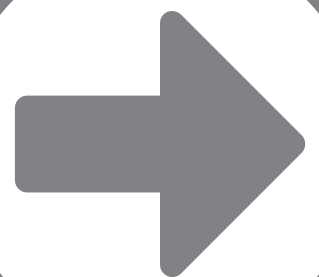


Use of actio popularis in Cases of Discrimination

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List of Acronyms:

ECHR	- European Convention on Human Rights
ECtHR	- European Court of Human Rights
EU	- European Union
ERRC	- European Roma Rights Center
LPPD	- Law on the Prevention and Protection against Discrimination
HRI	- Human Rights Institute
UNCHR	- United Nations Commission on Human Rights
LGBTI	- Lesbian, Gay, Bisexual, Transgender and Intersex Persons
CPD	- Commission for Protection against Discrimination
NPD	- Network for Protection against Discrimination
NP	- Ombudsman
UN	- United Nations
OSCE	- Organization for Security and Cooperation in Europe
CJEU	- The Court of Justice of the European Union
FOSIM	- Foundation Open Society Institute Macedonia
MHC	- Helsinki Committee for Human Rights in Macedonia

INTRODUCTION

The model of individual justice is very often an ineffective tool for proving structural and institutional discrimination. For these reasons, in finding the existence of a systemic violation the legal principle *actio popularis* is used, which has been established as an effective mechanism for protection in such cases. The essence of *actio popularis* is the established action of a third party in order to protect the rights of others, or protection of the principle of equality. Starting from the context of non-discrimination itself, protection of minority groups should be a public interest in a society that aims to be defined as democratic. Hence, what is essential in the application of this method is the assessment of what constitutes public interest and what represents a particular group of people, i.e. a community. Believing that the effective protection of minority groups is a society value immanent for a country that declares itself as being democratic, it appears that the provision of that protection and the access to justice is of particular importance when these rights are violated. The specifics of *Actio popularis* consist in the fact that it enables a proactive role of Citizens' associations in the protection against discrimination, especially when it comes to marginalized and vulnerable groups of people.

In the international legal thought there are conflicting views about the use of this mechanism, ranging from denial of *actio popularis* to its complete acknowledgement and application in the judicial protection. In countries where this mechanism is allowed, it significantly contributes to the protection of minority groups' rights from discrimination and the development of the legal practice and thought. It can be concluded that its positive impact in the protection and promotion of human rights is undisputed, especially in the area of non-discrimination.

Given the different experiences in the application of this mechanism, a need arises for analysis of the international practice and the practice of countries in the region which allow its application, for the purpose of its proper regulation in our legal framework. We decided to make this publication with the support of the OSCE Mission to Skopje, which gives an overview of both domestic and European legislation on the admissibility and use of this mechanism, the practice of the European Court of Human Rights and the Court of Justice of the European Union as well as the practice of the region. This publication also provides insight on the specific methodology for use of *actio popularis*, in order to provide proper guidance for citizen associations in terms of the cases and ways they should use this mechanism.



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Human Rights

I.ACTIO POPULARIS IN DISCRIMINATION CASES

1. History of *Actio Popularis*

Actio popularis originates in Roman law under which it was a complaint that could be filed by anyone on behalf of another person or in general interest with a view to impose a fine as part of penal law. It was conceived to safeguard the public or the general interest, which in turn would also protect the individual interest, recognizing the solidarity between the interests of the community and interests of the individual.¹ Its contemporary use in the field of discrimination encompasses cases in which there has been a violation of the equal treatment principle with wide-ranging effects and organizations are allowed under national law to file a complaint in their own right even where there is no specific victim. Bringing *actio popularis* focuses on patterns, trends and practices of discrimination and is therefore very useful tool in tackling institutional, structural and *de facto* discrimination.²

During his term at the Inter-American Court of Human Rights, Judge Antônio Augusto Cançado Trindade during noted a difference between *actio popularis* and a class action, observing that the latter had developed out of procedural necessity whenever an individual, a member of a community takes action to prevent or remedy individual complaint, which coincides with the harm to all members of such community, and there is thereby a legal action for protection of the defenseless.³ He also considered that there is approximation between those two tools, but that the class action required more clearly the existence of victims, even though potential ones. In view of the fact that class actions are filed in other persons' interest (which can partially be identified with general interest), a class action can be considered as a type of *actio popularis*.⁴ In terms of practical considerations, lawyers working on strategic litigation point out that *actio popularis* is particularly effective in cases concerning segregation in educational institutions, where given the vulnerability of the persons affected (children) it helps avoiding secondary victimization and it is easier to prove discriminatory practice by submitting statistical evidence.⁵ Examples from Hungary analyzed below indicate that *actio popularis* can also be used when the equal treatment has been violated by ethnic profiling.

2. United Nations and *Actio Popularis*

The situation differs when it comes to international fora for human rights protection. The UN Human Rights Committee (HRC) considers that when there are no specific complainants who can be individually identified, the communications amount to an *actio popularis* and are inadmissible. Only in very limited circumstances does the HRC allow a communication to be brought in the name of another person. Thus, this is the case when the victim has allegedly been abducted, has disappeared or there is no other way of knowing his or her whereabouts, or the victim is imprisoned or in a mental institution, or when communication is submitted on behalf of a deceased person (e.g. *Panayote Celal v. Greece* (communication no. 1235/2003); *Juliya Vasilyevna Telitsina v. Russian Federation* (communication no. 888/1999), etc.

¹Ihering, R. *El fin el Derecho*, Buenos Aires, Omeba ed., 1960 (reed), p. 271

²Farkas, L., *Collective Actions under European Anti-Discrimination Law in European Anti-discrimination Law Review* No. 19 (2014), available at <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

³Cançado Trindade A. A., (2014) Judge Antonio A. Cançado Trindade. the Construction of a Humanized International Law a Collection of Individual Opinions (1991-2013) (Judges), Martinus Nijhoff Publishers / Brill Academic; Lam edition

⁴Škugor E.M., *Udružna tužba kao mehanizam zaštite kolektivnih prava i interesa*, 2012, p.8

⁵Bodrogi, B., *Legal Standing – The Practical Experience of a Hungarian NGO in European Anti-discrimination Law Review* No. 5 (2007), available at: http://ec.europa.eu/justice/discrimination/files/lawrev5_en.pdf

3. European Legislation and *Actio Popularis*

3.1. Examples of *Actio Popularis*

3.1.1. The European Court of Justice

In EU law, under Directive 2000/43/EC (Racial Equality Directive)⁶ and Directive 2000/78/EC (Employment Equality Directive),⁷ Member States are obliged to provide judicial and/or administrative procedures, for the enforcement of their obligations under the directives to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. For the purposes of this analysis, the most important provision is that associations, organizations or other legal entities, may engage, either on *behalf of or in support* of the complainant, with his or her approval, in any judicial and/or administrative procedure set forth in domestic law. The European Court of Justice (CJEU) has clarified important principles in this respect. *The Firma Feryn case*⁸ was initiated on domestic level by the Belgian Centre for Equal Opportunities and Combating Racism against a company following remarks of one of its directors that his company did not wish to recruit “immigrants”. The CJEU decided that the existence of such direct discrimination was not dependent on the identification of a complainant who complains to have been the victim of such discrimination. Moreover, it noted that Directive 2000/43 did not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. CJEU, however, observed that it was solely for the national court to assess whether national legislation allowed such a possibility. Subsequently, in the *Asociația Accept* case, standing of the association was not questioned.⁹

