Implementing Anti-Discrimination Law:
A Toolkit for Civil Society
The Croatian Law Center (CLC) is a non-governmental and not-for-profit organisation with the main goal of establishing and promoting the rule of law in Croatia; it focuses on the needs of vulnerable and marginalised groups by providing free legal aid in cases of violations of human rights and freedoms, as well as by reacting against the discriminatory regulations and practice and lack of compliance with the international standards.

“HOMO” Association for Protection of Human Rights and Citizens’ Freedoms is a non-governmental and not-for-profit organisation with 15 years of experience in maintaining a continuous field presence starting from the end of the war, monitoring the return of refugees, women’s and minority rights, and providing legal aid, information and advice.

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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CLC and HOMO acknowledgements

Chapters 4-6 of this Toolkit were written by associates of the Croatian Law Centre and the Association for the Protection of Human Rights and Citizens’ Freedoms.
ACRONYMS

ADA Anti-Discrimination Act
CEDAW Covenant on the Elimination of All Forms of Discrimination Against Women
CERD International Convention on the Elimination of All Forms of Racial
CRPD Convention on the Rights of Persons with Disabilities
CPA Civil Procedure Act
EA Execution Act
GEA Gender Equality Act
IPA Instrument for Pre-Accession Assistance
LA Labour Act
NHRI National Human Rights Institution

Note: A Guide to Boxes used in this Toolkit

Blue Boxes contain the principles found in the Declaration of Principles on Equality.

Yellow Boxes contain the grounds upon which discrimination is prohibited under international human rights law and the Declaration of Principles on Equality.

Green Boxes contain summaries of various topics such as direct discrimination, indirect discrimination, and reasonable accommodation.

Pink Boxes contain examples of discrimination issues in practice such as forms of discrimination or steps that could be considered reasonable accommodation.

Dark Blue and Gold EU Boxes contain examples of anti-discrimination legislation and policy from other European Union member states.
1 Introduction

1.1 Purpose of this Toolkit

The Anti-Discrimination Act has been in force in Croatia since January 1st 2009 and provides comprehensive protection from discrimination across a number of grounds and in all areas of life regulated by law. The Act provides Croatia with a strong legal framework for combating discrimination and promoting equality, in line with current European standards. However, awareness of the Act remains low and its implementation and enforcement are underdeveloped.

This Toolkit is intended to be a resource for civil society in Croatia to assist in promoting the full implementation of the Anti-Discrimination Act, in line with international law and best practice. As such, it combines a detailed assessment of international and comparative standards on equality law with explanation and analysis of the Anti-Discrimination Act and other Croatian laws and policies relevant to non-discrimination and equality. It also introduces best practice techniques and strategies from other European Union jurisdictions and provides practical step-by-step guides for those seeking to bring strategic discrimination cases before national and regional courts, and those wishing to engage in legislative and policy advocacy.

It is expected that the Toolkit will be a key source of reference for civil society organisations, legal practitioners, governmental authorities, national and international human rights organisations, and all other stakeholders in the promotion of equality and non-discrimination within Croatia and the wider region.

1.2 About the Authors/Project

This Toolkit has been developed by The Equal Rights Trust (ERT), the Croatian Law Center (CLC), and the Association for the Protection of Human Rights and Citizens’ Freedoms (HOMO).

The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as a resource centre and a think tank, it focuses on the complex relationship between different types of discrimination, developing strategies to translate principles of equality into practice.

The Croatian Law Center is a non-governmental and not-for-profit organisation with the main goal of establishing and promoting the rule of law in Croatia; it focuses on the needs of vulnerable and marginalised groups by providing free legal aid in cases of violations of human rights and freedoms, as well as by reacting against the discriminatory regulations and practice and lack of compliance with the international standards.

"HOMO" Association for Protection of Human Rights and Citizens’ Freedoms is a non-governmental and not-for-profit organisation with 15 years of experience in maintaining a continuous field presence starting from the end of the war, monitoring the return of refugees, women’s and minority rights, and providing legal aid, information and advice.

ERT, CLC and HOMO have a have been working in partnership since 2011 on a joint project, funded by the EU under the IPA scheme, designed to empower civil society to combat discrimination and inequality in Croatia. Throughout the project, the partners have undertaken research into the reality of discrimination and inequality in Croatia today. They have also analysed the legal and policy framework governing discrimination and inequality in Croatia. This Toolkit draws upon this research to present a practical document for those seeking to challenge discrimination and inequality in Croatia.
2 The Unified Human Rights Framework on Equality and the Declaration of Principles on Equality

This Toolkit takes as its conceptual framework the unified human rights framework on equality which emphasises the integral role of equality in the enjoyment of all human rights, and seeks to overcome fragmentation in the field of equality law and policies. The unified human rights framework on equality is a holistic approach which, while keeping in view the specificities of the different strands of equality and the different types of disadvantage, seeks more effective implementation of the right to equality by stressing the overarching aspects of these different strands and types. The framework brings together inequalities based on different grounds, such as age, gender, race, religion, nationality, disability, sexual orientation and gender identity; and inequalities in different areas of life, such as the administration of justice, policing, employment, education, and provision of goods and services.

The unified human rights perspective on equality is expressed in the Declaration of Principles on Equality, which itself is based on legal concepts that have evolved in international, regional and national human rights or equality jurisprudence. Although many of the terms employed in the Declaration are sufficiently well established, the resulting conception of equality in its entirety opens a new space for standard development in the international human rights system. In that respect, the Declaration may be described as a step forward in promoting equality and human rights.

The Declaration of Principles on Equality was drafted and signed by 128 human rights and equality experts from over 40 different nations and reflected a moral and professional consensus on the right to equality. These 27 principles take their starting point from the principle enumerated in the United Nations Declaration on Human Rights that “all human beings are born free and equal in dignity and rights”.

The principles are intended to assist the efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality.

The Declaration of Principles on Equality proclaims a universal right to equality. It expresses in the terms of general legal principles an integrated view of substantive equality, deriving the right from the universal recognition of equality as a value in itself, as well as a necessary aspect of a fair society. The Declaration shares the basic assumptions of human rights philosophy: for example, that as a human right, equality is an entitlement and not a benefit, and must be legally enforceable, like every other human right. As has been stated by the Office of the High Commissioner for Human Rights, the principle of equality is inseparable from the principle of human dignity and is an entitlement of every person.

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Throughout the Declaration, the concept of equality, as well as its equivalent, “full and effective equality”, has a content which is larger than that of “non-discrimination” and richer than the notions of equality before the law and equality of opportunity. Similar general references to full equality can also be found in other modern documents setting legal standards, such as the European Union’s Equal Treatment Directives which refer to “ensuring full equality in practice”. Most importantly, the right to equality in Principle 1 encompasses a right to equal participation in all areas of life in which human rights apply, and it is a right which is autonomous. As Dimitrina Petrova states in a commentary on the Declaration:

Defining the right to equality as requiring participation on an equal basis with others in any area of economic, social, political, cultural or civil life is consistent with international human rights law in delineating the areas in which human rights apply. But the Declaration defines the areas of application of the right to equality without drawing the distinctions between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, which have for so long bedevilled international human rights law. At the same time, the Declaration goes beyond the understanding of discrimination and equality as necessarily related to an existing legal right (...) In the drafters’ view, the right to equality (and non-discrimination) can be claimed in any of the listed five areas of social life, even in the absence of certain legal rights within them. (...) The definition in Principle 1 does not require the right to equality to be based on or related to the enjoyment of any other human right.5

Thus the right to equality implies not only the equal enjoyment of other human rights. Nor is it limited to the equal benefit of rights set out in law. This non-subsidiary approach to the definition of equality marks a step forward from that taken by international human rights law, the law of the European Convention on Human Rights and other legal systems that understand discrimination as discrimination in the exercise and enjoyment of a legal right. The definition in Principle 1 does not require the right to equality to be based on or related to the enjoyment of any other human right.

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The Declaration proclaims that this right extends to guarantee equality in all areas of human life normally regulated by law, and should be addressed holistically. This approach recognises the interconnectedness of inequalities arising in different contexts, which makes it necessary to take a comprehensive approach to combating manifestations of discrimination arising in all areas of life.

Principle 1 also reaffirms the inter-relatedness of equality and dignity articulated in Article 1 of the Universal Declaration of Human Rights which asserts that: “All human beings are born free and equal in dignity and rights”. Principle 1 further implies a vision of a just and fair society as one in which all persons participate on an equal basis with others in economic, social, political, cultural and civil life and in which all persons have an equal and fair prospect to access opportunities available in society.

The content of the right to equality includes the following aspects: (i) the right to recognition of the equal worth and equal dignity of each human being; (ii) the right to equality before the law; (iii) the right to equal protection and benefit of the law; (iv) the right to be treated with the same respect and consideration as all others; (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.

Principle 2 requires treating people as equals in respect of their dignity, in light of the purpose “to realise full and effective equality”. The understanding of “equal treatment” in this Principle abandons the framework of formal equality, whereby individuals would be treated in identical ways regardless of their relative capabilities for participation in economic, social, political, cultural or civil life. As the right to equality defined in Principle 1 requires ensuring such participation “on an equal basis with others”, non-identical treatment is justifiable and indeed necessary in order to achieve such participation. Principle 2 requires treating people according to their unique circumstances as far as possible, with a view to moving in the direction of equal participation in the sense of Principle 1. Treatment that would be detrimental to those who are the least well-off in society would therefore clearly violate the object and purpose of the Declaration.

Principle 2: Equal Treatment

Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

Principle 2 requires treating people as equals in respect of their dignity, in light of the purpose “to realise full and effective equality”. The understanding of “equal treatment” in this Principle abandons the framework of formal equality, whereby individuals would be treated in identical ways regardless of their relative capabilities for participation in economic, social, political, cultural or civil life. As the right to equality defined in Principle 1 requires ensuring such participation “on an equal basis with others”, non-identical treatment is justifiable and indeed necessary in order to achieve such participation. Principle 2 requires treating people according to their unique circumstances as far as possible, with a view to moving in the direction of equal participation in the sense of Principle 1. Treatment that would be detrimental to those who are the least well-off in society would therefore clearly violate the object and purpose of the Declaration.

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6 The departure from a formal conception of equal treatment is in progress in present-day international, regional and national legislation and jurisprudence. See, for example, Council of Europe, Explanatory Report to Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Committee of Ministers of the Council of Europe on 26 June 2000, which states: “While the equality principle does not appear explicitly in the text of either Article 14 of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists”. 

13
Principle 3: Positive Action

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

As with other principles in the Declaration, Principle 3 draws upon emerging approaches in international and regional human rights law, in this case with regards to the concepts of special measures in the various instruments, whereby “it should be noted that the Declaration captures the growing tendency of interpreting "special measures" as part of, rather than an exception to, equal treatment”. The concept of positive action in Principle 3 goes further towards substantive equality than the concepts of special measures related to specific categories of persons found in international and regional human rights instruments. The notion of positive action plays an important role in the unified perspective on equality. As previously discussed, the right to equality extends beyond a right to be free from discrimination and contains an element of participation on an equal basis with others in all areas of life regulated by law. Positive action is key to addressing those inequalities which are not attributable solely to discrimination.

Principle 4: The Right to Non-discrimination

The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality.

The definition of the right to non-discrimination in Principle 4 as a free-standing right is meant in two senses: (i) in the sense that it is a separate right, which can be violated even if a related right is not; for example, a person’s right to non-discrimination in the enjoyment of the right to education may be violated, while no breach of her right to education has been found; and (ii) in the sense of an autonomous right, not related to any other right set out by law. In this second sense, the free-standing status of the right to non-discrimination means that this right does not depend on whether another legal right actually exists.


