, ethnic, religious, language and other minorities and/or special form of protection prescribed in a law, under condition that these measures do not lead to practicing special rights and privileges for different groups and individuals and do not continue after goals, for which they are proposed, are achieved;
- c) If special conditions are applied for performing a particular job and if these conditions represent real and deciding criteria due special circumstances related to performing working tasks and if the purpose that is to be achieved is appropriate and justified with a legitimate goal;
- d) When establishing a working relation, membership and acting in compliance with the science and mission of church and religious communities that are registered in Bosnia and Herzegovina, and other public or private organizations that are working in compliance with the BiH laws, if such thing is demanded by religious doctrine, persuasion or goals.
- e) If such treatment is proscribed by a law aiming to preserve health, public order, general security and prevent criminal acts and offences, and if used means are justified and appropriate for a goal that needs to be achieved;
- f) Defining the most appropriate maximum age for ending a working relation and defining age as a condition for a pension;
- g) Based on citizenship according to special regulations;
- h) For putting into a less favorable position when identifying rights and obligations from the Family Law when they are defined by the law, and especially when aiming to protect rights and interests of children, protection of public moral, and favoring marriage in compliance with provisions of the Family Law;
- i) Reasonable accommodation denotes necessary compliance which does not cause unreasonable, i.e. unnecessary burden, where needed in a concrete case, in order to ensure that persons or groups of persons realize all human rights and fundamental freedoms equally with others.

CHAPTER III: PROTECTED RIGHTS

Article 6 (Scope of Application)

- (1) This Law shall apply to actions of all bodies of state, entities, cantons, and Brcko District of BiH, municipal institutions and bodies, and legal persons with public au-

thority, as well as to the action of all legal and natural persons, especially in the following fields:

- a) work and working conditions, possibility of performing independent or non-independent activity, including conditions for selection and conditions of employment, advancement, access to professional orientation, advance, vocational and professional,
- b) education, science and sports,
- c) social protection, protection of a family with children and persons with disabilities, pension and health insurance and insurance in case of unemployment,
- d) health protection,
- e) judiciary and administration,
- f) housing,
- g) public information and the media,
- h) access to goods and services and their providing,
- i) membership and action in trade unions, organizations of civil society, political parties or any other associations and organization,
- j) participation in cultural and artistic creation.

(2) List of rights protected by this Law is based on a list of rights recognized by the European Convention on Human Rights and Fundamental Freedoms and Protocols, and other international treaty bodies that Bosnia and Herzegovina is a signatory.

CHAPTER IV: COMPETENT INSTITUTIONS FOR PREVENTION OF DISCRIMINATION

Article 7 (Central Institution for Prevention of Discrimination)

(1) Central institution competent for prevention of discrimination is Ombudsman for Human Rights of Bosnia and Herzegovina (hereinafter: BiH Ombudsman).

(2) Within its competences the BiH Ombudsman shall have the competence to:

- a) Receive individual and group complaints related to discrimination;
- b) Assist natural and legal persons who filed a complaint for discrimination by informing them about their rights and obligations, and possibilities of judicial and other forms of protection;

- c) The BiH Ombudsman shall decide on accepting a complaint or starting an investigation;
 - d) With consent of parties conduct a reconciliation process with a possibility of making an out of court settlement;
 - e) Collect and analyze statistical data on discrimination cases;
 - f) Deliver annual and if necessary extraordinary reports on discrimination to the Parliamentary Assembly of BiH, FBiH Parliament, RS National Assembly and Brcko District Assembly;
 - g) Inform¹ public on discrimination manifestations;
 - h) Conduct surveys in the field of discrimination on its own initiative;
 - i) Give opinions and recommendations aiming to prevent and combat discrimination, and suggest appropriate legal and other solutions to competent BiH Institutions.
- (3) When delivering regular reports, opinions and recommendations on discrimination manifestations, BiH Ombudsman shall be obliged to consult civil society organizations dealing with protection and promotion of human rights and organizations dealing with protection of groups at high risk of discrimination.
- (4) The Ombudsman of BiH shall provide assistance to persons or groups of persons seeking international protection assistance from by international bodies in matters of discrimination.
- (5) In order to exercise its competence, BiH Ombudsman shall be able to form special departments for combating discrimination within the frame of institutions of BiH Ombudsman.
- (6) All state, entity and cantonal institutions, and Brcko District of BiH bodies, municipal institutions and legal persons, with public authorities, and all other legal and natural persons shall be obliged to deliver requested data and documents within 30 days as of the day when a request is received.
- (7) Competent institutions in BiH shall be obliged to cooperate with the BiH Ombudsman and deliver their responds and notifications in written within the deadline defined by the BiH Ombudsman and report on efficiency of recommendations given in order to end discrimination.