3.1.2. European Court of Human Rights

In principle, *actio popularis* is also not allowed before the European Court of Human Rights (ECtHR). Under Article 34 of the European Convention for Human Rights (ECHR), a person, a non-governmental organization or a group of individuals can file a complaint only if they can prove to have been victims of a violation of the rights set forth in the Convention. The ECtHR has held that in order for a person to be a victim of such a violation, a person must be directly affected by the impugned measure and that the Convention did not envisage the bringing of an *actio popularis* complaint (e.g. *Tănase v. Moldova* [GC], no. 7/08, § 104, ECtHR 2010). ECtHR has allowed a legal standing (*locus standi*) to an association as it was a party to the proceedings brought by it before the domestic courts to defend its members' interests.¹⁰ In addition, according to the case-law the victim criterion should not be applied in a rigid and inflexible way (e.g. *Bitenc v. Slovenia* (dec.), no. 32963/02, 18 March 2008). Thus, in *Aksu v. Turkey*¹¹ the plaintiff, who was of Roma origin, complained about remarks and expressions in publications which allegedly debased the Roma community. The ECtHR noted that although the plaintiff had not been personally targeted, he could have felt offended by the remarks concerning the ethnic group to which he belonged. In view of the fact there had been no dispute in the domestic proceedings regarding his standing and the need to apply the criteria governing victim status flexibly, the Court accepted that the plaintiff could be considered a victim. More recently, the case *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,¹² the concerned Mr. Valentin Câmpeanu was a young Roma man with severe mental disabilities and HIV infection. He had no known next-of-kin, had spent his life in State care and

⁶Racial Equality Directive no. 2000/43/EC, available at the following link in all languages of European Union Member countries:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043>

⁷Employment Equality Directive no. 2000/78/EC, available at the following link in all languages of European Union Member countries:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

⁸*Firma Feryn NV*, Case C-54/07, 10 July 2008, CJEU available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=70156&pagelIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=276506>

⁹*Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, Case C-81/12, 25 April 2013, CJEU available at:

<http://curia.europa.eu/jcms/upload/docs/complaint/pdf/2013-04/cp130052en.pdf>

¹⁰*Gorraiz Lizarraga and others v. Spain*, no.62543/00, 27 April 2004, available at: [http://hudoc.echr.coe.int/eng#{"appno":\["62543/00"\],"itemid":\["001-61731"\]}](http://hudoc.echr.coe.int/eng#{)

¹¹*Aksu v Turkey*, nos. 4149/04 and 41029/04, 15 March 2012, available at:

[http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF AKSU v. TURKEY"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-109577"\]}](http://hudoc.echr.coe.int/eng#{)

¹²*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, no 47848/08, 17 July 2014, available at: <https://lovdata.no/static/EMDN/emd-2008-047848.pdf>

died in hospital. The Council of Europe Commissioner for Human Rights in a third party intervention argued that allowing NGOs to lodge applications with the Court on behalf of people with disabilities in exceptional circumstances (e.g. extremely vulnerable victims, such as persons detained in psychiatric and social care institutions, with no family and no alternative means of representation) would be fully in line with the principle of effectiveness underlying the Convention and also with the trends existing at domestic level in many European countries and the case-law of other international courts, such as the Inter-American Court of Human Rights. In this landmark judgment, the ECtHR ruled that in the exceptional circumstances of the case and in view of the serious nature of the allegations, the NGO that represented Mr Câmpeanu on domestic level should be allowed to act as his representative in the proceedings before it, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died the application was lodged under the Convention. The Court observed that to hold otherwise, would allow the respondent State to escape accountability and would not be consistent with the High Contracting Parties' obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.

While it is clear that the ECtHR will not accept *actio popularis* as a matter of principle, another example of the Court's flexibility is the judgment in *D.H. and Others v. the Czech Republic*¹³ concerning segregation of Roma students in schools, where the ECtHR considered that the plaintiffs as members of the community necessarily suffered the same discriminatory treatment and did not examine their individual cases. It has been argued that thereby this case had been virtually transformed from a complaint brought by 18 individual plaintiffs into an *actio popularis* or collective complaint (i.e. class action).¹⁴ The same approach can be observed in the similar case, *Oršuš and Others v. Croatia*,¹⁵ where the Court stated that although the case concerned individual plaintiffs, it could not ignore that they were members of the Roma minority and that therefore, in its further analysis of the case, it would take into account the specific position of the Roma population. This flexibility mostly refers, of course, to the manner in which the case had been analyzed and which was logical and procedurally most effective in the circumstances of these particular cases.

The effects of the pilot judgment procedure that the ECtHR uses can in given cases be approximated with the effects of class actions. ECtHR uses this procedure when it receives a significant number of complaints deriving from the same root cause and it can decide to select one or more of them for priority treatment and will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue.¹⁶ Under that procedure the Court identifies structural problems underlying the violations that it establishes in the individual case and it can indicate measures to the respondent States. The ECtHR may decide to adjourn the examination of similar cases¹⁷ pending before it thus giving the respondent States a chance to settle them, however, if the respondent State does not adopt the measures indicated that the ECtHR will resume the examination of all similar complaints.¹⁸ ECtHR, used that procedure, for example, in *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* ([GC], no. 60642/08, 16 July 2014) concerning the "frozen" foreign-currency savings. The violations found by the Court affected not only the individual plaintiffs, but also 1,850 similar complaints, introduced on behalf of more than 8,000 plaintiffs and many thousands of potential plaintiffs. In this context, when awarding non-pecuniary damage, ECtHR noted that the plaintiffs' "distress and frustration have inevitably been exacerbated by their taking upon themselves the trouble and burden of acting – at least to some extent – on behalf of all others in their position (*emphasis added*)." However, the use of this procedure is a decision of the Court itself.

¹³*D.H. and Others v. the Czech Republic* (GC) no. 57325/00, ECHR 2007 IV, available at:

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1084&context=njihr>

¹⁴Farkas, L. The Scene after Battle: What is the Victory in D.H. Worth and Where to Go From Here? available at: <http://hudoc.echr.coe.int/eng?i=001-83256>

¹⁵*Oršuš and Others v. Croatia*, no. 15766/03, 16 March 2010, available at: <http://www.refworld.org/pdfid/4ba208fc2.pdf>

¹⁶Pilot-Judgement Procedure, Information note issued by the Registrar, available

at: http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf

¹⁷*Burdov v. Russia* (no.2), no. 33509/04, § 127, ECtHR 2009, available at:

[http://eclass.uoa.gr/modules/document/file.php/LAW288/%CE%95%CE%A3%CE%94%CE%91%3A%20%CE%94%CE%AF%CE%BA%CE%B1%CE%B9%CE%B7%20%CE%B4%CE%AF%CE%BA%CE%B7%20%CE%AC%CF%81%CE%B8%CF%81%CE%BF%206\)/CASE%200F%20BURDOV%20v.%20RUSSIA%20\(No.%202\).pdf](http://eclass.uoa.gr/modules/document/file.php/LAW288/%CE%95%CE%A3%CE%94%CE%91%3A%20%CE%94%CE%AF%CE%BA%CE%B1%CE%B9%CE%B7%20%CE%B4%CE%AF%CE%BA%CE%B7%20%CE%AC%CF%81%CE%B8%CF%81%CE%BF%206)/CASE%200F%20BURDOV%20v.%20RUSSIA%20(No.%202).pdf)

¹⁸*Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 136, ECHR 2014, available at: <https://lovdata.no/static/EMDN/emd-2006-026828-3.pdf>

4. National Legislation and *Actio Popularis*

4.1. Law on Prevention and Protection against Discrimination

According to Article 41 of the Law on Prevention and Protection against Discrimination (LPPD, 2010) associations and foundations, institutions or other organizations from the civil society that have a justified interest for protection of collective interests of certain group or in the framework of their activity deal with protection of the rights to equal treatment, may file a claim and in the court proceedings act as co-litigants against the person who had violated the right to equal treatment, if they make it probable that with the treatment of the defendant, the right to equal treatment has been violated to larger number of persons (*class action for protection against discrimination*). The claim may contain a request to determine that the treatment has violated the equal treatment of particular group of people; to prohibit undertaking actions that violate or may violate the equal treatment, i.e. to perform actions for eliminating the discrimination or its consequences in view of the group members; and to publish the judgment in the media at the expense of the defendant. In this type of claim, as opposed to individual claim, the law does not envisage compensation of damages.

The claim can be lodged only with the consent of the person claiming to be a victim of discrimination (Article 41, paragraph 4). If these provisions are narrowly interpreted, than it can be concluded that the relevant law provides for a class action given that it talks of co-litigants and that the claim cannot be filed without consent of the victims.