8 See above, note 5, p. 32.

9 See, for example, Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 4(1) 1 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 2(1)(d) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.
It should be noted that, as defined in Principle 1, the right to equality is also a free-standing right in the two senses specified above. It is not dependent on or related to the recognition of any other civil, cultural, economic, political or social right. Accordingly, the definitions of direct and indirect discrimination in Principle 5 do not link discrimination to any other right set out by law. In this respect, therefore, the Declaration goes considerably further than international human rights law in proclaiming a free-standing right to equality.

The practical implications of this approach, recognising equality as larger than non-discrimination and as not necessarily related to another legal right, are far-reaching. People are entitled to equality in this understanding without having to construct themselves as victims of direct or indirect discrimination, and without having to rely on the individualistic and reactive nature of enforcing anti-discrimination law. Rather, this understanding entails a strong and serious positive obligation of the duty-bearer (the State) to take steps to realising equality in a proactive way and with societal reform in mind. This approach does not diminish the role of legal enforcement of the right to non-discrimination by individual or group claimants but enables more comprehensive measures of improving the position of disadvantaged groups in society.
3 International and Comparative Standards on Equality and Anti-Discrimination Law

3.1 Grounds of Discrimination

**Principle 5: Definition of Discrimination**

*Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness...*

3.1.1 Explicit Grounds

The Declaration of Principles on Equality lists the following grounds upon which discrimination is prohibited: race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, and genetic or other predisposition toward illness. These are referred to as protected/prohibited grounds/characteristics.

**Box 1: Protected grounds under early international human rights instruments**

- Race
- Colour
- Sex
- Language
- Religion,
- Political or other opinion,
- National or social origin,
- Property,
- Birth
- (Association with a National Minority - European Convention on Human Rights only)

Under the early international human rights instruments such as the International Covenant on Civil and Political Rights (1966) (Articles 2(1) and 26), the International Covenant on Economic, Social and Cultural Rights (1966) (Article 2(2)), and the European Convention on Human Rights (1950) (Article 14 and Article 1 of Protocol 12), only a limited number of grounds were protected. These, in turn, came from those explicitly referred to in Article 2 of the Universal Declaration on Human Rights which was adopted in 1948 (See Box 1).

All of these early international human rights instruments listed the protected grounds as part of an open list, i.e. instead of a specific, closed list of prohibited grounds, the Articles provided that discrimination was also prohibited on any "other status", thus allowing for the prohibition of discrimination on grounds not specifically mentioned in the instruments.
The bodies interpreting the instruments – the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the European Court of Human Rights – have, over the years, identified other groups which are protected under the heading “other status” as the protection of human rights has evolved and after identifying further groups which faced discrimination and needed protection (See Box 2).

**Box 2: Further protected grounds identified by bodies interpreting international human rights instruments**
- Civil and family status
- Nationality
- Economic status
- Sexual orientation
- Gender identity
- Age
- Disability
- Health status

Since the adoption of the early international human rights instruments, further instruments have been adopted at an international level providing for specific protection for disadvantaged and/or discriminated groups, most notably, from an equalities perspective, racial groups (through the International Convention on the Elimination of All Forms of Racial Discrimination, or ‘ICERD’ (1966)), women (through the Convention on the Elimination of All Forms of Discrimination Against Women, or ‘CEDAW’ (1979)), and persons with disabilities (through the Convention on the Rights of Persons with Disabilities, or ‘CRPD’ (2006)). These instruments have further elaborated on which grounds are protected (See Box 3).

**Box 3: Additional protected grounds under later international human rights instruments**
- Pregnancy (CEDAW)
- Maternity (CEDAW)
- Ethnicity (CERD)
- Descent (CERD)

Finally, the Declaration of Principles on Equality includes two additional grounds which are still in the process of being accepted as protected grounds by the professional community (See Box 4).

**Box 4: Additional protected grounds under the Declaration of Principles on Equality**
- Carer status
- Genetic or other predisposition toward illness
3.1.1.1. **Race**

Race is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights,\(^{10}\) Article 2(2) of the International Covenant on Economic, Social and Cultural Rights,\(^{11}\) and Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{12}\)

Under the European Convention on Human Rights, discrimination on grounds of race is prohibited under Articles 14 and Article 1 of Protocol 12.

Under European Union law, discrimination on grounds of racial origin in certain fields is prohibited under the Race Equality Directive.\(^{13}\) Although the Directive uses the term “racial origin” rather than “race”, the terms are equivalent.

3.1.1.2. **Colour**

Colour is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights,\(^{14}\) Article 2(2) of the International Covenant on Economic, Social and Cultural Rights,\(^{15}\) and Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{16}\)

Under the European Convention on Human Rights, discrimination on grounds of colour is prohibited under Articles 14 and Article 1 of Protocol 12.

Under European Union law, the Race Equality Directive,\(^{17}\) which prohibits discrimination in certain fields, prohibits discrimination on grounds of “racial origin”. This term is understood as covering “colour”, in compliance with the well-established non-anthropological understanding of race in international law.

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3.1.1.3. **Ethnicity**

Ethnic origin is a prohibited ground under international law, specifically under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination. Under European Union law, discrimination on grounds of ethnic origin in certain fields is prohibited under the Racial Equality Directive. Although the International Convention on the Elimination of All Forms of Racial Discrimination and the European Union Directive use the term 'ethnic origin' rather than ethnicity, the terms are synonymous for the purposes of the legal definition.

3.1.1.4. **Descent**

Descent is a prohibited ground under international law, specifically under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

3.1.1.5. **Sex**

Sex is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and Article 1 of the Convention of the Elimination of All Forms of Discrimination against Women.


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3.1.1.6. **Pregnancy**

Under the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect pregnant women from discrimination.\(^{26}\) This includes prohibiting dismissal on the grounds of pregnancy, providing special protection to women during pregnancy in types of work proved to be harmful to them, and ensuring to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.\(^{27}\)

Under European Union law, discrimination on grounds of pregnancy is prohibited under Article 4(1)(a) of the Gender Equality (Goods and Services) Directive\(^{28}\) and Article 2(2)(c) of the Gender Equality (Employment) Directive.\(^{29}\)


3.1.1.7. **Maternity**

Under the Convention on the Elimination of All Forms of Discrimination against Women, states must take steps to protect women from discrimination on grounds of maternity.\(^{31}\) This includes prohibiting dismissal on grounds of maternity leave and introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.\(^{32}\)

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27 Ibid. Articles 11(2) and 12(2).


32 Ibid. Articles 11(2).

3.1.1.8. **Civil, Family or Carer Status**

Marital status is a prohibited ground under international law, specifically under Articles 1 and 11(2)(a) of the Convention on the Elimination of All Forms of Discrimination against Women. In addition, the Human Rights Committee has stated that the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights includes differentiation between married and unmarried couples. Similarly, the Committee on Economic, Social and Cultural Rights has stated that marital and family status are prohibited grounds falling within "other status" in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. Furthermore, the European Court of Human Rights has held that the prohibition of discrimination in Article 14 of the European Convention of Human Rights includes differentiation between married and unmarried couples.

The Human Rights Committee has regarded status as either a natural child or foster child as a protected ground under "other status" in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, insofar as it has agreed to compare the two with the aim of establishing whether Article 26 has been violated.

The European Court of Human Rights has also treated status as a parent and as a parent of a child born out of wedlock as prohibited grounds in Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.

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3.1.1.9. **Language**

Language is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights\(^{41}\) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.\(^{42}\)


3.1.1.10. **Religion or Belief**

Religion is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights\(^{43}\) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.\(^{44}\)


Under European Union law, discrimination on grounds of religion or belief in certain fields is prohibited under the Framework Directive.\(^{45}\)

3.1.1.11. **Political or Other Opinion**

Political or other opinion is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights\(^{46}\) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.\(^{47}\)


Under the European Convention on Human Rights, discrimination on grounds of political or other opinion is prohibited under Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.

3.1.1.12. **Birth**

Birth is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.


3.1.1.13. **National or Social Origin**

National or social origin is a prohibited ground under international law, specifically under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

Under the European Convention on Human Rights, discrimination on grounds of national or social origin is prohibited under Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.

3.1.1.14. **Nationality**

The Human Rights Committee has stated that the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights includes differentiation between nationals and non-nationals. Similarly, the Committee on Economic, Social and Cultural Rights has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

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3.1.1.15. Economic Status

The Committee on Economic, Social and Cultural Rights has stated that the ground of “economic situation” falls under “other status” in Article 2(2) in the International Covenant on Economic, Social and Cultural Rights.54

3.1.1.16. Association with a National Minority


3.1.1.17. Sexual Orientation

The Human Rights Committee has stated that the prohibition of discrimination in Article 26 of the International Covenant on Civil and Political Rights includes discrimination based on sexual orientation.55 Similarly, the Committee on Economic, Social and Cultural Rights has stated that sexual orientation is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.56

The European Court of Human Rights has the prohibition on discrimination in Article 14 of the European Convention on Human Rights includes differentiation based on sexual orientation.57

Under European Union law, discrimination on grounds of sexual orientation in certain fields is prohibited under the Framework Directive.58

3.1.1.18. Gender Identity

The Committee on Economic, Social and Cultural Rights has stated that gender identity is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.59


The European Court of Human Rights has held that gender identity is a prohibited ground falling within “other status” in Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.\(^{60}\)

The European Court of Justice has held that discrimination on grounds of ‘sex’ also includes discrimination against a person because he or she “intends to undergo, or has undergone, gender reassignment”.\(^{61}\)

### 3.1.1.19. Age

The Committee on Economic, Social and Cultural Rights has stated that age is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.\(^ {62}\)

The European Court of Human Rights has held that age is a prohibited ground falling within “other status” in Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.\(^ {63}\)

Under European Union law, discrimination on grounds of age in certain fields is prohibited under the Framework Directive.\(^ {64}\)

### 3.1.1.20. Disability

Discrimination on grounds of disability is expressly prohibited under international law, specifically under Article 4 of the Convention on the Rights of Persons with Disabilities.\(^ {65}\) The Committee on Economic, Social and Cultural Rights has also stated that disability is a prohibited ground which falls within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.\(^ {66}\)

The European Court of Human Rights has held that disability falls within “other status” in the prohibition of discrimination in Article 14 of the European Convention on Human Rights.\(^ {67}\)

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\(^{60}\) See, for example, *Christine Goodwin v. the United Kingdom* (Application No. 28957/95), 11 July 2002.

\(^{61}\) See, for example, *P v. S and Cornwall County Council*, Case C-13/94, [1996].


\(^{63}\) See, for example, *Schwizgebel v. Switzerland* (Application No. 25762/07), 10 June 2010.


\(^{67}\) *Glor v. Switzerland* (Application No. 13444/04), 30 April 2009.
Under European Union law, discrimination on grounds of disability in certain fields is prohibited under the Framework Directive.68

3.1.1.21. Health Status

The Committee on Economic, Social and Cultural Rights has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.69

3.1.1.22. Genetic or Other Predisposition to Illness

Article 11 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine prohibits discrimination on grounds of a person’s genetic heritage.70

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 1(1)

3.1.2 Additional Grounds


70 CETS No.: 164, adopted 4 April 1997.
The Declaration of Principles on Equality uses a closed list of prohibited grounds complemented by a set of criteria for determining whether a characteristic should be regarded as a prohibited ground. Although many international human rights instruments are open lists in that they include “any other status” as a protected ground, they do not specify what the criteria are for further grounds to be considered as protected under this heading. The approach of the Declaration of Principles on Equality instead reflects that of the principal anti-discrimination legislation in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act,\(^{71}\) which provides both a list of explicitly prohibited grounds and a condition that further grounds are to be prohibited if one of the three criteria listed above is met.