Article 8

(Records Keeping and Coordination of Competent Bodies)

- (1) Competent institutions in BiH shall be obliged to regularly keep records of all reported cases of discrimination and to deliver collected data to the Ministry for Human Rights and Refugees.
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- (2) In accordance with its competences defined by the law, Ministry for Human Rights and Refugees shall inform the Council of Ministers of BiH once a year about manifestation and scope of discrimination based on collected data and prepare proposal of measures for preventing and combating of discrimination in Bosnia and Herzegovina.
- (3) Within the scope of their annual and special reports the Ministry for Human Rights and Refugees shall be obliged to inform the Council of Ministers and Parliamentary Assembly of BiH about discrimination manifestations and propose related concrete legislative or other measures.
- (4) In line with provisions of this Article, special records shall be established in legislative, executive and court bodies for the purpose of registering cases of discrimination determined in criminal, civil, extrajudicial and enforcement procedures.
- (5) Central database for committed acts of discrimination shall be established in the Ministry for Human Rights and Refugees.
- (6) Ministry for Human Rights and Refugees shall deliver a Rulebook on collecting data about cases of discrimination in Bosnia and Herzegovina within 90 days after the Law enters into force, that shall define content and form of a questionnaire for collecting data on cases of discrimination and other issues related to procedure for collecting necessary data.

Article 9 (Supervision)

Ministry for Human Rights and Refugees shall supervise the implementation of the Law.

Article 10 (Cooperation with Civil Society Organizations)

While developing reports, during preparation of laws, strategies and other plans related to situation in human rights and discrimination issues, all competent authorities shall be obliged to cooperate with civil society organizations dealing with protection and promotion of human rights, and organizations dealing with protection of rights of persons and groups of persons exposed to a high risk of discrimination.

CHAPTER V: PROCEDURES FOR PROTECTION FROM DISCRIMINATION

Article 11 (Protection through Existing Procedures)

- (1) Any person or group of persons who deems that some of his/her rights has been violated due to discrimination, shall be able ask for the protection of that right in the procedure within which that right is decided upon as the main issue, and can also ask for protection in the special procedure prescribed under Article 12 of this Law.

- (2) In procedures prescribed by provisions of special laws applied in Bosnia and Herzegovina, shall apply provision on burden of proof that is prescribed by Article 15 of the Law.
- (3) Courts and other bodies running a procedure shall be obliged to take procedural actions urgently, making sure that claims about discrimination are investigated as soon as possible.

Article 12 (Special Lawsuits for Protection from Discrimination)

- (1) A person or group of persons exposed to any form of discrimination in accordance with provisions of this Law, shall have the right to submit a lawsuit and demand:
 - a) To determine that a defendant violated a plaintiff's right to equal treatment i.e. that the action s/he undertaken or failed to undertake can directly lead to violation of a right to equal treatment (lawsuit for determining discrimination);
 - b) To prohibit undertaking actions that violate or can violate plaintiff's right to equal treatment, i.e. to perform actions to remove discrimination or its consequences (lawsuit for prohibiting or ending discrimination);
 - c) To compensate material and non-material damage caused by violation of rights protected by this Law (lawsuit for compensation);
 - d) To publish a verdict in media according to which violation of the right to equal treatment was established on the expense of the defendant;
- (2) When all claims based on the same factual and legal ground, claims from the previous paragraph can be brought together in a single lawsuit which will be decided in a civil procedure if all claims are interrelated and if the same court has subject matter (in rem) jurisdiction disregarding regulations to solve the case in regular or special civil procedure.
- (3) Claims, referred to in paragraph 1 of this Article shall be decided by the court through application of provisions of the laws on civil proceedings being applied in BiH, unless stipulated otherwise by this Law.