Based on this interpretation, it can be concluded that in order to initiate proceedings pursuant to law, the victims should be identified, which leads to the conclusion that the conditions for an *actio popularis* proceedings initiated in the public's interest, with no identifiable victim who is supported or represented have not been met. In contrast, the relevant Croatian Law on Prevention of Discrimination¹⁹ contains a similarly worded provision, but does not refer to co-litigants and to the consent of the victims. However, if the group of people affected by a violation is exceptionally high, it may be impractical to seek consent from every individual victim and it would overly complicate the proceedings for the courts themselves. A better solution would therefore be to amend the law so that it does not require consent of the victims and the reference to co-litigants be omitted, as is the case in the relevant Croatian law. Thereby, citizens associations would be free to choose whether to pursue the claim as *actio popularis* or class action.

4.2. Institutional Framework

4.2.1. Commission for Protection against Discrimination

As to the conduct of the Commission for Protection against Discrimination (CPD), there is an already established practice of accepting *actio popularis* complaints submitted only by associations, without asking for consent from the victim. Although in Article 25 of LPPD it is stated that a complaint can be filed by any legal or physical person who claims to have been a victim of discrimination, CPD accepts complaints from associations of citizens working in the field of protection of the right to equal treatment or to a specific group. In this regard, CPD offered the opportunity for filing a complaint on behalf of another person or group of persons in the form of a complaint posted on their official website.²⁰

This possibility has helped in creating a practice of filing *actio popularis* complaints by associations of citizens in cases of discrimination, a practice that is continuously supported CPD itself. Most of the complaints are filed by associations in the field of education and media, in which discrimination on grounds of disability, sexual orientation and ethnicity has been detected. These *actio popularis* complaints allow a timely response by

¹⁹The full title of the Croatian Law for non-discrimination is: Zakon o suzbijanju diskriminacije, which is available at: <http://www.zakon.hr/z/490/Zakon-o-suzbijanju-diskriminacije>

²⁰The form of the complaint published on the official web page of CPD is available at: <http://www.kzd.mk/?q=node/33>

associations in cases of discrimination among larger groups of persons, without being obliged to seek individual victims or having to submit a written consent of a victim of discrimination. Considering that most of the associations working with marginalized groups who are often exposed to discrimination, but there are rarely any individuals who are encouraged to file a complaint to the CPD, the acceptance of *actio popularis* complaints is a positive practice that CPD should continue in the future.²¹

4.2.2. Ombudsman

The situation is similar regarding the proceedings before the Ombudsman. Namely, the Law on the Ombudsman states that the proceedings before the Ombudsman shall be initiated by a complaint, which can be filed by any person if he or she believes that their constitutional or legal rights or the principle of non-discrimination have been violated. However, when it comes to a larger group of citizens, the Ombudsman also acts upon complaints submitted by citizens' associations. An example of that is the complaint filed by the Helsinki Committee for Human Rights (MHC) regarding the discrimination by public and private health institutions to male and female persons due to the inability of men (parents or guardians) to accompany children who should be hospitalized in public and private health institutions. In this case, MHC conducted a telephone situation testing²² throughout the entire country which showed that five public health facilities do not allow men who are parents or guardians to accompany their hospitalized children, which represent discrimination on the grounds of sex, but also against women based on gender because of existing stereotypes of women as primary care providers for children. Acting upon a complaint, the Ombudsman stated that there was discrimination on grounds of sex and gender and made recommendations to health facilities to ensure conditions for men to be able to accompany children in the event of their hospitalization.

Same as in the case of the CPD, the acceptance of *actio popularis* complaints by the Ombudsman is a good practice which should be continued in the future.

4.2.3. Constitutional Court

Under the Constitution as it now stands, *actio popularis* is not allowed in respect of the limited set of rights that fall within the competence of the Constitutional Court, including the prohibition of discrimination on the grounds of gender, race, religion, and national, social and political affiliation. It is important to note that the proposed amendments of the Constitution in 2014²³ envisage introduction of a constitutional complaint. The Venice Commission in its opinion on the constitutional amendments in the Host country warned against the use of *actio popularis* and advised that when providing for the constitutional complaint, it should be made clear that only victims of violations have the right to complain.²⁴ In the event that the constitutional complaint is introduced, when citizens associations have unsuccessfully acted in a discrimination case before ordinary courts on behalf of others, they will not have standing to file such a complaint before the Constitutional Court.

²¹More details on the complaints filed by CPD can be found in the report available at:

http://www.mhc.org.mk/system/uploads/redactor_assets/documents/685/ZVESTAJ_-_Mreza_za_zastita_od_diskriminacija_-_FINAL.pdf

²²Situation testing is a method used to prove direct discrimination against a person with specific identity characteristics protected by law by putting that person in a comparable situation another person who does not possess the specific characteristics and has not been discriminated against. Compared to the use of statistics, as evidence in occasionally indirect discrimination, the method of situation testing is used to prove direct or systematic discrimination. More about this method can be found in the publication titled "Situation testing – A Method for Proving Discrimination" available at:

http://www.mhc.org.mk/system/uploads/redactor_assets/documents/894/Method_za_Diskriminacija_MKD.pdf

²³During 2014, there was an attempt to make certain amendments to the Constitution, including the part for submitting a constitutional complaint. These draft amendments triggered massive reactions and were negatively evaluated because the given arguments were not clear and concise, but were rather proposed with a very short, inadequate, and unsustainable explanation and presented a state of confusion, especially when taking into account the establishment of a system of parallelism and the need for efficient and effective legal remedies. The Assembly did not include these draft amendments in the agenda because there are many elements of misconduct, including accelerated parliamentary procedure in the absence of 64 opposition and the lack of public debate and expert discussion on the content of these amendments.

²⁴Opinion on the Seven Amendments to the Constitution, Adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)026-e)

5. Comparative Experiences

5.1. Croatia

In Croatia, the Anti-discrimination Law²⁵ allows citizens associations, bodies or institutions to lodge *actio popularis* for protection against discrimination in a way that associations, bodies, institutions or other organizations established in accordance with the law which have a justified interest in protecting collective interests of certain groups or within their activities deal with protection of the right to equal treatment. Such organisations may bring a so-called joint legal action against the person who violated the right to equal treatment if they show it is probable that the actions of the defendant has violated the right to equal treatment of a larger number of people who mostly belong to a group whose rights the plaintiff wants to protect. In this kind of opportunity for submitting *actio popularis* for protection against discrimination by citizens associations, in the Croatian law, no consent is required from the person claiming to be discriminated against, i.e. this condition is not required to prove the legal capacity of organizations in the initiation of proceedings for protection from discrimination. In the so-called joint legal action against the person who violated the right to equal treatment, it needs to be shown *prima facie* (at first glance) that the conduct of the defendant has violated the right to equal treatment of a larger number of persons who predominantly belong to a group whose rights association defend or represent.