The International Covenant on Civil and Political Rights includes “other status” in Articles 2(1) and 26. The Human Rights Committee, in interpreting “other status” in the Treaty has examined additional grounds as and when communications come before the Committee, but has not laid down any rules or guidance as to when an additional ground will fall within “other status”. In *Ibrahima Gueye et al. v. France,*\(^{72}\) for example, the Committee examined whether “nationality” fell within “other status”. In dealing with whether nationality was a ground which fell within “other status”, the Committee simply said:

*There has been a differentiation by reference to nationality acquired upon independence. In the Committee’s opinion, this falls within the reference to “other status” in the second sentence of article 26.*\(^{73}\)

The International Covenant on Economic, Social and Cultural Rights includes “other status” in Article 2(2). In its General Comments, the Committee on Economic, Social and Cultural Rights has elaborated on its reasoning as to which further grounds would fall within “other status”:

*The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be*

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\(^{71}\) Act 4 of 2000. This legislation itself drew inspiration from the decision of the South African Constitutional Court in *Hoffman v. South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLR 1365 (CC) (28 September 2000), where it was held that the constitutional prohibition on discrimination in Section 9 extended to discrimination on grounds of HIV status, despite the fact that HIV status was not one of the explicitly listed prohibited grounds. See, in particular, Paras 28 and 29.


\(^{73}\) Ibid. Para. 9.4.
reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.\(^\text{74}\)

The Committee then went on to list disability, age, nationality, marital and family status, sexual orientation, gender identity, health status, place of residence, and economic and social situation as examples of further grounds which fell within “other status”.

The European Convention on Human Rights includes “other status” in Articles 14 and Article 1 of Protocol 12 to the Convention. While the European Court of Human Rights has not given an authoritative explanation as to how it determines whether or not a particular characteristic will fall within Article 14 or Article 1 of Protocol 12, the court has stated that:

\[
\text{“The list set out in Article 14 is illustrative and not exhaustive, as is shown by the words “any ground such as” (in French “notamment”) (...) The court further recalls that the words “other status” (and a fortiori the French “toute autre situation”) have been given a wide meaning...”}\(^\text{75}\)
\]

### 3.1.3 Discrimination by Association and by Perception

The Declaration of Principles on Equality, reflecting international law, also refers to discrimination by association and discrimination by perception.

The Committee on Economic, Social and Cultural Rights has said in its General Comments that:

\[
\text{Membership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).}\(^\text{76}\)
\]

The European Court of Justice, sitting as a Grand Chamber, has held that direct discrimination as defined by the Framework Directive\(^\text{77}\) was not limited to persons with the protected characteristic. The Court, in the context of discrimination on grounds of disability, held that:

\[
\text{“The prohibition of direct discrimination laid down by those provisions [of the Framework Directive] is not limited only to people who are themselves...”}\]


\(^{75}\) Carson and others v. United Kingdom (Application No. 42184/05), 16 March 2010, Para 70.

\(^{76}\) Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, Para 16.

disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).  

The European Commission against Racism and Intolerance has stated in its General Policy Recommendations that:

> The law should provide that the following acts, inter alia, are considered as forms of discrimination: (...) discrimination by association.

### FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 1(2), 1(3), 9

#### 3.1.4 Multiple Discrimination

**Principle 12: Obligations Regarding Multiple Discrimination**

Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground. Particular positive action measures, as defined in Principle 3, may be required to overcome past disadvantage related to the combination of two or more prohibited grounds.

The Declaration of Principles on Equality, reflecting international law, recognises that discrimination can occur on the basis of more than one ground.

The Convention on the Rights of Persons with Disabilities states in its Preamble at paragraph (p):

> Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status...

At Article 6(1) of the Convention, it states:

> States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

The Committee on Economic, Social and Cultural Rights has stated in a General Comment that:

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79 General Policy Recommendation No. 7: National legislation to combat racism and racial discrimination

Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.\textsuperscript{80}

The Committee, in the same General Comment, stated that multiple discrimination may be considered as a prohibited ground falling within "other status" in Article 2(2) of the International Convention on Economic, Social and Cultural Rights.\textsuperscript{81}

The Committee on the Elimination of Racial Discrimination has referred in its General Recommendations to the intersection between discrimination on grounds of race and gender and to intersectionality more generally.\textsuperscript{82}

The Committee on the Elimination of Discrimination against Women has also referred in its General Recommendations to multiple discrimination where gender is one of the intersecting grounds:

\begin{quote}
Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.\textsuperscript{84}
\end{quote}

\textsuperscript{80} Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, Para 17.

\textsuperscript{81} Ibid. Para. 27.


\textsuperscript{84} Committee on the Elimination of Discrimination Against Women, General recommendation No. 25: On article 4, paragraph 1, on temporary special measures, U.N. Doc. HRI/GEN/1/Rev.7 at 282, 2004, Para 12.
3.1.5 Relationship between the Grounds of Discrimination

**Principle 6: Relationship between the Grounds of Discrimination**

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.

As explained in a Commentary to the Declaration:

> According to Principle 6 (...) legislation should ensure equal levels of protection against discrimination on each of the prohibited grounds. This means that while exceptions, justifications and limitations to the principle of non-discrimination will certainly differ with regard to different grounds, the victim of discrimination is entitled to an effective remedy irrespective of the ground (or combination of grounds). For example, if any occupational requirements related to race are provided as justifications for direct discrimination in a certain legal system, these requirements and the related exceptions would be very different as compared to those related to language, or age. But once a certain treatment, provision, criterion or practice is found to constitute discrimination, the persons concerned should be entitled to an equally effective remedy, regardless of the prohibited grounds.\(^{85}\)

3.2 Forms of Prohibited Conduct

3.2.1 Direct Discrimination

**Principle 5: Definitions of discrimination**

... Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

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The Declaration of Principles on Equality, reflecting international law, requires states to prohibit direct discrimination.

### 3.2.1.1 Definition of Direct Discrimination

The International Covenant on Civil and Political Rights does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. However, the Human Rights Committee, in interpreting Articles 2(1) and 26 has stated in General Comment No. 18 that:

> [T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.\(^{86}\)

The Committee on the Elimination of Racial Discrimination has used the same language in relation to Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{87}\)

While the terms “purpose” and “effect”, are not equivalent to direct and indirect discrimination respectively, the scope of prohibited behaviours covered by the definition referring to “purpose or effect” is coextensive with a prohibition of both direct and indirect discrimination. The International Covenant on Economic, Social and Cultural Rights prohibits discrimination in Article 2(2). The Committee on Economic, Social and Cultural Rights has elaborated on this prohibition in its General Comments:

> [D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights...

**Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground (...) Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).\(^{88}\)

European Union law defines direct discrimination as:

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Where one person is treated less favourably than another is, has been or would be treated in a comparable situation [on a prohibited ground].

The European Court of Human Rights uses the formulation:

A “difference in the treatment of persons in analogous, or relevantly similar, situations” which is “based on an identifiable characteristic”.

3.2.1.2 Justification of Direct Discrimination

The Human Rights Committee has stated that:

[Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.]

The Committee on Economic, Social and Cultural Rights has adopted this “reasonable and objective test”, but has elaborated on its practical meaning:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.

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90 See, for example, Willis v. the United Kingdom (Application No. 36042/97); Carson and Others v. United Kingdom (Application No. 42184/05), 16 March 2010; Para 61; D.H. and Others v. the Czech Republic (Application No. 57325/00), 13 November 2007, Para 175; and Burden v. United Kingdom (Application No. 13378/05), 29 April 2008, Para 60.


The Committee on the Elimination of Racial Discrimination uses a slightly different test:

[A] differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention.93

### Direct Discrimination: Summary

Direct discrimination comprises three elements:

- Less favourable treatment of a person or a group of persons;
- When compared with how other persons or groups of persons have been, are, or would be treated, in a similar or comparable situation; and where
- The reason for which is a characteristic which falls under a prohibited ground.

Direct discrimination can only be justified very exceptionally where the discrimination is reasonable, objective, and justified against strictly defined criteria.

### Direct Discrimination: Examples

- A shop, restaurant or hotel denies a person access because they have a protected characteristic (e.g. because they are a woman, gay, of a certain race, or have a disability);
- A bar or nightclub refuses to let a person in because they have a physical disability;
- A woman is paid less than a man for doing the same work (or because of any other protected characteristic);
- The law provides for different pension ages for women born women and transsexual women;
- A private landlord refuses to rent out a property to a family because they are of Roma origin.

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 2(1), 9

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3.2.2 Indirect Discrimination

**Principle 5: Definitions of discrimination**

... Discrimination may be direct or indirect. ...

**Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.**

The Declaration of Principles on Equality, reflecting international law also requires States to prohibit indirect discrimination.

3.2.2.1 Definition of Indirect Discrimination

As discussed above, the International Covenant on Civil and Political Rights does not use the terms "direct" and "indirect" in its prohibition on discrimination in Articles 2(1) and 26. Instead, the Human Rights Committee, when interpreting Articles 2(1) and 26, has used the terms "purpose" and "effect" which, while they are not are equivalent to direct and indirect discrimination respectively, cover the same range of prohibited conducts.\(^\text{94}\) The Committee on the Elimination of Racial Discrimination has used the same language on “purpose or effect”, based on the wording of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination\(^\text{95}\).

The Committee on Economic, Social and Cultural Rights, in interpreting the prohibition against discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, has stated:

*Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate*

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European Union law defines indirect discrimination as:

Where an apparently neutral provision, criterion or practice would put persons [with a protected characteristic] at a particular disadvantage compared with other persons.\(^97\)

The European Court of Human Rights has used the following formulation:

[A] difference in treatment [which takes] the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.\(^98\)

### 3.2.2.2 Justification of Indirect Discrimination

The Human Rights Committee and the Committee on the Elimination of Racial Discrimination adopt the same test for determining whether discrimination is justified, irrespective of whether the discrimination is direct or indirect: the differential treatment must be reasonable and objective.\(^99\) The Committee on the Elimination of Racial Discrimination uses the test of whether the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within Article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination.\(^100\)

European Union law provides that a provision, criterion or practice that would otherwise amount to indirect discrimination is not discriminatory if it can be objectively justified by a

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98 See, for example, D.H. and Others v. the Czech Republic (No. 57325/00), 13 November 2007; and Zarb Adami v. Malta (No. 17209/02), 20 June 2006, Para 80.

99 See discussion at section 3.2.1.2.

100 Ibid.
**legitimate aim** and the means of achieving that aim are **appropriate and necessary**. In addition, the Framework Directive provides that there is no indirect discrimination if, with regards to persons with a particular disability, the employer or any person or organisation to whom the Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 of the Directive in order to eliminate disadvantages entailed by such provision, criterion or practice.

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**Indirect Discrimination: Summary**

Indirect discrimination comprises three elements:

- A neutral law, rule, provision, criterion, policy or practice;
- Which disadvantageously affects a group with a protected characteristic;
- When compared to others in a similar situation.

Indirect discrimination can only be justified when the law, rule, provision, criterion, policy or practice is (i) objectively justified (ii) by a legitimate aim, and (iii) the means of achieving that aim are appropriate and necessary.

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103 Article 2(2)(b)(ii).
Harassment is a form of discrimination under international law and the Declaration of Principles on Equality, and States are therefore also required to prohibit it.