Article 13 (Competences, Deadlines and Execution)

- (1) If not prescribed differently with this Law, and in compliance with the laws on courts in both Entities and BiH Brcko District, courts having general territorial jurisdiction are competent for disputes upon a lawsuit from Article 12 of this Law in first and second instance.
- (2) An appeal shall not be allowed against a second instance verdict, but filing request for revision shall be allowed.

The Appellate Department of the BiH Court shall have the competence to render a decision that orders revision of judicial verdicts to a competent court for harmonization of legal practice in the field of discrimination.

- (3) Competent court shall be able to decide, on grounds of the lawsuits from Article 12, paragraphs b) and d), if complaint does not put the execution on hold or determines shorter deadline for taking action ordered to a defendant.
- (4) Deadline for submitting the lawsuit referred to in Article 12 of this Law is 3 months after violation of a right was committed and latest one year as of the day a violation was committed. Deadline for submitting the request for revision is 3 months as of the day when second-instance verdict was delivered.

Article 14 (Temporary Measures of Protection)

- (1) Prior to initiation or during a procedure due to claims from Article 12 of this Law, the court may, on a party's proposal, determine a temporary measure without a prior informing and hearing of respondent in the procedure, if proponent states grounded reasons for which the measure shall be urgent, and that acting otherwise would lose the purpose.
- (2) The court shall immediately deliver a decision from paragraph 1 of this Article to the respondent of a temporary measure.
- (3) The opponent of the measure can respond and challenge reasons for determining a temporary measure within three days, afterwards the court shall schedule a hearing in the next three days. A response of the opponent of the measure has to be explained.
- (4) After a hearing referred to in paragraph 3 of this Article took place, the court shall by a special decision null a decision on determining a temporary measure or replace that decision with a new one on determining a temporary measure.

Article 15 (Burden of Proof)

- (1) When a person considers to be discriminated on grounds of this Law, and therefore is denied access to a certain right, and when before the court or some other competent administrative body, presents evidence that makes it look probable that there was a direct or indirect discrimination, burden of proof lies with the respondent.
- (2) In cases when a person considers that s/he suffered consequences of discrimination as a real evidence for realization of the right from paragraph 1 of this Article, statistical data or database can be used.

- (3) In cases when a person considers that s/he suffered consequences of discrimination due failure of reasonable accommodation, burden of proof lies with the respondent.²

Article 16
(Participation of Third Persons)

- (1) During proceedings, in accordance with the claims referred to in Article 12 of this Law, a third party can join a person claiming to be discriminated in the capacity of a body, organization, institution, association or other person whose scope of activities includes protection from discrimination of persons or group of persons whose rights are being decided upon within the procedure.
- (2) The court shall allow participation of a third party only with consent of a person in whose case the third party wants to intervene.
- (3) Regardless of the outcome of the proceedings, the third party shall cover its expenses for participation in the civil proceedings.

Article 17
(Collective Lawsuit for Protection from Discrimination)

Associations, bodies, institutions and other organizations established in compliance with appropriate regulations, and have a justified interest for protection of interest of a certain group, or they deal with protection from discrimination of a certain group of persons in scope of their activities, can file a lawsuit against a person who violates the right to equal treatment, if it is probable that acting of defendant violates the right to equal treatment of a larger number of persons largely belonging to a group whose rights are protected by a plaintiff.