In practice this remedy has been used by the Association of private employers in the health sector in 2009, but their complaints have been dismissed on two occasions on procedural grounds, without a decision on the merits.²⁶

LGBTI citizens associations which deal with the rights of the LGBTI community (community of lesbian, gay, bisexual, transgender and intersex persons) have filed a number of complaints against football club presidents who gave homophobic statements, but the case-law seems to be inconsistent, the Supreme Court deciding once in favour of the *complainants*, and in other factually similar case dismissing claim complaint.²⁷ Analysis of the joint legal action remedy shows that many of the lodged claims are dismissed on procedural grounds due to strict interpretation of the relevant legislative provisions and that there is inconsistent case-law of domestic courts warranting enhanced education of all affected parties in order for this remedy to be implemented in its full potential.²⁸

5.2. Hungary

In Hungary, citizens associations are allowed by law to initiate legal proceedings in their own name when not all the victims of discrimination may be individually identifiable. Thus, in principle, they are entitled to file an *actio popularis* claim, but nothing in the legislation prevents them from filing a class action as well.²⁹ In Hungary, there are positive examples of the application of *actio popularis*, such as the case of a citizens association that submitted *actio popularis* case before the Equal Treatment Authority against a bar seeking a young female bartender in a newspaper advertisement. The Authority established that the principle of equal treatment had been violated, and ordered that the decision establishing violation be made public.³⁰

There is also a positive example in submitting an *actio popularis* claim to the courts by citizens associations regarding segregation of Roma children. In this case, the Chance for Children Foundation filed an *actio popularis* claim on behalf of Roma children, and against the local council and two primary schools

²⁵Zakon o suzbijanju diskriminacije, Narodne novine br. 85/08, 112/12 available at: http://www.amorevera.org/pdf/zakon_o_diskriminaciji.pdf

²⁶See Škugor supra at 4

²⁷Statement by the Citizens associations which submitted joint legal actions available at <http://www.24sata.hr/nogomet/manic-nije-markovic-vrhovni-sud-zdravka-oslobodio-krivnje-288867>

²⁸Škugor, Supra at 4

²⁹Hungary, Country Report on measures to combat discrimination, state of affairs up to 1 January 2013, available at <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>

³⁰Idem

in the city Hajduhadhaz (Hajdúhadház).³¹ In the claim, the Foundation presented statistics which showed that the percentage of Roma pupils located in additional buildings of schools is significantly higher (86 and 96 percent in the first school and 100 percent in the second school) than the percentage of Roma pupils located in the central building of schools (28 percent in the first school and 22 percent in the second school). In both schools, the central building is much better equipped than the additional buildings, in which there are no gymnasium, library, computers or specialized classrooms. The percentages given above were determined by an expert on Roma education appointed by the Court upon the proposal of the plaintiff. The Court gave specific instructions on how the expert will perform the research. The expert received instructions to include the Roma pupils in the research, those who had Roma origin, as well as those children who may be perceived as Roma by the majority of students. The court managed to establish segregation based on the data submitted by the expert. This decision by the First Instance Court was partially accepted by the Appellate Court, but the Supreme Court fully accepted the decision, stating that the percentages obtained by the expert research confirm the existence of segregation. Although there are many cases of confirmed segregation through submission of *actio popularis* lawsuits, there appears to be a problem in the process of implementing the decision because the court did not give specific instructions for carrying out the process of desegregation. In one of these cases, the plaintiff or citizens association filed complaints with the Constitutional Court (which may annul the decision of the basic court), and that court dismissed the appeal, because in Hungary it is no longer possible to lodge an *actio popularis* before the Constitutional Court (unlike before basic courts). An additional positive example is the case filed by the non-government organization NEKI, when a company published a racist advertisement on the internet which excluded tenants with pets and tenants with darker skin.³² The advertisement was removed and the company announced an official apology during the proceedings.

Furthermore, an additional case concerns a case when a clerk in a small village noticed that the vast majority of fines for the lack of bicycle accessories required by law seemed to have been imposed on local Roma Hungarians, although the village was largely non-Roma.³³ He notified the Equal Treatment Authority and the Hungarian Helsinki Committee which carried out *actio popularis* litigation on behalf of the public. The problem in the case was that national law did not allow registration of ethnicity, but this was circumvented by using surname and residence as proxies for ethnicity. The analyses proved that 97% of those fined had been Roma. The case ended with friendly settlement and the police acknowledging that the cumulative effect of the lawful police measures might have led to ethnic disproportionality and agreed to send 20 officers on a three-day, anti-discrimination training organized by the Equal Treatment Authority; to call the attention of its employees to the content of the settlement as well as the anti-discrimination requirements under Hungarian law; to provide the Authority with data on petty offences related to bicycle usage in the region for two years; and to offer obligatory bicycle accessories free of charge to the minority self-government.

5.3. Slovakia

According to the 2013 country's report on Measures to Combat Discrimination,³⁴ *actio popularis* is allowed under Slovak national Law, whereby complaints for violation of the right to equal treatment to greater or non-specified number of persons can be filed by the Slovak National Centre for Human Rights (the Equality Body) or citizens associations active in the field of anti-discrimination. The non-government organization submitting the complaint can ask from the court to determine that there had been a violation of the principle of equal treatment, to order cessation of the acts violating that principle, and if possible, to remedy the situation's consequence. The possibility of initiating an *actio popularis* legal proceedings in case of discrimination has been used only by one citizens association - the Center for Civil and Human Rights. This situation comes from to the limited resources of associations, who cannot recover the legal costs of the defendants in the case of a positive judgment by the courts, and the lack of statistical data provided by the

³¹Hungary, State Report of Measurements for Fight Against Discrimination, for the period from 01.01.2015 to 21.12.2015, available at: <http://www.equalitylaw.eu/downloads/3734-2016-hu-country-report-nd>

³²Bodrogi, B., supra at 5

³³Fined for Being Roma while Cycling, available at <http://www.opensocietyfoundations.org/voices/fined-being-roma-while-cycling>

³⁴2013 Slovakia Country Report on Measures to Combat Discriminations, State of affairs up to 1 January 2014, available at <http://www.non-discrimination.net/countries/slovakia>

state without which it is difficult to prove cases of indirect discrimination. The Center for Civil and Human Rights conducts a growing number of complaints initiated as *actio popularis*. The only *actio popularis* case that has been resolved favorably is against a primary school with long-term practice of segregation of Roma persons. Therefore, it was required from the court to determine the existence of discrimination based on ethnicity.³⁵ In October 2012, the Regional Court with a final judgment ordered the school to remove Roma classes beginning with the next school year, pointing out the broader context of Roma children's unequal access to education in Slovakia. In 2013, The Center for Civil and Human Rights filed a new *actio popularis* complaint against a hospital in eastern Slovakia and at the same time and against the Ministry of Health and against the state or the Slovak Republic due to a segregation of Romani women in maternity hospitals on the basis of ethnicity and gender. The case is still pending before the Court of First Instance (last update in April 2016).³⁶

5.4. Serbia

Filing an *actio popularis* action for protection against discrimination stipulated in Article 46 of the Law on Prohibition of Discrimination,³⁷ which states that an action for protection against discrimination may be filed by the Commissioner for Protection of Equality (an equality body, similar to the National Commission for Protection against Discrimination) and civil society organizations working on human rights protection or the protection of the rights of certain groups. This provision of the Serbian Law on Prohibition of Discrimination enables the state body to protect the right to equality and enables citizens associations to appear as initiators of proceedings for protection against discrimination *ex officio*. The possibility of initiating legal proceedings for protection against discrimination is also used by citizens associations and the Commissioner for Protection of Equality. Citizens' associations have initiated a larger number of *actio popularis* legal proceedings, one of which is the case of the Gay Straight Alliance against a journalist because of giving a disturbing, homophobic statement a day before the Gay Parade in Belgrade.³⁸ The journalist stated in electronic and print media that she was not against peaceful demonstrations, but believed that the gay parade promoted something she considered a disease. The Primary Court dismissed the suit as unfounded, but the Court of Appeal in Belgrade overturned that decision, finding it as a severe discrimination against LGBTI people. The Court of Appeal banned the journalist from giving such statements in the future and obligated her to reimburse the legal costs of the plaintiff - Gay Straight Alliance.

The possibility for initiating *actio popularis* legal proceedings is also used by the Commissioner for Protection of Equality, who in the period from 2010 to 2015 has initiated 13 court proceedings for protection against discrimination.³⁹ Of these, seven lawsuits were filed due to discrimination based on belonging to the national Roma minority, three were filed because of discrimination based on sex, one lawsuit because of discrimination based on disability and two lawsuits for discrimination on multiple grounds.