The Committee on Economic, Social and Cultural Rights has stated in its General Comments that discrimination under Article 2(2) of the International Convention on Economic, Social and Cultural Rights includes harassment.104

The Declaration of Principles on Equality takes its definition of harassment directly from European Union law which defines harassment as "when an unwanted conduct related to [a prohibited ground] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."105

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3.2.3.1 Sexual Harassment

The Committee for the Elimination of Discrimination against Women has defined sexual harassment as including:

Such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.106

The European Union Gender Equality (Employment) Directive defines sexual harassment as harassment where "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs"107.

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 3, 9

3.2.4 Instructions to Discriminate

European Union law recognises that instructions to discriminate constitute prohibited discrimination and provisions prohibiting instructions to discriminate are contained within all Equality Directives.108

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 4(1), 9


3.2.5 Incitement to Discriminate

International law recognises incitement to discriminate as a form of discrimination and requires states to prohibit incitement to discrimination.

Article 20(2) of the International Covenant on Civil and Political Rights states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.\(^\text{109}\)

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination states:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.\(^\text{110}\)

Although the International Covenant on Economic, Social and Cultural Rights does not explicitly prohibit incitement to discriminate, the Committee on Economic, Social and Cultural Rights has stated in a General Comment that:

Discrimination also includes incitement to discriminate. (…) Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary.\(^\text{111}\)


The Council of the European Union has also stated in its Joint Action of 1996 that Member States should criminalise public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin.\(^\text{112}\)

**FOR RELATED PROVISION SEE:** CROATIAN ANTI-DISCRIMINATION ACT: Article 4(2), 9

### 3.3 Reasonable Accommodation

**Principle 13: Accommodating Difference**

*To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.*

*Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.*

Reflecting an emerging international consensus, in the Declaration of Principles on Equality, the concept of reasonable accommodation “is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life”.\(^\text{113}\) Thus, in the context of this Toolkit, it is accepted that the duty of reasonable accommodation can arise in respect of any ground.

\[^{112}\text{The Council of the European Union, 96/443/JHA: Joint Action of 15 July 1996 adopted by the Council on the basis of Article K 3 of the Treaty on European Union, concerning action to combat racism and xenophobia, Title I. A (a).}\]

As to disability, the Convention on the Rights of Persons with Disabilities states in Article 5(3):

*In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*

The Convention defines "reasonable accommodation" as:

>[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The Convention makes explicit reference to the requirement of reasonable accommodation when securing particular rights of persons with disabilities, including:

- The guarantee that if a person with a disability is deprived of their liberty, that they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the Convention (Article 14(2);
- The right to education including general tertiary education, vocational training, adult education and lifelong learning (Articles 24(2)(c) and (5));
- The right to work to work, on an equal basis with others, including includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities (Article 27(1)(i)).

While the International Covenant on Economic, Social and Cultural Rights does not refer to discrimination on grounds of disability, or to reasonable accommodation, the Committee on Economic, Social and Cultural Rights has stated that disability is a prohibited ground under "other status" in Article 2(2), and in its General Comments has stated:

*The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.*

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115 Ibid., Article 2.

116 See discussion at section 2.2.1.20.

The European Union Framework Directive provides that:

\[\text{In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.}^{118}\]

While neither the Convention on the Rights of Persons with Disabilities nor the European Union Framework Directive state what measures would amount to a “disproportionate or undue burden”, the United Nations handbook, "From Exclusion to Equality: Realizing the rights of persons with disabilities" identifies the following factors as common to national legislation in various states in determining whether a measure so amounts:

- The practicability of the changes required;
- The cost involved;
- The nature, size and resources of the entity involved;
- The availability of other financial support, occupational health and safety implications; and
- The impact on the operations of the entity\(^{119}\).

### Reasonable Accommodation: Examples

- A government department produces large print, easy read, Braille and audio versions of all its literature so as to allow persons with hearing, visual or learning difficulties to be able to access the documents.

- A bakery open at the weekends arranges the shifts of the staff so that no employees have to work on days where their religion requires them not to.

- A school installs ramps, handrails and lifts in its buildings so that children with physical disabilities are able to access all of the classrooms.

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3.4 Discrimination and Violence

**Principle 7: Discrimination and Violence**

Any act of violence or incitement to violence that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

International law and the Declarations of Principles on Equality recognise that violence motivated by the victim having a protected characteristic is a serious denial of the right to equality, and that states have a duty to penalise, prevent and deter such violence.

In the context of gender-based violence, the Committee on the Elimination of Discrimination against Women has stated in its General Recommendations that:

> Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.\(^{120}\)

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The Committee has also stated that the definition of “discrimination against women” in Article 1 of the Convention includes gender-based violence.\textsuperscript{121}

The Committee has defined gender-based violence as “violence that is directed against a woman because she is a woman or violence that affects women disproportionately”.\textsuperscript{122} It includes “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs”.\textsuperscript{123} The Committee also stated that “gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”.\textsuperscript{124}

The Committee has stated that states have an obligation to “prevent, investigate, prosecute and punish such acts of gender-based violence.”\textsuperscript{125}

The Committee on Economic, Social and Cultural Rights has also made reference to gender-based violence in a General Comment:

\begin{quote}
Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.\textsuperscript{126}
\end{quote}

In the context of racially-motivated violence, the International Convention on the Elimination of All Forms of Racial Discrimination imposes obligations on states in eliminating such violence in Articles 4 and 5:

\begin{quote}
State Parties (…) (a) Shall declare an offence punishable by law (…) all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin…\textsuperscript{127}
\end{quote}


\textsuperscript{122} \textit{Supra} n. 117. Paras 6 and 19 respectively.


\textsuperscript{124} \textit{Ibid}.

\textsuperscript{125} \textit{Ibid}.


\textsuperscript{127} G.A. Res. 2106 (XX), 1965, Article 4(a).
In compliance with the fundamental obligations laid down in article 2 of [the] Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights (...) (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution...\[128\]

The European Court of Human Rights has recognised gender-based violence as a form of discrimination prohibited under Articles 14 and Article 1 of Protocol 12 of the European Convention on Human Rights.\[129\]

The European Commission against Racism and Intolerance has stated in its General Policy Recommendation No. 7: National legislation to combat racism and racial discrimination, that:

\[128\] Ibid. Article 5(b). See also the Committee on the Elimination of Racial Discrimination, General Recommendation No. 15: Organized violence based on ethnic origin, U.N. Doc. A/48/18 at 114 (1994), para. 3 which requires states to "to penalize .. (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts."

\[129\] Opuz v. Turkey (Application No. 33401/02) (9 June 2009), para. 200.

\[130\] Adopted on 13 December 2002, p. 6, para. IV.21.

3.5 Scope and Right-Holders

3.5.1 Scope

**Principle 8: Scope of Application**

The right to equality applies in all areas of activity regulated by law.

The two anti-discrimination Articles in the International Covenant on Civil and Political Rights differ in their scope. Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, whereas Article 26 states that:

\[128\] All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any
discrimination and guarantee to all persons equal and effective protection against discrimination.

The Human Rights Committee has interpreted Article 26 as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities.”¹³¹ Unlike Article 2(1), Article 26 is therefore a freestanding right with a much broader scope.

The Committee on the Elimination of Discrimination Against Women has taken an even wider approach in regards to the interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women. In its General Recommendations, it has stated that:

[States] must also enact legislation that prohibits discrimination in all fields of women's lives under the Convention and throughout their lifespan.¹³²

Similarly to the International Covenant on Civil and Political Rights, the European Convention on Human Rights contains two different anti-discrimination Articles with differing scopes. Article 14 of the Convention itself prohibits discrimination in the enjoyment of the rights contained within the Convention. Like Article 2(1) of the International Covenant on Civil and Political Rights, Article 14 is not a free-standing right but contingent on the freestanding rights within the Convention. In practice, the European Court of Human Rights does not require there to be a violation of one of the freestanding rights before Article 14 can be violated¹³³, but does require one of the freestanding rights to be engaged. The Court, however, takes a broad approach and will examine potential violations of Article 14 if the facts of the case broadly relate to issues that are protected under the Convention.

European Union law is specific in its scope and different Directives provide for different fields to which the Directive applies. (See Table 1)

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 8


¹³³ See, for example, Sommerfeld v. Germany (GC) (Application No. 31871/96), 8 July 2003.
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<td>Access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience</td>
<td>Yes</td>
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<td>Employment and working conditions (including dismissals and pay)</td>
<td>Yes</td>
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<td>Membership of unions, professional organisations, and any other organisation for employers or workers</td>
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<td>Yes</td>
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<td>Social advantages</td>
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<td>Goods and services (including housing)</td>
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</tr>
</tbody>
</table>
**3.5.2 Right-Holders**

**Principle 9: Right-holders**

The right to equality is inherent to all human beings and may be asserted by any person or a group of persons who have a common interest in asserting this right.

The right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State.

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.

The notion that the right to equality is inherent to all human beings stems from Article 1 of the Universal Declaration of Human Rights which states:

*All human beings are born free and equal in dignity and rights.*

The right to equality, inherent to all persons, must therefore be able to be asserted by any person wherever they are. States therefore have a duty to ensure that the right can be asserted by all persons in the jurisdiction of the State and all persons subject to the jurisdiction of the State. This reflects international law.

Article 2(1) of the International Covenant on Civil and Political Rights provides that the Convention rights extend to "all individuals within its territory and subject to its jurisdiction".

The Human Rights Committee has stated in its General Comments that:

*The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.*

*This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.*

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This interpretation of the right-holders has also been adopted by the Committee on Economic, Social and Cultural Rights,\textsuperscript{135} the Committee on the Elimination of Racial Discrimination,\textsuperscript{136} and the Committee on the Elimination of Discrimination against Women.\textsuperscript{137}

Article 1 of the European Convention on Human Rights provides that the Convention extends to "everyone within [the] jurisdiction" of the State, and this has been held to extend beyond the national territory to those areas under the effective control of the State, such as occupied territories.\textsuperscript{138}

### 3.5.3 Duty-Bearers

#### Principle 10: Duty-bearers

*States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.*

In addition to the various duties in respect to realising the rights to equality and non-discrimination imposed upon states themselves, certain duties extend to non-State actors as well.

The Committee on Economic, Social and Cultural Rights has stated, for example, in its General Comments that:

*Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.*\textsuperscript{139}


\textsuperscript{136} *General Recommendation No. 30: Discrimination Against Non Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).*


\textsuperscript{138} *Loizidou v. Turkey (Application No. 15318/89), 18 December 1996.*

\textsuperscript{139} *Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, para. 11.*
Similarly, the Committee on the Elimination of Discrimination against Women has stated:

*Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.*

(...)

*States parties also have an obligation to ensure that women are protected against discrimination committed by (...) organizations, enterprises or private individuals, in the public and private spheres.*¹⁴⁰

The European Commission against Racism and Intolerance has stated in its General Policy Recommendations that:

7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services.

8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.

9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.

3.6 Obligations on States

3.6.1 Giving Effect to the Right to Equality

International law requires States to give effect to the right to equality. Giving effect to the right to equality, in turn, comprises a number of elements.

Adopting appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality

**Principle 11: Giving Effect to the Right to Equality**

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular

States must

(a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;

(b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;

(c) Promote equality in all relevant policies and programmes;

(d) Review all proposed legislation for its compatibility with the right to equality;

(e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;

(f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;

(g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

Article 2(2) of the International Covenant on Civil and Political Rights requires states to:

[T]ake the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights requires States to:

Take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women requires states to:

(a) [E]mbody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(...)

(c) [E]stablish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination...

Article 4(1)(a) of the Convention on the Rights of Persons with Disabilities requires States to:

[A]dopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the (...) Convention.