CHAPTER VI: PENAL PROVISIONS

Article 18
(Harming Dignity)

- (1) A person who causes fear or creates hostile and humiliating environment for a person or group of persons, on grounds of Article 2 of the Law, in a way prescribed with Articles 3 and 4 harm dignity, shall be fined with 1.000 to 5.0000 KM.
- (2) A responsible person in a state, entity and cantonal institution, Brcko District body, municipal institution, legal entity with public authorities, and other legal and natural persons, shall be also be fined for violations prescribed in paragraph (1) of this Article.

Article 19
(Failure to Act)

A responsible person in a state, entity and cantonal institution, Brcko District body, municipal institution, legal entity with public authorities, and other legal and

natural persons that fail to act or do not act upon the order from the competent court or BiH Ombudsman, and if that failure put another person or groups of persons to a less favorable position, shall be fined with 1.000 to 10.000 KM.

**Article 20
(Not Delivering Data)**

A responsible person in a state, entity and cantonal institution, Brcko District body, municipal institution, legal entity with public authorities, and other legal and natural persons that do not deliver statement, data and documents related to discrimination upon a request from the BiH Ombudsman, and does not allow the inspection, shall be fined with 1.000 to 5.000 KM.

**Article 21
(Putting a person who reported or witnessed discrimination
into a less favorable position)**

- (1) A person who puts a person who reports on discrimination in good faith or in any way participates in proceedings due discrimination into a less favorable position, shall be fined with 1.000 to 10.000 KM in compliance with Articles 2, 3 and 4 of this Law.
- (2) A person shall be fined with a fine prescribed in paragraph (1) of this Article if intentionally puts another person into a less favorable position a person who witnesses discrimination or disobeys instruction to discriminate.

CHAPTER VII: TRANSITIONAL AND FINAL PROVISIONS

**Article 22
(Harmonization of other Regulations with this Law)**

All laws and general regulations shall be harmonized with provisions of this Law within one year as of the day when the Law enters into force.

**Article 23
(Initiating Procedure by BiH Ombudsman)**

Proposal to initiate procedures for protection from discrimination for minor offences prescribed by this Law may be submitted by the BiH Ombudsman.

**Article 24
(Entering into Force)**

This Law shall enter into force on the eight day from the day of its publication in the "Official Gazette of Bosnia and Herzegovina".

EXPLANATORY NOTES

I. CONSTITUTIONAL AND LEGAL BASIS FOR INTRODUCING THE REGULATION

It was set forth in Article IV.4.a) of the BiH Constitution that the BiH Parliamentary Assembly shall enact laws towards fulfilling the BiH obligations which, aimed at passing the Law Against Discrimination in BiH, refer to fulfilling the BiH obligations defined in Article II.1. Human Rights and Fundamental Freedoms which provides: “Bosnia and Herzegovina and both entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms...” and within the same Article paragraph 2. International Standards also provides that: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

It is essential to consider as basis the same Article II.3. Catalogue of Rights which provides that “All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

- a) The right to life.
- b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
- c) The right not to be held in slavery or servitude or to perform forced or compulsory labor.
- d) The rights to liberty and security of person.
- e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.
- f) The right to private and family life, home, and correspondence.
- g) Freedom of thought, conscience, and religion.
- h) Freedom of expression.
- i) Freedom of peaceful assembly and freedom of association with others.
- j) The right to marry and to found a family.
- k) The right to property.
- l) The right to education.
- m) The right to liberty of movement and residence.

The principal provision of the BiH Constitution which was basis for preparation of the text of this Law is enshrined in Article II.4. Nondiscrimination which is substantial basis for enactment of this Law and which provides: “The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The basis for enacting this Law is also enshrined in the Dayton’s General Peace Agreement for BiH – Agreement on Human Rights known as Annex 6. This Annex sets forth 16 international human rights instruments which are binding for BiH. Among these conventions and declarations it is worth to mention the General Declaration of Human Rights from 1948 which in Article 7 proclaims equality of all people

before the law and that “all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Convention on Elimination of All forms of Discrimination Against Women from 1979 sets forth in Article 2 that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...”

International Convention on the Elimination of All Forms of Racial Discrimination from 1965 condemns racial discrimination and the States Parties undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms...”