Out of a total number of 13 lawsuits for protection against discrimination, six ended in favour of the Commissioner with a final decision, in two cases the lawsuit was withdrawn due to termination of discriminatory treatment or provisions, one was rejected, and the rest are pending on appeal. In the lawsuits which are filed to the court by the Commissioner, apart from proving discrimination, a prohibition of further acts of discrimination and/or prohibition of repetition of discrimination is also required. In cases where possible, the Commissioner requires from the court to order the defendants to carry out certain actions that will remove the consequences of discriminatory treatment and to publish the court decision in a daily national newspaper.⁴⁰

³⁵2012-2013 Annual Report of the Centre for Civil and Human Rights, available at <http://poradna-prava.sk/wp-content/uploads/2014/05/PDF-697-KB.pdf>

³⁶More information about this case can be found in the 2015 report for the non-discrimination situation in the Republic of Slovakia prepared by the European Network of Experts for gender equality and non-discrimination. The report is available at <http://www.equalitylaw.eu/downloads/3714-2016-sk-country-report-nd>

³⁷Law on Prohibition against Discrimination (Official Gazette RS, no 22/2009) available at http://www.paragraf.rs/propisi/zakon_o_zabrani_diskriminacije.html

³⁸More details about this case can be found in the report titled "A View in the Fight for Non-discrimination" issued by the Serbian citizens' association YUVOM- Lawyers' Committee for Human Rights. The report is available at <http://www.yucom.org.rs/wp-content/uploads/2015/04/Policy-paper-SRB.CG.ALB-WEB.pdf>

³⁹The full report for the work of the Commissioner for Protection of Equality Rights in the Republic of Serbia for 2015 is available at <http://ravnopravnost.gov.rs/wp-content/uploads/2016/09/Redovni-godisnji-izvestaj-poverenika-za-2015.pdf>

⁴⁰All reports by the Commissioner for Protection of Equality Rights can be found in Serbian at the following link: <http://ravnopravnost.gov.rs/izvestaji/>

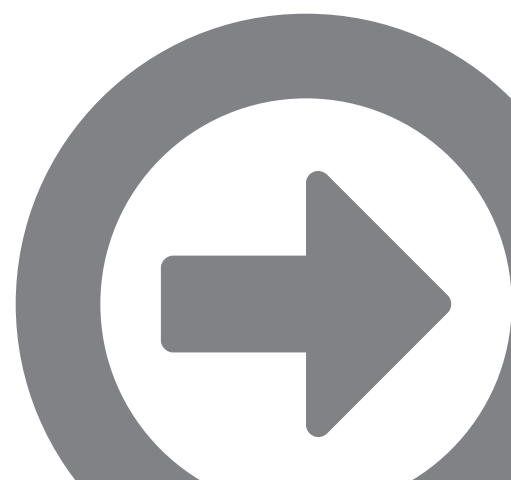
Considering all of the above, it is obvious that citizens associations as well as the Commissioner for Protection of Equality Rights actively use the possibility for initiating *actio popularis* legal proceedings which has a positive effect in the fight against discrimination and changes the discriminatory practices. This particularly affects the position of the Commissioner of playing a proactive role in combating discrimination and initiating legal proceedings for protection against discrimination, especially when it comes to larger groups of people. In contrast to this legal framework, our legislation does not allow CPD to initiate *actio popularis* proceedings, which adversely affects the role of CPD in the protection against discrimination and the development of legal practices for determining the systemic discrimination that affects a large number of people.

5.5. Bosnia and Herzegovina

Provisions for filing a collective action by citizens associations for protection against discrimination in the Law on Prohibition of Discrimination in Bosnia and Herzegovina is similarly arranged as in the Croatian Law on Prohibition of Discrimination. Namely, Article 17 of the Law on Prohibition of Discrimination stipulates that "associations or other organizations that are established in accordance with the law dealing with human rights, or rights of certain groups of individuals can file a complaint against individuals who have violated the right to equal treatment of people who generally belong to a group whose rights are being protected by the plaintiff." In the case of Bosnia and Herzegovina, citizens associations which are willing to initiate legal proceedings for protection against discrimination have no legal obligation to provide consent from the person claiming to have been discriminated against.

5.6. Montenegro

The submission of a collective action for protection against discrimination is stipulated in Article 30 of the Law on Prohibition of Discrimination in Montenegro. This Article stipulates that "action for protection against discrimination may be initiated by the civil society organizations working on protection of human rights. The lawsuit may be filed only with the written consent of the person or group of persons who have been discriminated against." The Montenegrin Law on Protection from Discrimination is very precise in terms of the form of the consent of the discriminated person/persons so that civil society organizations can file a lawsuit for protection against discrimination and it clearly states that consent should be in writing. On the other hand, the same Law gives statutory powers to the Protector of Human Rights so that he/she can file a lawsuit for protection from discrimination *ex officio*, without requiring consent from the person/persons who have been discriminated against.



II. Methodology for Application of Actio Popularis in Discrimination Cases

1. Basis

Actio popularis is a mechanism for the protection of a particular group of people against systemic violations of rights which represents a public interest in a society that is defined as democratic. The essence of *actio popularis* is contained in the principle of one party taking action for protection of the rest, and its purpose is to protect the rights or protect the principle of equality. A particularly important issue that arises in the application of this method is what is meant by the public interest as well as the significance of a larger group of citizens, i.e. of the community. For a country that sees itself as being democratic, it is essential to ensure effective protection of various minority groups in the society, as well as access to justice when those rights are violated.

Nevertheless, when we talk about minorities, we have to consider that these vulnerable groups are often unaware that their rights have been violated or that they are unable to protect them for different reasons. Some of these reasons include the lack of a working ability or limited ability due to age, intellectual disabilities, limited freedom of movement, but also for socio-economic reasons. In certain situations the inability to include the specific victim of discrimination in court proceedings occurs due to well-founded fear of a violation of privacy of the person and her family, victimization, restriction or loss of already acquired rights which are necessary for the daily functioning of the person in question.

Starting from that point, it is inevitable for the Citizens associations working on human rights and the principle of equality to be recognized as potential plaintiffs in cases of violation of human rights of a larger group of people. In fact, the very foundation of civil society organizations is joining citizens on the basis of protecting human rights. The forms of action of citizens associations in fulfilling this goal are always different and can be directed towards the prevention of human rights violations, educating citizens about human rights, monitoring the situation of human rights and also providing direct legal protection of their rights. Hence arises the necessity and the basis for Citizens associations to initiate proceedings for protection of citizens' rights in cases when they are unable to act alone.

As can be seen from the given examples, *actio popularis* is a mechanism that can be applied to a case of direct and indirect discrimination, as well as in the case of inciting, provoking and encouraging discrimination as specific forms of discrimination. This means that after certain revelations of discrimination against a particular group that can be obtained in different ways (through reports of discrimination, witnessed discrimination, media, statistics, reports, etc.) citizens associations could initiate proceedings for protection of the specific group from discrimination. The application of *actio popularis* in the case of direct discrimination could be exemplified through job advertisements in which, for example, there is the need for employment of five female sales assistants. This is a direct discrimination against men or discrimination based on sex (via statement – “five female sales assistants needed”). Given that the advertisement states that persons applying for the job should submit a photograph, it becomes clear that there is also an indirect discrimination, which could mean discrimination based on age, ethnicity, race, skin color and gender. In the case of such advertisements pertaining to an unidentified number of discrimination victims who are prevented from applying for some jobs, citizens' associations could initiate proceedings for protection from direct discrimination on grounds of sex, but also for indirect discrimination based on age, ethnicity, race, skin color and sex, depending on the individual case.⁴¹ In the abovementioned case of *Firma Feryn*,⁴² CJEU confirms this viewpoint and allows *actio popularis* initiated by the Belgian Centre for Equal Opportunities and Fight against Racism against a company after the statements of one of its executives that his company does not want to employ "immigrants". The CJEU ruled that the existence of such direct discrimination is not dependent on the identification of a plaintiff who would claim to be a victim of discrimination.

⁴¹The full analysis on discrimination in job advertisements prepared by the Commission for Protection against Discrimination is available at <http://www.osce.org/mk/skopje/116800?download=true>

⁴²*Firma Feryn NV*, Case C-54/7, 10 July 2008, CJEU, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=70156&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=276506>

2. An Appropriate Case for *Actio Popularis*

In order to initiate any legal proceedings for protection against discrimination through *actio popularis*, whether before equality bodies or at the courts through judicial representation, there must be evidence of discrimination on certain grounds in a particular area, which affects a larger group of citizens. Such evidence can be obtained through complaints from citizens or through monitoring of the realization of people's /citizens' rights with which the citizen organization is working in a particular area, which may include monitoring statistics, analysis and reports concerning certain conditions or policies.