The Committee on Economic, Social and Cultural Rights has stated that:

Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above.\footnote{Committee on Economic, Social and Cultural Rights, General Comments No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (2009) Para 37.}

Modifying or abolishing laws, regulations, customs and practices

Article 2(1)(c) of the International Convention on the Elimination of All Forms of Racial Discrimination requires States to:

[T]ake effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists...

Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women requires States to:

(f) [T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) [R]epeal all national penal provisions which constitute discrimination against women.

Article 4(1)(b) of the Convention on the Rights of Persons with Disabilities requires States to:
[T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities...

The Committee on Economic, Social and Cultural Rights has stated that:

[L]aws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.  

Promoting equality

Article 4(1)(c) of the Convention on the Rights of Persons with Disabilities requires States to:

[T]ake into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.

Refraining from adopting any policies inconsistent with the right to equality

Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination requires States:

(a) To engage in no act or practice of racial discrimination against persons, groups of persons or institutions...

(b) Not to sponsor, defend or support racial discrimination by any persons or organizations...

Article 2(d) of the Convention on the Elimination of All Forms of Discrimination against Women requires States to:

[R]efrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation...

Article 4(1)(b) of the Convention on the Rights of Persons with Disabilities requires States to:

[R]efrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention...

Ensuring public authorities and institutions act in conformity with the right to equality

Article 2(1)(a) of the International Covenant on the Elimination of All Forms of Racial Discrimination requires States to:

[E]nsure that all public authorities and public institutions, national and local, shall act in conformity with this obligation...

Eliminating all forms of discrimination by any person, or any public or private sector organisation

Article 26 of the International Covenant on Civil and Political Rights provides that:

[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...

Article 2(1) of the International Convention on the Elimination of All Forms of Racial Discrimination requires states to:

Undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(…)

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women requires states to:

[T]ake all appropriate measures to eliminate discrimination against women by any person, organization or enterprise...

Article 4(1)(e) of the Convention on the Rights of Persons with Disabilities requires states to:

[T]ake all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise...

The Committee on Economic, Social and Cultural Rights has noted that:

Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which
Principle 15: Specificity of Equality Legislation

The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

International law and the Declarations of Principles on Equality recognise the link between poverty and discrimination.

The Committee on Economic, Social and Cultural Rights has stated in its General Comments that:

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

Principle 15: Specificity of Equality Legislation

The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

In her commentary to the Declaration, Dimitrina Petrova explains the importance of Principle 15:

It is difficult to see how a State would be able to implement the right to equality without comprehensive national legislation and policy. Principle 15 [Specificity of Equality Legislation] affirms that national equality legislation, whether in the form of one unified comprehensive Act or a combination of several pieces of

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3.6.4 Participation

**Principle 16: Participation**

All persons, particularly those who have experienced or who are vulnerable to discrimination, should be consulted and involved in the development and implementation of laws and policies implementing the right to equality.  

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FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 15

3.6.5 Education on Equality

**Principle 17: Education on Equality**

States have a duty to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right.  

The Committee on Economic, Social and Cultural Rights has stated in its General Comments that:

> Teaching on the principles of equality and non discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society.  

The Committee on the Elimination of Discrimination against Women has stated in its General Comments that:

> [Article 2(1)(e) of CEDAW] establishes an obligation of States parties to eliminate discrimination by any public or private actor. The types of measures that might be considered appropriate in this respect are not limited to constitutional or legislative measures. States parties should also adopt measures that ensure the practical realization of the elimination of discrimination against women and women’s equality with men. This includes measures that ...

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3.7 Enforcement

3.7.1 Access to Justice

**Principle 18: Access to Justice**

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.

International law requires States to provide effective access to justice for victims of discrimination.

Article 2(3)(a) of the International Covenant on Civil and Political Rights requires states:

*To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*

Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires states:

*[To] assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*

Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women requires states:

*To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public*

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institutions the effective protection of women against any act of discrimination.\textsuperscript{150}

Article 13 of the European Convention on Human Rights states that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Access to justice comprises a number of elements.

Access to judicial and/or administrative procedures

Article 2(3)(b) of the International Covenant on Civil and Political Rights requires states:

[\textit{To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State...\textsuperscript{151}}]

The Human Rights Committee has attached importance to “States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law”\textsuperscript{152}.

The Committee on Economic, Social and Cultural Rights has stated that these bodies “customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons\textsuperscript{153}” and that such bodies “should be accessible to everyone without discrimination”,\textsuperscript{154}

Legal aid

The Committee on the Elimination of Discrimination against Women has stated that:

\textit{States must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary...}\textsuperscript{155}

Absence of undue obstacles


\textsuperscript{154} Ibid.

The Committee on the Elimination of Discrimination against Women has stated that victims of discrimination must have access to redress which is “affordable, accessible and timely”.156

**Independent and impartial investigative bodies**

The Human Rights Committee has stated that:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.157

The Committee on Economic, Social and Cultural Rights has stated that:

> These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations (...) including actions or omissions by private actors.158

The Committee on the Elimination of Discrimination against Women has stated that:

> States must further ensure that women have recourse to (...) remedies (...) to be settled in a fair hearing by a competent and independent court or tribunal, where appropriate.159

**Bringing perpetrators to justice**

The Human Rights Committee has stated that:

> Where (...) investigations (...) reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.160

The Committee on the Elimination of Discrimination against Women has stated that:

> Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate

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156 Ibid.


criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions.\textsuperscript{161}

**Effective remedies which are enforced**

Articles 2(3)(a) and (c) of the International Covenant on Civil and Political Rights requires States:

\begin{itemize}
\item[(a)] To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.
\item[(c)] To ensure that the competent authorities shall enforce such remedies when granted.
\end{itemize}

Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States:

\begin{quote}
[To] assure to everyone within their jurisdiction effective ... remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.
\end{quote}

The Human Rights Committee has stated that:

\begin{quote}
Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.\textsuperscript{162}
\end{quote}

The Human Rights Committee has also stated that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”.\textsuperscript{163}


In terms of reparation including "guarantees of non-repetition and changes in relevant laws and practices", the Human Rights Committee has stated:

In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.164

The Committee on Economic, Social and Cultural Rights has stated:

These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.165

The Committee on the Elimination of Racial Discrimination has stated that:

The right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination ... is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.166

The Committee on the Elimination of Discrimination against Women has stated that Article 2(b) of the Convention on the Elimination of All Forms of Discrimination against Women167 requires states:

To provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and


165 Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, para. 40


167 Article 2(b) reads: “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 and, to this end, undertake (...) (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”. 
Effective access to justice requires victims of discrimination to be able to seek legal redress and obtain an effective remedy. Access to justice comprises a number of elements:

- The establishment of judicial and administrative mechanisms for addressing claims of violations of the rights to equality and discrimination under domestic law;
- The provision of appropriate legal aid and assistance;
- The elimination of any undue obstacles to effectively enforcing the right to equality;
- The establishment of independent and impartial investigative bodies;
- Ensuring perpetrators are brought to justice; and
- Providing effective remedies.

FOR RELATED PROVISIONS, SEE: CROATIAN ANTI-DISCRIMINATION ACT: Articles 16, 17 and 18

3.7.2 Victimisation

**Principle 19: Victimisation**

*States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.*

European Union law recognises that the effective implementation of the right to equality requires adequate judicial protection against victimisation, and provisions prohibiting victimisation are contained within all Equality Directives.

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 7

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3.7.3 Standing

**Principle 20: Standing**

*States shall ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.*

European Union law recognises that in order to provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage, either on behalf or in support of any victim, in proceedings. As such, provisions granting standing to such associations, organisations and legal entities are contained within all Equality Directives.\(^{170}\)

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 24(1)

3.7.4 Evidence and Proof

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International law recognises that it can be difficult for a person to prove that discrimination has occurred. As such, international law provides for a "shift" in the burden of proof in discrimination cases.

The Committee on Economic, Social and Cultural Rights has stated in its General Comments that:

Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.\(^{171}\)

That the adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced is also recognised in European Union law and provisions on the burden of proof are contained within all Equality Directives in the following terms:

[When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the right to equality.]{\(^{172}\)}

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**Principle 21: Evidence and Proof**

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.

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FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 20

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3.7.5 Remedies and Sanctions

**Principle 22: Remedies and Sanctions**

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.

International law, reflected in the Declaration of Principles on Equalities, requires remedies and sanctions for breaches of the right to equality. This comprises a number of elements:

**Effective, proportionate and dissuasive**

The Human Rights Committee, in relation to the International Covenant on Civil and Political Rights, has stated in its General Comments that:

> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.\(^{173}\)

The Human Rights Committee has also stated that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”\(^{174}\).  

Article 13 of the European Court of Human Rights requires everyone whose Convention rights have been violated to have an “effective” remedy.

European Union law, through the Equality Directives, requires sanctions to be “effective, proportionate and dissuasive”.\(^{175}\)

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Reparations for Material and Non-Material Damage

Sanctions must include reparations for material and non-material damage.

The Human Rights Committee has stated in its General Comments that “the Covenant generally entails appropriate compensation”.\(^\text{176}\)

Other Sanctions

In addition to reparations or compensation, violations of the right to equality may necessitate additional or alternative sanctions in order to prevent future occurrence.

The Human Rights Committee has stated in its General Comments that:

\[\text{[W]here appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations... In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.}\]^\(^\text{177}\)

The Committee on Economic, Social and Cultural Rights has stated in its General Comments that:

\[\text{[I]nstitutions should (...) be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.}\]^\(^\text{178}\)

The Committee on the Elimination of Racial Discrimination has stated in a General Recommendation that:

\[\text{[T]he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent}\]


Principle 23: Specialised Bodies

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

The Committee on the Elimination of Discrimination against Women, in relation to Article 2(b) of the Convention on the Elimination of All Forms of Discrimination Against Women, has stated in its General Recommendations that:

_This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women._

FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Articles 11, 17, 23, 25 to 28

### 3.7.6 Specialised Bodies

**Principle 23: Specialised Bodies**

States are required under international law to establish a National Human Rights Institution in line with the Paris Principles. The International Coordinating Committee for National Human Rights Institutions has stated that:

_While their specific mandate may vary, the general role of NHRIs is to address discrimination in all its forms, as well as to promote the protection of civil, political, economic, social and cultural rights. Core functions of NHRIs include complaint handling, human rights education and making recommendations on law reform._

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181 Principles relating to the status and functioning of national institutions for protection and promotion of human rights endorsed by the UN General Assembly in its resolution 48/134 of 20 December 1993.

182 International Coordinating Committee for National Human Rights Institutions, Roles and Types of NHRIs, available at: [http://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx](http://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx) [last accessed on 21 August 2012].
The Committee on the Elimination of Racial Discrimination, in a General Recommendation, has recommended that states:

[E]stablish national commissions or other appropriate bodies, taking into account, [the Paris Principles] to serve, inter alia, the following purposes: (a) To promote respect for the enjoyment of human rights without any discrimination ...; (b) To review government policy towards protection against racial discrimination; (c) To monitor legislative compliance with the provisions of the Convention; (d) To educate the public about the obligations of States parties under the Convention; and (e) To assist the Government in the preparation of reports submitted to the Committee on the Elimination of Racial Discrimination.¹⁸³

European Union law also requires the establishment of a body or bodies to promote equality, although different Directives use different language.