European Convention on Human Rights from 1950 which has priority over the laws in BiH, guarantees enjoyment of human rights and freedoms without discrimination and Protocol 12 to the European Convention from 2000 contains the provision that introduces universal prohibition of discrimination on any basis.

Convention on the Rights of the Child from 1989 guarantees respect of the rights of each child without discrimination. Likewise, two international covenants, Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights are based on the principle of prohibition of discrimination.

II. REASONS FOR INTRODUCING THE REGULATION AND EXPLANATION OF SELECTED POLICY

Concept of equality for all human beings constitutes the central concept of all basic international human rights conventions, beginning with the UN Charter. Since the current BiH Constitution emphasizes the primacy of these conventions over all domestic laws, this concept as such is included in the sole basis of this Law at the state level for protection of human promotion of BiH citizens and promotion of their equal rights and opportunities. With regard to substantial universality and inseparability of the concept of equality for all human beings in the relevant international conventions, the concept in this Law is treated as universal and inseparable within the entire territory under jurisdiction of Bosnia and Herzegovina and as basic reason for enacting this Law.

Bosnia and Herzegovina is additionally obligated by endeavor to become a member of the European Union. Membership in the European Union is conditioned by adoption of the anti-discriminatory legislation and its practical implementation.

With regard to the aforementioned obligation of Bosnia and Herzegovina, it is essential to underline importance of the Directives of the EU Council which oblige Bosnia and Herzegovina, as member of the Council of Europe, to respect the anti-discrimination principle: Directive which guarantees equal treatment regardless of racial and ethnic origin, Directive that prohibits discrimination in employment on the basis of religion, belief, disability, age or sexual orientation and Directive on implementation of the principle of equal opportunities and equal treatment of men and women within the employment field.

Besides the aforementioned reasons, it is important to lay emphasis on the recommendations which the UN Committee for Racial Discrimination submitted to Bosnia and Herzegovina i.e. the recommendation number 13 which reads:” *The Committee recommends that the State party enact comprehensive administrative, civil and/or criminal antidiscrimination legislation, which prohibits acts of racial discrimination in employment, housing, healthcare, social security (including pensions), education and public accommodations.*

Similar recommendations that specify other forms of discrimination have been submitted by other committees such as Committee for Human Rights, Committee for Economic, Social and Cultural Rights and Committee for Civil and Political Rights.

III. HARMONISATION OF REGULATIONS WITH THE EUROPEAN LEGISLATION

Chapter I. General Provisions-articles 1 and 2

The Agreement on Stabilization and Association between Bosnia and Herzegovina and European Community and its State Parties has been concluded as document of special importance for development of legislation from which derives a need for legal and full regulation of this issue in accordance with the standards prescribed by the European Union regulations.

Concluding this Agreement, Bosnia and Herzegovina has formally undertaken the obligation to harmonize its overall legislation with the EU regulations.

Proposal of the Law on prohibition of discrimination (hereinafter: **Law**) shall be harmonized with the European Union Directives, specifically:

- Council Directive 2000/43/EC on application of the principle of equal treatment between people irrespective of racial or ethnic origin
- Council Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation.

However, anti-discriminatory **labor right of the European Union** is primarily regulated by **the general and individual Directives**:

- Council Directive 75/117/EEC from 10.02.1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,
- Council Directive 76/207/EEC from 09.02.1976 on the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion and working conditions
- Council Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion, and working conditions,
- Directive 86/378/EEC from 24.07.1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes,
- Council Directive 96/97/EC from 20.12.1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes,
- Council Directive 92/85/EEC from 19.10.1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding,
- Council Directive 97/80/EC from 15.12.2007 on the burden of proof in cases of discrimination based on sex
- Council Directive 2000/78/EC from 27.11.2000 establishing a general framework for equal treatment in employment and occupation, and
- Council Directive 2000/43/EC Council Directive 2000/43/EC on application of the principle of equal treatment between people irrespective of racial or ethnic origin.

- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine – Oviedo, 04.04.1997 – Council of Europe, BiH is a State Party (Genetic heritage);
- European Social Charter (marital status), extended with the following bases: **health condition, education, social status, gender identity and expression.**

One of the basic goals of the Directives on anti-discrimination is to ensure more instruments to victims of discrimination which they will use to initiate activities against discrimination which is based on race or ethnic origin, religion or belief, disability, sexual orientation and age.

As the European Court of Justice specified related to discrimination between men and women, combating discrimination is “a part of social aims of community”.

Principle that nondiscrimination is crucial for values of the European Union is strengthened by the Charter on fundamental rights which in Article 21(1) indicates that discrimination is “prohibited” on numerous grounds. More specifically, Directive on Racial Equality (2000/43/EC) acknowledges that racism and discrimination are root trouble for social and economic integration.

The Law on prohibition of discrimination, in its general part, included a wider list of reasons that were enshrined in Article 2 of this Law which directly draw on the EU Directives and recommendations submitted to Bosnia and Herzegovina.

Public bodies are obliged to restrain from discrimination in accordance with Article 1 of the Protocol 12 to the European Convention on Human Rights and Freedoms and obligation to restrain from discrimination, as already pointed out, derives from Article 3 of the Directive on Racial Equality and Directive on equal position and access to employment.

Chapter II. Forms of discrimination - Articles 3 to 6

Forms of discrimination are within already mentioned directives recognizable but regarding the legal practice being applied in Bosnia and Herzegovina, definitions are proposed in Articles 3 to 6 which define forms and exceptions from discrimination.

This Article defined direct discrimination, indirect discrimination, incitement to discrimination, failure to ensure certain rights for persons with disabilities and encompassed created forms of discrimination such as harassment, sexual harassment, mobbing and segregation.

Definition of **direct discrimination** was harmonized with the Council Directive 2000/43/EC and the Council Directive 2000/78/EC which are specially important from the aspect of practical application of this Law because the definition indicates the grounds for identifying discrimination.

Definition of **harassment** was partially taken from the Law on Gender Equality of BiH, Article 2.3. of the EU Directive on Racial Equality and Article 2.3. of the EU Directive on Equality in Access to Employment. The Council Directive 2000/78/EC defines harassment as a form of discrimination.

Incitement to discrimination is prohibited and is equalized with discrimination in accordance with Article 2.4. of the EU Directive on Racial Equality and Article 2.4. of the EU Directive on Equality in Access to Employment.

Paragraph 6 defines three forms of established discrimination having influence on **severity** of executed (prohibited) action and failure, so that courts must be guided by this fact when determining compensation for acquired nonmaterial damage as well as when judging a penalty in accordance with the legal minimum and maximum.

The Council Directive 2000/78/EC defines that “incitement to discriminatory act against people because of any reasons mentioned in Article 1 shall be considered discrimination.”

Omitting reasonable accommodation except if it is not unreasonable burden to persons with disabilities, shall be considered discrimination.

Definition of mobbing is partially extended but is included as special form of harassment at work.

Article 4 also contains **prohibition of victimization** that was envisaged by Article 9 of the EU Directive on Racial Equality and Article 11 of the of the EU Directive on Equality in Access to Employment.

Article 5, exceptions from discrimination (i.e. established measures) are aimed to stimulate protection and application of the universal equality principle for all human beings and also protection of overall legal system grounded on the universal principles of international system and international legal relations since it stimulates equalization of the rights of potential or actual groups or individuals deprived of their rights.

Except in cases when so called established measures, i.e. positive discrimination, stimulate equalization of the rights of potential or actual groups or individuals deprived of their rights with the rights of other individuals or groups present in society, discrimination as practical breach of the universal equality principle for all human beings is necessarily prohibited in all of its emerged forms, with the aim of protection and maintenance of the overall legal system.