As we mentioned earlier, under the current national legislation of LPPD, *actio popularis* can be used for initiating a legal proceedings for proving direct and indirect discrimination, for harassment, inciting or encouraging discrimination.⁴³

An appropriate example of initiating *actio popularis* proceedings in case of direct discrimination is the case of discrimination by banks in the country against blind people or people with sensory disabilities due to maladjustment of services to the needs of this group of people. Namely, the unequal treatment of persons with sensory disabilities by banks refers to methods of use of banking services and products for which a user signature is essential, where banks do not accept the signature of the blind, do not allow the use of facsimile and force clients to empower a third party who would sign in their name and on their behalf. Blind people also face problems while using online banking due to the internal regulations of banks (use of tokens, codes and related security tools that blind people are unable to use because of their disability). In addition, banks do not provide the use of assistive technology, such as spoken ATM, Braille printer, software solutions for access to electronic services, etc. In this case, there is clear evidence that the blind have limited access to banking services and products, unlike other people who can freely use these services. MHC was informed about these practices after a complaint by a person with sensory disabilities. Considering that there is a larger group of discriminated persons, MHC decided to file a complaint against the banks to the Commission for Protection against Discrimination. The complaint was filed along with 7 other Citizens' Associations and the National Association of the Blind in the name of the person who filed the complaint, but also on behalf of all other blind people and partially sighted people in the country. The Commission for Protection against Discrimination in this particular case recognized a continuous discrimination based on physical disability and recommended banks to not require an authorized person to act on behalf of the blind and visually impaired and to create conditions for personal signature and facsimile, and asked that each bank should make reasonable accommodation to the specific needs of these people, both in their offices and on the internet.

Despite the fact that initiating *actio popularis* proceedings by citizens associations is not explicitly stipulated in the LPPD, same as in the aforementioned cases, CPD acted upon the complaint from an unidentified number of persons and established discrimination based on physical disability.

This case shows the importance of bringing together all concerned parties with the problem of discrimination in initiating *actio popularis*, i.e. the creation of a broad coalition of proponents who seek change of a particular condition or discriminatory practice. In the case of *actio popularis*, apart from coalitions made between citizens' associations, of particular importance is the cooperation with the equality bodies which can occur as co-litigants or as interveners in the proceedings, depending on national legislation. According to the national legal framework, the CPD may act as an intervener in the legal proceedings initiated for protection against discrimination. Recognizing the importance of the involvement of equality bodies in legal proceedings for protection against discrimination, CPD decided to engage in *actio popularis* litigation which requires the establishment of segregation of Roma children (more details can be found in the Case Study chapter). Given the fact that the proceedings is still in the process of consideration from procedural aspects regarding the recognition of the plaintiffs' legal standing, the CPD has not yet had the opportunity to become involved in the proceedings as an intervener.

⁴³More information on particular forms of discrimination can be found in the manual for training of judges for non-discriminatory law available at <http://www.osce.org/skopje/116787>

In order for a case to be considered, and then be acknowledged as a case of discrimination for which it is appropriate to apply the *actio popularis* principle, a systemic problem has to be acknowledged and it has to refer to a larger group or a community.

In international practice, *actio popularis* is used in cases of segregation, especially in education. In these cases, segregation refers to a larger group of persons without an accurately determined number. In cases of segregation in education, victims are usually young students who have not yet obtained legal capacity and are unable to initiate litigation. For these reasons, it is impossible to require the consent of the direct victim for initiation of legal protection against discrimination because that consent is required from children's parents. However, obtaining consent limits the possibility of initiating *actio popularis* proceedings to protect child victims against discrimination by citizens' associations, and the required consent simplifies the form of the discrimination because the court will consider only the segregation of an individual victim, and not as a systemic problem concerning the entire group of people. Segregation is one of the systemic forms of discrimination and its existence is a social problem whose solution is of public interest. Such broad view of what is considered a public interest would render *actio popularis* as mechanism for protection admissible and will strengthen the vulnerable groups in a society. However, in many jurisdictions, the role that could be assigned to *actio popularis* is still not recognized, and therefore this mechanism is not explicitly permitted in national legislation.

In national legislation, *actio popularis* has not yet been accepted in its generic form and it is limited with the requirement from associations which would appear as plaintiffs in a particular case to submit a consent of a person claiming to have been discriminated against.

3. Goal

After determining the problem, i.e. a case of discrimination that involves a larger group of people and the need for initiation of proceedings for protection against discrimination, we need to determine a desired goal in the particular case, and depending on the goal, we need to define the next steps for action in order to reach it. Therefore, it must be assessed whether a proceedings for protection from discrimination will be initiated or other tools would be used for changing the situation, such as raising awareness of the problem, representing the group before state institutions for changes in a certain policy, practice or law.

If the assessment shows that the most appropriate mechanism to change the situation is initiating proceedings for protection against discrimination, it should be assessed whether the proceedings would be brought before equality bodies, national human rights institutions or before court. The decision on which protection mechanism will be applied in a particular case depends on several factors, particularly if it is continuous and repeated discrimination, whether it is a case where the equality bodies and national human rights institutions have proven discrimination and the discriminator does not comply with recommendations for change of discriminatory treatment, whether the discriminator is warned about the discriminatory acts and asked to stop discriminating and to eliminate discrimination, whether it is systemic discrimination that affects a great number of people. If other mechanisms to eliminate discrimination have been previously used, but the actions continued in the future, the most adequate step is to initiate a legal proceedings for protection against discrimination. A particularly important opportunity in judicial protection is the request for a temporary measure until a final decision has been reached or a request from the court to temporarily prohibit a certain discriminatory treatment.

4. The capacity of Citizen Associations for Conducting the Proceedings

For a successful initiation of *actio popularis* litigation, a prior analysis of the capacity of civil society organization is required, i.e. establishing if it has the necessary resources and knowledge of all aspects of the problem as well as the conduct of the proceedings.

For an organization to be able to initiate an *actio popularis* for protection against discrimination of a certain group, it is necessary to maintain a close relationship with the group, or to work on the specific problem and to protect the interests of the group or generally act in the prevention and protection of the right with equal treatment. Previous involvement of the association in solving the problem or the protection of the right to equal treatment is necessary for proving the justification, i.e. the legitimate interest of the association to be a plaintiff in proceedings for protection against discrimination of a particular group. The legitimate interest can be demonstrated by reference to the earlier actions undertaken by the association, especially by providing legal support for the group affected by the particular problem, documenting the cases, conducting research and analysis, representing the group before institutions in order to change the discriminatory practice or regulation, representing the group before equality bodies and national human rights institutions for proving discrimination. Namely, in a court proceedings initiated as *actio popularis* which refers to the segregation of Roma children, five citizen associations are involved directly or indirectly by dealing with this discriminatory practice. The Citizen Association KHAM Delchevo worked directly on providing legal support and documenting cases of unjustified enrollment of Roma children in special schools, while MHC, FOOM, ECPR and ICP conducted analysis and research on over-representation of Roma children in special schools. In addition, all organizations are involved in the prevention and protection of the right to equal treatment of the Roma community. This action proves their interest to initiate a proceedings for proving and protection against discrimination of Roma children. The details on this case can be found in the section of the analysis titled Case Study.

If the condition for proving legitimate interest is fulfilled, the second phase of assessment for initiation of such a proceedings will be assessment of the internal capacity of the association to initiate *actio popularis* litigation in cases of discrimination. Before initiating such proceedings, it is necessary to do an analysis that will include the following aspects:

1. Human Resources;
2. Financial assets;
3. Lawyer/Lawyers with some experience in court representation in cases of discrimination, who will represent the association/associations. All three aspects are discussed below.