The Race Equality Directive requires Member States to:

[D]esignate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.¹⁸⁴

The Gender Equality Directives require Member States to:

[D]esignate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex.¹⁸⁵

These bodies should:

- Provide independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- Conduct independent surveys concerning discrimination; and
- Publish independent reports and make recommendations on any issue relating to such discrimination.¹⁸⁶


FOR RELATED PROVISION SEE: CROATIAN ANTI-DISCRIMINATION ACT: Article 12

**3.7.7 Duty to Gather Information**

**Principle 24: Duty to Gather Information**

To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. States must not use such information in a manner that violates human rights.

Article 31 of the Convention on the Rights of Persons with Disabilities requires States to:

[Collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the (...) Convention.]

The Committee on the Elimination of Racial Discrimination has stated that:

[It] is essential that States parties provide as far as possible the Committee with information on the presence within their territory of [different] groups.

The Committee on the Elimination of Discrimination against Women has stated that:

[States] have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular.

**3.7.8 Dissemination of Information**

and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20(2).


European Union law requires states to disseminate information on laws and policies adopted to give effect to the right to equality and that such laws and policies be brought to the attention of all persons who may be concerned by them.\(^{189}\)

### 3.8 Prohibitions

#### 3.8.1 Prohibition of Regressive Interpretation

*Principle 26: Prohibition of Regressive Interpretation*

In adopting and implementing laws and policies to promote equality, there shall be no regression from the level of protection against discrimination that has already been achieved.

The Declaration of Principles of Equality, reflecting international law\(^{190}\) and the European Union Equality Directives, provides that States should not use the modification of laws on equality and discrimination as an opportunity to reduce the existing level of protection.\(^{191}\)

#### 3.8.2 Derogations and Reservations


Permission to derogate from or make reservations with regards to international treaties varies from treaty to treaty.

Although Article 4 of the International Covenant on Civil and Political Rights permits derogations from Articles 2(1) and 26, they must only take place “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” and then only “to the extent strictly required by the exigencies of the situation”\(^{192}\). However, such derogations must not discriminate solely on the ground of race, colour, sex, language, religion or social origin\(^ {193}\). The Human Rights Committee has further elaborated on derogations with respect to Articles protecting equality:

\textit{Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant} \(^ {194}\)

The European Convention on Human Rights permits a State to derogate from Article 14 but only “in time of war or other public emergency threatening the life of the nation”\(^ {195}\). Such derogations must only be “to the extent strictly required by the exigencies of the situation” and must not be “inconsistent with its other obligations under international law”\(^ {196}\).

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\(^{193}\) Ibid.


\(^{195}\) European Convention on Human Rights, Article 15(1).

\(^{196}\) Ibid.
4 Equality and anti-discrimination legislation in Croatia

4.1 Introduction

In order to achieve civil law protection against discrimination, regulations are a necessary prerequisite. On the one hand, these regulations define discriminatory conduct and prescribe appropriate sanctions for such conduct; on the other hand, they determine the bodies that will be in charge of undertaking procedures in order to determine and sanction discriminatory conduct, and they define the procedure according to which such bodies will act.

Types of discriminatory conduct, prohibition of such conduct, and civil law sanctions are determined via a range of laws having been reached in succession in the Republic of Croatia. Three laws are crucial in this context: the Labour Act (LA), Gender Equality Act (GEA), and Anti-Discrimination Act (ADA). These laws also contain rules in regard to competence and procedure. Due to its content and approach to tackling discriminatory issues, ADA can be considered as the law determining the general substantive and procedural legal rules in connection with this issue. In this regard, the provisions of this Act apply in all cases, except in cases where provisions of the other aforementioned Acts expressly state otherwise.

In general terms, sedes materiae of procedure in civil law anti-discrimination disputes can be found in laws determining the general and fundamental civil and enforcement procedure, i.e. in the Civil Procedure Act (CPA) and Execution Act (EA). The provisions of these two Acts apply in anti-discrimination matters, unless the specific Acts mentioned above prescribe otherwise.

In this chapter, we will first aim to elaborate, in relatively basic terms, on conduct qualified as discriminatory, and on the sanctioning of such conduct, including foreseen procedural solutions based on LA, GEA and ADA. Following this, we will aim to describe the course of action that should be undertaken in order to engage the courts for the purpose of providing anti-discrimination protection.

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197 Official Gazette (NN) 149/09, 61/11. Changes and amendments of the Labour Act of 1995 (NN 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04, 137/04 (consolidated text), together with the Decision of the Constitutional Court of the Republic of Croatia No. U-I-2766/2003 et al. of May 24, 2005., NN 68/05; LA 95), aimed to cover specific aspects of discrimination in labour relations, and court protection against such discrimination.

198 NN 82/08, 112/12.


200 Consolidated text, NN 148/11, 25,13.

201 NN 112/12.
4.2 Discriminatory conduct and its prevention based on specific laws

4.2.1 Labour Act

4.2.1.1 General matters

The Labour Act of 1995 already contained a significant number of specific anti-discrimination provisions,\textsuperscript{202} regarding the protection of dignity of workers;\textsuperscript{203} procedure and measures of protection; and court procedure in regard to protection against discrimination in labour relations. In the Labour Act of 2009, the issue of discrimination in labour relations has been reduced to the proclamation of a general prohibition of discrimination and the duty of the employer to protect the dignity of workers\textsuperscript{204} and also on provisions pertaining to measures that the employer is obliged to undertake for the purposes of protecting the dignity of workers and their rights when workers’ dignity is violated.\textsuperscript{205} The issue of court protection from discrimination in labour relations, in particular when it comes to the issue of violation of dignity, is not specifically covered by the Act.

4.2.1.2 Prohibition of discrimination

Direct or indirect discrimination in the sphere of labour and working conditions is prohibited, including the criteria for selection and employment requirements, promotion, occupational training, vocational training, additional training and retraining, in accordance with specific laws.\textsuperscript{206}

4.2.1.3 Protection of dignity of workers

The employer has a duty to protect the dignity of workers in their work when it comes to the conduct of superiors, colleagues and persons with whom the worker is regularly coming in contact in the performance of their duties, if such conduct is unwanted and in conflict with specific laws.\textsuperscript{207}

Procedures and measures for protecting the dignity of workers against harassment and sexual harassment are defined by special law, collective agreements, agreements signed between the works council and the employer, or by work regulations.\textsuperscript{208}

An employer that employs at least twenty workers has a duty to appoint a person who, in addition to the employer himself/herself, will have the competence to receive and resolve complaints with regard to the protection of dignity of workers.\textsuperscript{209}

\textsuperscript{202} Articles, 2, 4, LA 95
\textsuperscript{203} Article 22(a) LA 95
\textsuperscript{204} Articles 5(4), 5, LA
\textsuperscript{205} Article 130 LA
\textsuperscript{206} Article 5(4) NZR
\textsuperscript{207} Article 5(5) LA
\textsuperscript{208} Article 130(1) LA
\textsuperscript{209} Article 130(2) LA
The employer, or the person appointed for such tasks, has a duty to examine the complaint and to undertake all required measures appropriate for a given case in order to prevent the continuation of harassment or sexual harassment if such harassment is deemed to exist, within the period stipulated by collective agreement, an agreement signed between the works council and the employer, or work regulations, and within a maximum of eight days following the submission of the complaint. No concrete deadline within which the worker has a duty to submit the complaint of harassment is prescribed.

If the employer does not undertake measures to prevent harassment or sexual harassment within the contractual or prescribed deadline, or if the measures undertaken are clearly inappropriate, the worker subjected to harassment or sexual harassment has the right to cease performing their work until his/her safety is ensured, provided that the worker requested protection before the competent court within the further time period of eight days. It is justified to assume that the worker would have the right to proceed in such a manner even in a case in which his/her complaint would eventually be rejected. The period of eight days required for the seeking of court protection would be preclusive, and it would be calculated from the moment of delivery of negative decision in regard to the complaint, assuming that the delivery took place prior to the expiry of the eight-day time period; or from the moment of expiry of the time period within which the employer should have taken appropriate measures. A complaint submitted after the expiry of the time period should be denied as inadmissible.

If there are circumstances due to which it is not justified to expect that the employer would protect the dignity of worker, that worker does not have the duty to submit the complaint to the employer, and has the right to cease working, provided that he/she requested protection before the competent court and provided that he/she informed the employer of that within eight days following the date of ceasing to work. The right to directly address the court would, therefore, depend on whether the circumstances by which this right is conditioned are met in a specific case (objectively, and not merely putatively). If it is determined that the conditions haven’t been met, the complaint – following (arg. a cohaerentia, per analogiam) the logic of necessity of first addressing the employer for the protection of rights stemming from the Labour Act – should be rejected as inadmissible, which does not seem to be an adequate solution.

All data determined in the process of protecting the dignity of workers is secret. That, however, should not prevent the employer from presenting such data in a possible dispute that the worker might initiate against the employer; however, in such a case, the public should not have right of access, in order to protect the confidentiality of such data.

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210 Article 130(3) LA
211 Article 130(4) LA
212 Arg. ex 282(1) CPA
213 Within eight days following the date he/she ceased working - arg. ex 130(4) LA
214 Article 130 LA
215 It might be possible to assume that it would be sufficient for the worker to have justified grounds to believe that these preconditions are met, irrespectively of whether they had indeed been met.
216 Arg. from Article 129(3) LA
217 Article 130(7). LA
The opposition of the worker to conduct representing harassment or sexual harassment does not represent a breach of obligations stemming from employment relations, nor may it constitute grounds for discrimination.\textsuperscript{218}

\textbf{4.2.2 Gender Equality Act}

\textbf{4.2.2.1 Interpretation of provisions of the Act}

In order to understand the Gender Equality Act, the provision on the interpretation of the Act’s provisions is important. Namely, provisions of this Act must not be either interpreted or applied in a manner that would limit or decrease the content of guarantees on gender equality enshrined in the universal rules of international law, the \textit{acquis communautaire} of the European Community, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{219} This particular provision certainly places a significant burden on those who will have the duty to apply this Act – they will have to have a thorough understanding of the standards determined by these international instruments.

\textbf{4.2.2.2 Definitions of concepts}

Gender equality means that women and men are equally present in all spheres of public and private life, that they have equal status, equal access to all rights and equal benefits from achieved results.\textsuperscript{220}

Discrimination on the grounds of sex pertains to any difference, exclusion or restriction made on the grounds of sex with the effect or purpose to jeopardise or frustrate recognising, benefiting from or exercising human rights and fundamental freedoms in the political, social, cultural, economic, civil or other area on the grounds of equality between men and women, education, economic, social, cultural, civil and any other sphere of life.\textsuperscript{221}

There shall be no discrimination on the grounds of marital or family status. Less favourable treatment of women for reasons of pregnancy and maternity shall be deemed to be discrimination.\textsuperscript{222}

There shall be no discrimination based on sexual orientation.\textsuperscript{223}

There shall be no discrimination with regard to access to and supply of goods and services.\textsuperscript{224}

\begin{itemize}
  \item \textsuperscript{218} Article 130(8) LA
  \item \textsuperscript{219} Article 4 GEA
  \item \textsuperscript{220} Article 5 GEA
  \item \textsuperscript{221} Article 6(1) GEA
  \item \textsuperscript{222} Article 6(2) GEA
  \item \textsuperscript{223} Article 6(3) GEA
  \item \textsuperscript{224} Article 6(4) GEA
\end{itemize}
An instruction to discriminate, if it is done intentionally, shall be deemed to be discrimination within the meaning of this Act.\textsuperscript{225}

Direct discrimination is any treatment where, on the grounds of sex, one person is treated or has been treated or might be treated less favourably than another in a comparable situation,\textsuperscript{226} while indirect discrimination occurs where a neutral legal provision, criterion or practice puts persons of one sex at a disadvantage compared to persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.\textsuperscript{227}

Harassment and sexual harassment shall be deemed to be discrimination within the meaning of this Act.\textsuperscript{228}

Harassment is any unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of a person and of creating an unpleasant, hostile, degrading or offensive environment.\textsuperscript{229}

Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that occurs with the purpose or effect of violating the dignity of a person, in particular when creating an unpleasant, hostile, degrading or offensive environment.\textsuperscript{230}

4.2.2.3 Court protection

Both individual and collective forms of court protection are foreseen.