These provisions are based on Article 5 of the Directive on Racial Equality in, Article 7 of the EU Directive on Equality in Access to Employment, Article 4 paragraph 1 and 2 of the International Convention on Elimination of All Forms of Racial Discrimination and Article 4 of the of the EU Directive on Equality in Access to Employment and are related to real and crucial conditions for employment and retirement. In addition, the provision on reasonable accommodation is included and provision related to conditions for citizenship.

This chapter also contains specially indicated forms of other rights (freedom of expression, protection of specially vulnerable groups, refugees, displaced persons, minorities) since these groups are currently even more vulnerable so that in this sense the needs for positive activities with regard to combating discrimination against these vulnerable categories have been pointed out.

Chapter III Protected rights – Article 6

Although the employment field has already been regulated by the provisions of the Labor Law, it is very important that, besides employment, discrimination is prevented within the range of other social fields.

Content of this Law refers to all BiH institutions and public authorities as well as legal and physical persons especially in the fields of:

- a) work and working conditions, opportunities for performing independent and dependent work including criteria for selection and conditions at employment and advancement; approach to all forms of vocational orientation, vocational empowerment/training and retraining.
- b) education, science and sport,
- c) social security including social protection, pension and health insurance and insurance in case of unemployment,
- d) health protection,
- e) judiciary and administration,
- f) housing,
- g) public information and media,
- h) access to goods and services as well as their provision,

- i) membership and action in trade unions, organizations of civil society, political parties or any other associations and organization,
- j) participation in cultural and art creativity.

In terms of the Council Directive 2000/43/EC and the Council Directive 2000/78/EC, these have been applied to all persons in public and private sector including public bodies.

Chapter IV Institutions competent for protection from discrimination – Articles 7 to 10

Special body for combating discrimination is the recommendation of the European Commission and some specialized agencies and Article 13 of the EU Directive on Racial Equality. In 14 out of 25 states of the EU entrusted this activity to the Ombudsman's Offices, while 5 states entrusted majority of activities to parliamentary commissions. Ireland and Bulgaria have special bodies for combating discrimination that have quasi-court competence since they may pronounce a sentence in quasi-court procedure.

Activities that were enumerated in this Article were done according to recommendation of the EC and they correspond to competences of the Ombudsman's Offices in BiH.

Existing mechanisms, apart from the Ombudsman's Offices in BiH, are: Joint Commission for human rights, rights of children, youth, immigration, refugees, asylum and ethics of the Parliamentary Assembly of BiH, Department for human rights of the MHRR, Agency for Gender Equality etc.

Competence of the Ombudsman's Offices in BiH – in accordance with Annex 6 – Agreement on human rights of the Dayton's Peace Agreement, Articles 4, 5 and 6 of the Law on Ombudsman for human rights of BiH (Official Gazette of BiH, number 19/2002) and Regulations on work of the Ombudsman's Office for human rights of BiH.

The Chapter related central gathering of data on discrimination cases is very significant for implementation of the Law.

Principle of social dialogue exists in our legal system within labor field and it is specially reflected through forming the economic-social council, thus this Law extends this principle to cooperation with all civil society organizations which deal with: "protection and promotion of the human rights, organizations dealing with protection of the rights of groups exposed to high risk of discrimination and national minorities councils." It is envisaged by the Directive on Racial Equality in Articles 11 and 12, the EU Directive on Equality in Access to Employment in Articles 13 and 14.

Chapter V – Procedures for protection from discrimination, Articles 11 to 17

Regarding this chapter it is needed to take into account a fact that the European Law defines that the right to prohibition of discrimination is regulated by law in the same manner as parallel domestic rights.

If appeals are permissible in protection of other basic rights under the laws in BiH, they should be permitted in cases of discrimination as well.

Major concern exists in regard to decision on which court will be competent for deciding on cases of discrimination because municipal courts **might not be enough powerful and efficient court instances** to pass decisions in relatively new subject (discrimination). Due to this fact, it is envisaged to pass a decision which will entrust a part of this competence to the BiH Court in a way that it includes possibility for revision of verdicts reached by the entity courts.