1. Preparations for initiating *actio popularis* litigation can require time and human resources, which is why citizens associations should assess how much time and how many employees will be involved in preparing the lawsuit, in monitoring cases, in communication with other associations (if there are many plaintiffs), in communication with the media and the lawyer/lawyers. Of course, this assessment should also include the case in question or its massiveness and complexity because prior to the preparation of the complaint, a comprehensive analysis of existing international and national legal framework, the analysis of the research, actions taken to address the problem, the practice of the European Court of Human rights and the Court of Justice of the European Union, the recommendations made by human rights bodies of the United Nations and the European Council for the specific problem must be made. Based on this analysis of existing resources for specific problems follows the preparation of the lawsuit for proving discrimination.

2. An assessment of the funds available for initiating such a proceedings should also be made. The financial plan should cover the costs of representation by a lawyer/lawyers, the legal fees for the entire proceedings including compensation for the legal costs of the opposing party. The financial plan should include human resources within the organization as well as funds for meetings with other citizens associations, institutions, briefings and press conferences with the media.

3. In order to achieve the purpose of the initiated *actio popularis* proceedings, a lawyer/lawyers with some experience in court representation of discrimination cases should be appointed. It is recommended that the lawyer/lawyers is/are aware of the problem which is the subject of the legal proceedings, but to also have previous cooperation and be familiar with the association/associations of citizens who appear as plaintiffs in the lawsuit.

5. The Role of the Lead Organization

Upon the initiation of *actio popularis* case, several citizens associations appear before the court as plaintiffs (collective action for protection against discrimination), and one organization must appear in the role of coordinator of the whole process. The coordinating role involves several activities, especially mapping of organizations related to the problem and who would participate in the proceedings, organizing meetings with organizations, constant communication with the lawyer/s representing organizations in court, reporting to organizations during the proceedings, communication with the media, preparation of reports and reacting to the media. Due to the importance of the coordinating role in the submission of a class action for protection against discrimination, it is necessary for the organization to invest human resources, i.e. appointing a person who will be responsible for monitoring all stages of the proceedings and overtake all previously listed activities. Apart from human resources, the coordinating role of the organization also requires space and financial resources, which is why making a financial plan for implementation of all necessary activities is imperative.

6. Initiation of Legal Proceedings

The legal proceedings initiated as *actio popularis* is conducted as a lawsuit in which the plaintiffs is/are citizens association/associations on the grounds of proving discrimination based on certain protected characteristic of a larger group of people.

As previously mentioned, the lawsuit must contain detailed information about the citizens association/associations in the protection of the equal treatment principle or information on the work, i.e. the protection and promotion of the rights of a particular group of people. Such information is necessary for showing the legitimate interest of the association for protecting the interests of a particular group or protection against discrimination. For example, when initiating an *actio popularis* proceedings for the job advertisements which may be discriminatory on various grounds, the citizens association which works on protecting the right to equal treatment may initiate *actio popularis* proceedings for proving discrimination in job advertisements and ask the court to take action to eliminate discrimination or its consequences in relation to the group members. Also, *actio popularis* proceedings can be initiated by a citizens association working with specific groups in different ways, protecting its interests and working towards improving its social status.

Furthermore, the lawsuit must contain facts that provide reasonable doubt, i.e. a probability that in that particular case the defendant was being discriminatory. This section refers to the burden of proof, which in *actio popularis* proceedings should be shifted to the side of the defendant after establishing a *prima facie* case of discrimination. On this basis, the complaint should include data analysis, reports, documented cases, witnesses, and statistics. In addition, the complaint should contain certain evidence, such as newspaper clippings with a certain discriminatory content, footage of a report, a programme or other radio broadcasting content obtained from the Agency for Audio and Audiovisual Media.⁴⁴

At the end of the lawsuit, a request should be made the court to establish that the actions of the defendant have violated the equal treatment in relation to the group members, to prohibit undertaking actions that violate or may violate the equal treatment, i.e. to perform actions that eliminate discrimination or its consequences in relation to the group members. It can also be requested that the verdict which confirms a violation of the rights to equal treatment should be published in the media at the expense of the defendant. It is particularly important

⁴⁴The agency will issue the required copy of the recording if the complaint includes a photocopy of proof for an initiated court proceedings, a statement (certified by a notary), intended for initiation of proceedings or on the basis of a written notice from government authorities and other bodies and entities.

for the petitum of the lawsuit clearly specified so as the court can make a decision that will require specific actions which would prohibit undertaking actions that violate or may violate the plaintiff's right to equal treatment, i.e. to implement actions that eliminate discrimination or its consequences. The particular arrangement of the petitum of the complaint is especially important in cases of systemic discrimination for which several actions must be taken on behalf of the state to eliminate discrimination. For example, in cases of segregation in education is not sufficient for the court alone to determine the existence of segregation, but it also needs to specify the actions to be taken by the state for accomplishment of the process of desegregation.

Given the fact that LPPD in Article 41, paragraph 4 stipulates that the lawsuit is allowed if there is consent from the person claiming to have been discriminated against without having to specify the form in which that consent should be given, the plaintiffs need to decide whether they will submit such consent for the complaint in writing or they will use a different way of submitting such consent or they will ask for the court not to require the consent of a person because the complaint involves a larger number of persons, in most cases, an unidentified number of persons. In the only case of a lawsuit initiated as *actio popularis* for the segregation of Roma children, the plaintiffs decided not to file a consent of a person claiming to be discriminated against because a larger group of persons is concerned and their number is not identified. The Primary Court decided to dismiss this lawsuit due to the legal obligation to submit the consent of a victim of discrimination, and therefore the case is pending on appeal before the Appellate Court (more details can be found in the analysis titled Case Study).

7. Monitoring of the Legal Proceedings

It is recommended that legal proceedings be monitored by the association/associations of citizens who appear as plaintiffs. This would allow the plaintiffs to become familiarized with the entire proceedings and if there are certain violations of procedure, they can react to the court or to the media. Additionally, the continued presence of plaintiffs in all stages of the proceedings gives the impression that it is of particular interest to the association. Apart from the plaintiffs, the litigation can also be observed by the media. Regular monitoring of the proceedings by the media allows the public to be informed of all proceeding developments and raises awareness about this problem as well as the possibility of judicial protection against discrimination.

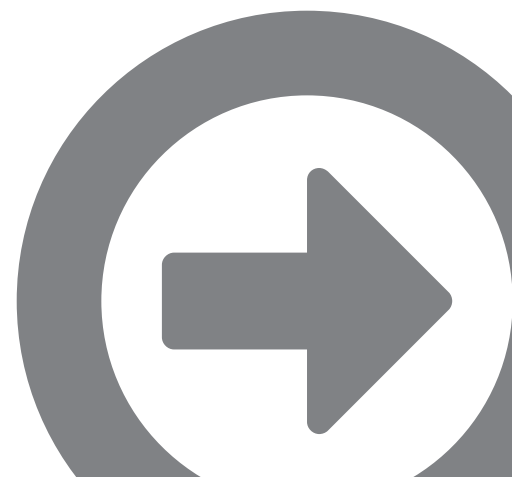
8. Public Relations

At the very beginning of the process of litigation, the plaintiffs should develop a strategy for communicating with the public, especially the media. The communication strategy should include the method of transmission of messages, the activities which will be undertaken to transfer messages (press releases, conferences for experts, press conferences, informative meetings with journalists). It is important to use the previously established relationships with certain journalists/media, which will ensure continuity in media reporting. Contact with the public is extremely necessary after the adoption of a final positive decision in order to raise awareness in the public about discriminatory treatment in a particular case or about the court's oversights made during the process of determining the actual situation, in cases where it fails to confirm discrimination.