Any persons who consider that, as a result of discrimination referred to in Articles 6, 7 and 8 GEA, their right has been infringed upon, may lodge a complaint to a regular court of general jurisdiction; in other words, institute civil proceedings\textsuperscript{231} before the municipal court.\textsuperscript{232} One should assume that this protection pertains to determining the right to appropriate equal treatment (declaratory protection); a person might also request condemnatory protection in order to suppress unacceptable conduct – whether it is currently ongoing, or (in certain cases) even threatening the condition of serious danger of discrimination, with rights to equal treatment being endangered.

In such discrimination cases,\textsuperscript{233} persons who consider themselves wronged may demand compensation pursuant to the provisions of civil obligations law on tort liability;\textsuperscript{234} i.e. they can

\begin{itemize}
  \item \textsuperscript{225} Article 6(5) GEA
  \item \textsuperscript{226} Article 7(1) GEA
  \item \textsuperscript{227} Article 7(2) GEA
  \item \textsuperscript{228} Article 8(1) GEA
  \item \textsuperscript{229} Article 8(2) GEA
  \item \textsuperscript{230} Article 8(3) GEA
  \item \textsuperscript{231} Arg. ex 185 CPA
  \item \textsuperscript{232} Arg. ex 34 CPA
  \item \textsuperscript{233} Articles 6–8 GEA
  \item \textsuperscript{234} Article 30(2) GEA
\end{itemize}
exercise condemnatory legal protection. Compensation of damages might pertain to both material and immaterial damages.

The possibility of joint legal action in case of discrimination is also foreseen. However, it is not fully clear what sort of protection this is — are we dealing with abstract protection, i.e. independent of the violations (endangerment) of equal treatment of individuals, for example in general terms, in order to combat a discriminatory practice or regulation, or in order to establish certain due mechanisms of protection, etc.; or are we, instead, dealing with concrete protection, in terms of protection of violated or endangered rights of individuals. This would then open the issue of legitimacy of associations that would have the right to joint legal action; under what conditions, and with what kind of legal protection. The Anti-Discrimination Act brought somewhat more clarity into this matter — provisions of this Act ought to be applied as general provisions, in the absence of specific rules on discrimination pertaining to gender equality.

The issue of the burden of proof in regard to prohibited conduct is somewhat "awkwardly" resolved in GEA. If a party to the proceedings claims that his/her right to equal treatment is breached, that party has the duty to expose facts that justify the suspicion that discriminatory conduct indeed took place. In such a case, the burden of proof of non-discrimination lies on the opposite party. It may be concluded that the process of editing the provisions on burden of proof resulted in the same error as in the process of their editing in LA 95. The conclusion would be that the allegedly discriminated party only needs to claim something, rather than make that plausible — i.e. determine the existence of facts which would themselves, assuming that they are correct, justify the suspicion of discriminatory conduct — and the alleged discriminator must engage in proving that these mere claims of the opponent are untrue, because, without such proof, the conclusion would have to be that discriminatory conduct did indeed occur.

It is worth noting that these rules on the burden of proof would only pertain to the fact of discriminatory conduct, rather than to other facts conditioned by it, e.g. the level of damage suffered, etc.

In jurisprudence, when determining individual cases of discrimination, it will be important to distinguish between so-called objective and subjective assumptions. In the first case, it will be sufficient to prove the objective state of discrimination; in the latter, a proof will be needed that a certain discriminatory act has been committed with intent, or due to negligence that results in liability.

Legal proceedings in discriminatory cases are expeditious proceedings.

In legal proceedings in regard to the breach of the right to gender equality, it would be possible to seek temporary measures, based on the general rules of litigation and execution law.

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235 Article 30(1) GEA

236 Verbandsklage

237 Article 24 ADA, v. infra ad 3

238 Article 30(4) GEA

239 Article 30(5) GEA
4.2.3 Anti-Discrimination Act

4.2.3.1 Purpose and scope of implementation of the Act

The purpose of the Anti-Discrimination Act is to ensure the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia, to create prerequisites for the realisation of equal opportunities and to regulate protection against discrimination on the grounds of race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity, expression or sexual orientation.240

According to the Act, placing a person, or a person related to that person by kinship or other relationship, in a less favourable position based on these grounds, is deemed to be discrimination.241

Placing a person in a less favourable position based on a misconception of the existence of the grounds is also deemed to be discrimination.242

The scope of entities expected not to engage in discrimination is determined by the scope of entities to which the Act applies – it applies to the conduct of all state bodies, bodies of local and regional self-government, legal persons vested with public authority, and to the conduct of all legal and natural persons, especially in the following areas:

(1) work and working conditions; access to self-employment and occupation, including selection criteria, recruiting and promotion conditions; access to all types of vocational guidance, vocational training, professional improvement and retraining;
(2) education, science and sports;
(3) social security, including social welfare, pension and health insurance and unemployment insurance;
(4) health protection;
(5) judiciary and administration;
(6) housing;
(7) public informing and the media;
(8) access to goods and services and their providing;
(9) membership and activities in trade unions, civil society organisations, political parties or any other organisations;
(10) access to participation in the cultural and artistic creation.243

Given these provisions on the purpose and scope of implementation of the Act, one question arises: can legal entities also be considered protected entities, provided that they can be exposed to (at the very least) so-called associative discrimination; discrimination that may focus on an entity which, admittedly, does not possess a specific characteristic that might constitute the grounds of discrimination, but is exposed to discrimination nevertheless, because it is, in a certain manner, connected to a person that does have that characteristic (e.g. based on the circumstance that the entity employs persons of a given race, ethnic affiliation, etc.); in other

240 Article 1(1) ADA
241 Article 1(2) ADA
242 Article 1(3) ADA
243 Article 8 ADA
words, discrimination on the basis of misconception.\textsuperscript{244} It does seem that, in regard to legal entities, we ought to accept the possibility of, at least, the so-called associative discrimination and discrimination on the basis of misconception, because, given the accepted legal formulations, these entities might also be introduced into the scope of affected persons.

\textbf{4.2.3.2 Definitions of discrimination under the Act}

Direct discrimination is a treatment based on any of the grounds referred to in Article 1(1) ADA whereby a person is, has been, or could be placed in a less favourable position than other person in a comparable situation.\textsuperscript{245} Indirect discrimination occurs when an apparently neutral provision, criterion or practice places or could place a person in a less favourable position on the grounds referred to in Article 1(1) ADA, in relation to other persons in a comparable situation, unless such a provision, criterion or practice may be objectively justified by a legitimate aim and the means of achieving such aim are appropriate and necessary.\textsuperscript{246}

Harassment is any unwanted conduct caused by any of the grounds referred to in Article 1(1) ADA with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.\textsuperscript{247} Sexual harassment is any verbal, non-verbal or physical unwanted conduct of sexual nature with the purpose or effect of violating the dignity of a person, especially if it results in intimidating, hostile, degrading or offensive environment.\textsuperscript{248} Provisions of ADA referring to discrimination apply accordingly to harassment and sexual harassment.\textsuperscript{249}

Encouragement to discrimination shall be deemed to be discrimination within the meaning of Article 1(1) ADA.\textsuperscript{250} Discrimination, within the meaning of the Act, also results from failure to enable persons with disabilities, in line with their specific needs, the following: use of publicly available resources, participation in the public and social life, access to workplace and appropriate working conditions, by adapting the infrastructure and premises, by using equipment and in another manner which does not present unreasonable burden for the person that is obliged to provide for it.\textsuperscript{251}

Segregation is also deemed to be discrimination.\textsuperscript{252} Segregation is a forced and systematic separation of persons on any of the grounds of discrimination.\textsuperscript{253}

\textsuperscript{244} Cf. Horvat, “Primjena Zakona o suzbijanju diskriminacije”, \textit{Informator}, No. 5703-5704, 2008, pp. 1-2., leaves this issue open.

\textsuperscript{245} Article 2(1) ADA

\textsuperscript{246} Article 2(2) ADA

\textsuperscript{247} Article 3(1) ADA

\textsuperscript{248} Article 3(2) ADA

\textsuperscript{249} Article 3(3) ADA

\textsuperscript{250} Article 4(1) ADA

\textsuperscript{251} Article 4(2) ADA

\textsuperscript{252} Article 5(1) ADA

\textsuperscript{253} Articles 1; 5(2) ADA

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More serious forms of discrimination within the meaning of this Act include discrimination against a certain person on more than one of the grounds of discrimination (multiple discrimination), discrimination committed several times (repeated discrimination), discrimination which lasted a longer period of time (continued discrimination), or discrimination whose consequences are particularly harmful for the victim. The court has the duty to take into consideration these circumstances when determining the amount of the compensation for non-proprietary damage and when deciding about the fine for misdemeanours defined by this Act.

No person shall be placed in a less favourable position because he/she had reported, in good faith, discrimination, witnessed discrimination, refused an instruction to discriminate or participated in any manner in proceedings based on discrimination.

4.2.3.3 Prohibition of discrimination

Discrimination is prohibited in all its manifestations. However, certain (justified) exceptions to this general prohibition have also been determined.

4.2.3.4 Right to compensation of damages

A victim of discrimination has the right to compensation of damages pursuant to obligatory relations.

4.2.3.5 Proceedings before the court

4.2.3.5.1 General outline

Any person who considers that his/her right has been violated on account of discrimination may request protection of that right in the proceedings deciding upon that right as the main issue, and he/she may also request protection in special proceedings.

It should be taken into account that, in proceedings dealing with the protection of rights violated by discrimination, but also in proceedings dealing with the request for prohibition or elimination of discrimination, or in proceedings for the compensation of damages caused by violation of protected rights, the court might resolve the issue of determining whether the defendant has breached the plaintiff's right to equal treatment, or whether the action undertaken or failure to act can directly result in the breach of the right to equal treatment (determination of the breach, or determination of threat to the right to equal treatment), as a

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254 Article 6(1) ADA
255 Article 6(2) ADA
256 Article 7 ADA
257 Article 9(1) ADA
258 Article 9(2) ADA
259 Article 11 ADA
260 Articles 16(1); 17 ADA. On special legal actions for the protection against discrimination v. infra ad 3.5.2.
261 Article 17(1.2) ADA
262 Article 17(1.3) ADA
prejudicial issue, or might order the stay of the proceedings and instruct the party to resolve this issue as the main issue within some other proceedings. One should also take into account that rules on the transfer of the burden of proof would also be valid in cases in which the issue of the breach of the right to equal treatment would be analysed in prejudicial manner. However, the plaintiff might also put forward a claim to determine whether the defendant had violated his/her right to equal treatment subsequently, during the course of proceedings.

Special proceedings for the purpose of protection against discrimination in the area of work and employment shall be deemed to be litigations arising from labour relations.

The court and other bodies conducting the proceedings have the duty to undertake actions within the proceedings urgently, endeavouring to investigate all discrimination-related statements as soon as possible.

Given the fact that no special procedures are foreseen in ADA on this matter, one should take into account that the rules on the obligation of preliminary undertaking of proceedings for a peaceful solution to the dispute in which the Republic of Croatia is party to the proceedings would also be valid in discrimination-related proceedings.