Article 15 of this Law also included the application of the **Directives on burden of proof (97/80/EC)** as one of the most important procedural rules being developed in practice of the EU states. This new procedural rule is envisaged by Article 8 of the Directive on Racial Equality and Article 10 of the EU Directive on Equality in Access to Employment.

Which facts will be sufficient that court or administrative body transposes a burden of proof to defendant will depend on facts of a case and progress of a practice in this field. This principle will not be applied in the criminal proceeding because of principle of innocence presumption.

Statistical data are very important for transposing a burden of discrimination in cases of indirect discrimination where because of big difference in, for instance, gender representation with a certain employer, he may be asked to prove why such a difference appeared.

Participation of the third person was defined by Article 16 of this Law; this possibility and obligation are envisaged by Article 7.2. of the Directive on Racial Equality, Article 9.2. of the EU Directive on Equality in Access to Employment, but also our Laws on Civil Procedure (see e.g. Law on Civil Procedure of FBiH in Articles 369 to 372 or Law on Civil Procedure of RS in Articles 369 to 372).

Article 17 also envisages a possibility for submitting collective appeal and this possibility and obligation is envisaged by Article 7.2. of the Directive on Racial Equality and Article 9.2. of the EU Directive on Equality in Access to Employment.

Chapter VI Penal Provisions - Articles 18- 21

Penal provisions are necessary for the content of this Law whose implementation will be simplified with establishing appropriate criminal and executive mechanism for violations of this Law.

Chapter VII Transitional and Final Provisions- Articles 22- 24

Having in mind that the content of this Law is new in many parts and that it is necessary to harmonize numerous laws, this provision is therefore very significant. This Article represents practice of some EU countries for more efficient promotion of principle of equal opportunities. Possible following policy would be to ask private entrepreneurs to adopt plans on preventing discriminatory practice.

IV. IMPLEMENTATION MECHANISMS AND ENSURING RESPECT FOR REGULATIONS

Basic institutional mechanism is defined through competences of the BiH Ombudsman and offers two procedural possibilities before submitting an objection during existing procedures or submitting a special appeal for protection from discrimination.

Ministry for Human Rights and Refugees is obliged to monitor application of this Law that is defined by the system for collection of data on discrimination cases that represents an obligation of all competent bodies in Bosnia and Herzegovina.

Competent institutions in BiH have a responsibility if they do not cooperate with the BiH Ombudsman and if they do not deliver requested information.

All elements defined by this Law ensure appropriate implementation mechanisms for application of this Law, and on the other hand, they are supported by introduction of criminal provisions for violations of this Law.

V. EXPLANATION OF FUNDS NEEDED FOR IMPLEMENTATION OF REGULATIONS AND FINANCIAL EFFECTS OF THE LAW

The Law predicts additional competences of the BiH Court, i.e. establishing anti-discrimination department that also needs funds.

In case this offered alternative solution is adopted, it is necessary to receive approval of entities' governments and Brcko District government since this extra cost will be part of their budgets.

At this moment, it is needed to plan funds for establishing appropriate Department within the BiH Court.

VI. DESCRIPTION OF CONSULTATION PROCESS

Public discussions on a draft of the Law on Prohibition of Discrimination were held in Sarajevo (20 November 2008) and Banja Luka (24 November 2008).

Text of the draft of the Law on Prohibition of Discrimination was presented through the link

<http://www.mhrr.gov.ba/PDF/LjudskaPrava/ZakonOZabraniDiskriminacijaNacrt.pdf>

Text was available for the public in this way and there was a possibility for citizens and interested groups to deliver suggestions in written, through e-mail messages until the beginning of December.

We received some suggestions from some NGOs, like queer community, persons with disabilities, OSCE and Interreligious Council etc. A big number of remarks and suggestions were incorporated into the text of the Law.

VII. TIMELINE FOR POSSIBLE REVISION AFTER THE LAW ENTERS INTO FORCE

In accordance with the character and content of the Law, we estimate that, after the Law enters into force, revision needs to be planned during at least 3 years of the implementation. This activity can be initiated even earlier if structure and organization of the BiH authorities is changed and if there are new international obligations.