9. Monitoring the Enforcement of the Court Decision

The active participation of citizens associations in the process of implementation of the court decision is necessary if we aim for some real changes of the situation. If the court confirms the existence of discrimination in the case and prohibits undertaking actions that violate or may violate equal treatment, i.e. the court states specific actions that must be performed to remove discrimination or its consequences in relation to the group members, citizens associations, i.e. the plaintiffs should monitor the process of implementation of the decision

and inform the public. In cases of severe forms of discrimination which need systemic changes that entail amendment of laws or regulations or the adoption/change of strategies (such as segregation), citizens associations should be involved in the adoption of these regulations and then monitor their implementation. This means that associations should participate in the process of making decisions, regulations or other documents because they represent the discriminated group and its needs. With their expertise, the citizens associations can contribute to an essential problem solving. Additionally, citizens associations are always in contact with the discriminated group and can easily learn about the changes that occur under specific regulations.



APPENDIX 1

Case Study of Discrimination and *Actio Popularis*

Case 1: Segregation of Roma Children in Education

In our country, there is currently one lawsuit initiated as *actio popularis* which refers to the segregation of Roma children in the educational process because of their overrepresentation in special schools. The Law on Prevention and Protection against Discrimination, with Article 41, paragraph 1 allows citizens associations to initiate *actio popularis* proceedings for protection against discrimination by means of a common complaint of the associations for protection against discrimination. However, paragraph 4 of the same Article states that such action is permitted if there is consent from the person claiming to have been discriminated against. Considering that there is no clear statement on the correct format of the consent (as is the case with the law in Montenegro which requires a written consent of the victim of discrimination), associations working to protect the right to equal treatment, as well as in the area of segregation of Roma children, decided to challenge this legal provision before the court by initiating an *actio popularis* proceedings.

In the proceedings, five citizens associations appear as plaintiffs: MHC, KHAM Delcevo, HRI, FOOM and ERRC, who have directly or indirectly worked on the problem of segregation of Roma children. The defendant in the case is the Government as responsible for this issue as well as for the fact it did not take any concrete actions and measures to eliminate the consequences of this discriminatory practice.

Citizens associations, i.e. plaintiffs, through their daily work with clients and through applied research and analysis, found that the representation of Roma children in special education (special schools and special classes within regular schools) is disproportionately larger compared to the one of children from other ethnic communities, meaning that children of Roma ethnicity who acquired their education within special education are usually categorized as children with educational negligence,⁴⁵ mild intellectual disability or as so called "borderline cases" and that the parents of these children either never gave an explicit consent for categorization and enrolling their children in special schools or that consent was not an informed consent, i.e. the parents did not even understand the difference between regular and special education or the consequences of the latter.

Thus, the first plaintiff KHAM from Delchevo, an association engaged in the promotion and protection of the rights of Roma in the country for more than 15 years, including the protection of the right to education and the right to equality by giving specific legal and psycho-social assistance, in the period from 2002 to 2015 documented 40 cases of Roma children without intellectual disabilities who are enrolled in special schools or classes, or an average of 3-4 cases recorded annually. The analysis made in 2011 by the second plaintiff FOOM from Skopje, which covers the period from 2007 to 2009, showed that in special schools and classes in primary education, there is a total 36.5% of Roma children, while in secondary education there is a total of 28%. The investigation conducted by the third plaintiff MHC and the fifth plaintiff ERRC conducted from May to June in 2011 indicates that the percentage of Roma children enrolled in special schools and special classes increased by 46%, or more precisely 42.5% in special schools and 52% in special classes of regular schools. The analytical report by the fourth plaintiff ICP, which includes analysis data and information from several reports and research, confirms the overrepresentation of Roma children in special education.

The legal interest of plaintiffs for initiating an *actio popularis* proceedings for this problem comes from their action in this area up to that point. Given that parents and children approached these organizations and presented their concerns about such conduct or participated in the research, the court should consider that

⁴⁵ Educational negligence is a social condition that depends on several factors, particularly on non-attendance at pre-schools, low level of education of parents, poor command of the Macedonian language, cultural differences and habits, inappropriate and poorly adapted tests for admission to regular schools, which of course, when it comes to so many children, cannot be an individual responsibility, but an objective responsibility of the defendant who supported these practices for many years without taking any measures.

there is a consensus among the victims to protect their rights in terms of Article 41 paragraph 2 of LPPD . In addition, the court should appreciate that the present case is about a systemic discrimination that affects an unidentified number of persons. Due to those reasons, it can neither be required, nor received a consent of the whole group. On the other hand, it is unsustainable for the court to consider that the consent of one child or his parent or guardian can represent the interest of the whole group.

The existence of segregation is confirmed by the reports of the Ombudsman who visited special schools and classes. A report from 2010 states that the representation of Roma children in special primary school "Dr. Zlatan Sremac", is 50%, while in the special primary school "Idnina" this representation of Roma children is 37.5% compared to children from other ethnic communities, while on the visit in 2013, it was found that although the percentage of representation of Roma children is lower, at around 25%, however, in certain schools representation of Roma children compared to children from other ethnic communities the percentage remains higher [Special Primary School Maca Gjorgjieva Ovtcharova-Veles 32.81%, State High School Iskra - Stip 41.17%, State High School Sv. Naum Ohridski - Skopje almost 36%].

The survey conducted during 2014 by the Commission for Protection against Discrimination, and supported by the OSCE Mission in Skopje, again confirmed the abovementioned fact and that there is a disproportionately higher percentage of Roma children who attend special schools, special classes in regular schools or in regular classes in regular schools but with special programs than the percentage of children from other ethnic groups [2.7%].

Overrepresentation of Roma children in special education is confirmed by the results of research and analysis of relevant national and international organizations and institutions in the period from 2010 to 2014.

Such behavior represents segregation or separation of persons/groups with specific safety feature from other persons/groups without their request and informed consent and without a legal permission to do so. Segregation as a serious form of discrimination is strictly forbidden in international and national legal framework.

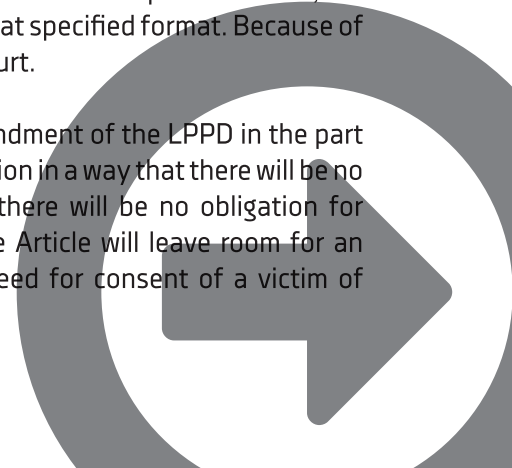
For these reasons, the plaintiffs required from the court to confirm the existence of discrimination and oblige the Government to initiate amendments to relevant laws and amend bylaws that are important for improving the process and removing all faults in the access of Roma children in the education process in order to prevent further discrimination and segregation because of ethnicity while exercising the right to education and the right to equality of Roma children.

Among other things, the complaint requires that the Government is obliged to prepare and adopt a de-segregation program for Roma children in the education system on a national level, which in itself will contain the recommendations included in the reports of national, regional and international bodies, organizations, institutions and mechanisms for protection against discrimination of Roma children in the education system.

The Primary Court, acting upon the filed complaint held two preliminary hearings where the plaintiffs once again explained the need for recognition of actio popularis proceeding. However, the court decided to dismiss the complaint due to lack of consent of a victim of discrimination in accordance with Article 41, paragraph 4 of LPPD.

Although the court in the explanation for the decision recognizes that the plaintiffs have a justified interest in the proceeding, however, they consider that such action cannot be allowed because of the lack of a written consent of a victim of discrimination. Although the LPPD does not specify a format for the required consent, the court states that it must be in writing, without further explaining the origin of that specified format. Because of these shortcomings in the decision, an appeal has been filed at the Appellate court.

Regardless of the outcome of this proceeding, there is a necessity for an amendment of the LPPD in the part that refers to the ability of citizens associations to initiate actio popularis litigation in a way that there will be no limitation, such as a mandatory consent of a victim of discrimination and there will be no obligation for establishing discrimination in initiation a class (joint) action. In this way, the Article will leave room for an association to be able to initiate an actio popularis litigation without the need for consent of a victim of discrimination.



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