4.2.3.5.2 **Special legal actions for protection against discrimination and objective cumulation**

A person claiming to be a victim of discrimination pursuant to the provisions of ADA, in addition to having the right to claims based on general rules, is also authorised to bring a legal action and request the following to be performed:

(1) to establish that the defendant has violated the plaintiff's right to equal treatment or that the action the defendant has undertaken or failed to undertake may directly result in the violation of the right to equal treatment (action for determination of discrimination). However, we should assume that the complaint in order to determine that an action can directly result in violation of the right to equal treatment would have the meaning of a complaint seeking to determine the violation of that right, which means that direct threat to the right would also have the meaning of discrimination;

(2) to prohibit the undertaking of activities which violate or may violate the plaintiff's right to equal treatment, or to carry out activities which eliminate discrimination or its consequences (action for prohibition or elimination of discrimination).

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263 Article 17(1.1) ADA; Article 12(1), (2) CPA

264 Article 213(1) CPA (v. infra ad 3.5.2.)

265 v. infra ad 3.5.5.

266 Article 187(3),(4) CPA; subsequent prejudicial request for determination.

267 Article 16(2) ADA

268 Article 16(3) ADA

269 Article 186(a) CPA

270 The expression "elimination of discrimination" in this context might mean undertaking positive actions that would eliminate the current state of discrimination, but also prohibiting any undertaking of actions that might result in discrimination pro futuro (threatening actions), or undertaking positive actions that might prevent discrimination in the future.
here would be condemnation in regard to omission or exposure, or condemnation in regard to the undertaking of certain positive actions;

(3) to compensate for proprietary and non-proprietary damage caused by the violation of the rights protected by this Act (action for damages);

(4) to publish in the media the ruling establishing the violation of the right to equal treatment, at the defendant's cost.\(^ {271}\)

The procedure in regard to the claim of discrimination is civil procedure.\(^ {272}\)

All these claims can be cumulated in the same complaint, or they can be pointed out subsequently in the same procedure until the conclusion of the main hearing, irrespective of the general rules of objective cumulation.\(^ {273}\) Only the request that the judgment determining the breach of the right to equal treatment be published in the media at the cost of the defendant would necessarily have to be cumulated with one of the other, "main" claims that seek to determine discrimination directly or indirectly.

However, special rules are foreseen on objective cumulation of all or some of the mentioned claims with claims for the protection of other rights being decided upon in civil procedure\(^ {274}\) – this cumulation is possible (1) if all the claims are interrelated\(^ {275}\) and (2) if the same court has the subject-matter jurisdiction over them, irrespective of whether these claims are prescribed to be settled in regular or special legal proceedings, except in cases of trespass litigations. In such cases, the rules for resolving the issue at hand would be consolidated based on the type of

\(^ {271}\) Article 17(1) ADA

\(^ {272}\) Article 17(2) ADA

\(^ {273}\) Arg. ex Article 17(3) ADA, Article 188(1) CPA

\(^ {274}\) According to the general rules on objective cumulation, a plaintiff may put forward several claims in a single complaint against the same respondent when these claims are related by the same factual and legal grounds. If the claims are not related by the same factual and legal grounds, they may be put forward in a single complaint against the same respondent only if the same court has subject-matter jurisdiction for each of these claims and if the same form of proceedings are prescribed for all the claims (Article 188(1) CPA).

\(^ {275}\) In CPA, but also in ADA, the concept of a "mutual relation" between claims is not defined. It is assumed that mutual relations between several claims will exist when the claims stem at least partly from the same factual complex, or from the same legal norm. Such a point of view cannot be accepted, especially not when it comes to the idea that the (partial) identity of the legal norm upon which the claims are founded justifies on its own the existence of sufficient connexity for objective alternation. Connexity should pertain to the legal relations that claims are derived from, and thus should pertain to the claims themselves, and this necessarily includes the factual state allowing the establishment of such relations, in addition to the legal norm. On the other hand, it seems excessively demanding to claim that the requests are, as a rule, in a mutual relation when they stem from essentially identical factual situations, and when they are focused on the fulfillment of essentially identical legal or economic interests. The stress should be on the legal connectedness of legal relations from which these claims are derived, and that include the assumption of a certain factual connection – this connection should exist to the extent that it can justify the existence of legal connexity. The concept of essentially identical legal and economic interest is not defined, and it is difficult to accept or understand the insistence on such interest in the context of determining the concept of mutual relation between claims.
Based on the rules on objective cumulatio
n, the conclusion would be that
discrimination disputes, if they were to be cumulated with other disputes, would be subject to
regulations relevant for these other disputes. In individual cases, however, that might mean that
a discrimination dispute for the compensation of damages might be resolved based on the rules
on small claims disputes, if that other dispute happens to be a dispute involving a small claim,
which was probably not the desire of the legislator. We should actually assume that "claims for
the protection of other rights" should also mean claims pertaining to the rights of those who are
victims or are threatened by the discriminatory conduct of the defendant, because it is only then
that rules on special assumptions for the establishment of objective cumulation would gain their
meaning.

The claim for publishing the ruling shall be granted if the court establishes:

1. that a violation of the right to equal treatment took place through the media; or

2. that information on the conduct violating the right to equal treatment were published in
   the media, and that the publishing of the ruling is necessary for the purpose of complete
damage compensation or protection against unequal treatment in future cases.

If the court grants the claim for publishing the ruling, the court will order that the ruling is to be
published in its entirety. In exceptional cases, the court may decide that the ruling be published
partially or that certain personal data be removed from the text of the ruling if this is necessary
for the protection of privacy of the parties and other persons, and if it does not jeopardise the
purpose of the provided legal protection. The ruling which imposes the publishing in the
media obliges the publisher of the medium in which the ruling is to be published, regardless of
whether the publisher was a party to the procedure or not. We need to take into account that

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276 Article 17(3) ADA states, "The claims referred to in paragraph 1 of this Article may be brought before the
court together with claims for the protection of other rights to be decided upon in legal proceedings if all the
claims are interrelated and if the same court has the subject-matter jurisdiction over them, irrespective of
whether these claims are prescribed to be settled in regular or special legal proceedings, except in cases of
trespass litigations. In such cases, regulations relevant for the type of litigation in question shall apply, unless
otherwise provided by this Act."

277 Article 17(4) ADA

278 Articles 17(4) and (5) ADA. This provision might lead to the conclusion that the court has the authority
to determine ex officio the content of the judgment or the content in connection with the judgment that
should be published, but also the manner in which individual parts of its content would be transmitted.

279 The provision whereby the judgment ordering the publication in the media obliges the publisher of the
medium in which the judgment is to be published, regardless of whether the publisher was a party to the
procedure or not (Article 17(6) ADA) may be interpreted in (at least) two ways. According to the first
interpretation, the medium in which the judgment should be published would have the duty to publish it
only if the judgment explicitly orders the publication. According to the second interpretation, the
publisher of every medium would have the duty to publish the judgment irrespectively of whether the
judgment orders the publication or not, if the plaintiff would request the publication – a general provision
on this matter in the judgment would suffice, with, possibly, a provision on the type of medium, the time
period within which the judgment is to be published from the date of submission of the request, etc. It
seems that the first option would correspond to the "nature of the matter" to a higher extent: in this case,
the publisher, having found out about the litigation, could become involved in it as co-litigant (Article 201
CPA), or as intervenor in the position of a co-litigant. In this case, we would certainly be dealing with the
extension of the subjective boundaries of finality – the judgment on the publication would oblige the
publisher irrespective of whether the publisher is allowed to participate as party to the proceedings or
the medium would have the duty to publish the ruling if the costs of publication are covered (paid in advance)—the publication is performed at the defendant’s cost.\textsuperscript{280} The plaintiff should request in the complaint that the defendant be ordered to pay the amount that would correspond to the cost of the publication of ruling, particularly if the plaintiff wishes to obtain the funds for covering the costs prior to the actual publication of the ruling. Alternatively, the plaintiff could finance the publication of the ruling on their own, and then request the compensation of costs of the publication of the ruling from the defendant subsequently.

Partial judgment\textsuperscript{281} may be rendered on each of the claims in special complaints for protection against discrimination, except on the claim for the publication of the judgment in the media, where the assumption is that a publishable judgment on one of the claims is already reached.

### 4.2.3.6 Jurisdiction

As a rule, a municipal court has the subject-matter jurisdiction in the first instance over litigations based on complaints due to discrimination\textsuperscript{282}—there is also the exception of subject-matter jurisdiction for disputes initiated by joint legal action.\textsuperscript{283}

Municipal courts would also have the jurisdiction in cases in which, based on general rules, the subject-matter jurisdiction would belong to the commercial court.\textsuperscript{284}

Litigations based on these complaints would be not only under the territorial jurisdiction of the court that has the general territorial jurisdiction, but also of the court in whose territory the plaintiff has permanent or temporary residence, and of the court in whose territory the damage took place or discrimination occurred.\textsuperscript{285}

### 4.2.3.7 Temporary measures

Prior to the institution, or in the course of proceedings based on discrimination complaints, the court may order temporary measures at the request of the party,\textsuperscript{286} with the corresponding application of the provisions of the Execution Act\textsuperscript{287}. However, in order to determine temporary measures in discrimination matters:

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not, which is certainly contrary to Article 29(1) of URH, and Article 6(1) of the European Convention. The consequence of such a solution would be the possibility of enforcement against the publisher, in order to force the publisher to fulfill the order in the judgment reached in proceedings to which the publisher was not a party.

\textsuperscript{280} Article 17(1.4) ADA

\textsuperscript{281} Article 329 CPA

\textsuperscript{282} Article 18(1) ADA

\textsuperscript{283} Article 24(3) ADA, v. infra ad 3.5.9. Due to the fact that the establishment of the formal relation of co-litigation requires that every claim is subject to the subject-matter litigation of the same court (196/1.2. CPA), it would not be possible to establish co-litigation between the submitter of joint legal action and the submitter of an individual (anti)discrimination complaint.

\textsuperscript{284} Article 34(b) CPA

\textsuperscript{285} Article 18(2) ADA

\textsuperscript{286} Article 19(1) ADA

\textsuperscript{287} Article 19(2) ADA
(1) the claimant must make a plausible case that his/her right to equal treatment was violated, which means that the claimant must prove the plausibility of existence of the right and its violation, including the threat when that is sufficient; and

(2) ordering a measure must be necessary with a view to eliminating irreparable damage, particularly serious violations of the right to equal treatment, and preventing violence. This means making a plausible case that the danger of irreparable damage exists, in particular the danger of serious violations of the right to equal treatment and violence, as well as the suitability of temporary measure for the protection of rights, aimed at the prevention of harmful consequences and elimination of these consequences, e.g. in actual violence, or, at the very least, aimed at the decrease of harmful consequences.

Plausibility would, therefore, constitute the foundation for transfer of the burden of proof, and for the determination of temporary measures.

4.2.3.8 Burden of proof

The party claiming in court or other proceedings that his/her right to equal treatment pursuant to ADA provisions has been violated has the duty to make a plausible case that discrimination has taken place. In this case, the burden of proof that there has been no discrimination shall fall on the respondent. Therefore, it is up to the plaintiff to prove the plausibility of the existence of facts upon which the existence of the right to equal treatment and violation of that right depend. The plaintiff does not have to prove these facts at the level of certainty, as would otherwise be the case with the party facing the burden of proof. Proven plausibility of the violation of the right to equal treatment has the effect of transferring the burden of proof onto the defendant. However, it must be taken into account that the defendant might be relieved of the burden of proof if he/she can subsequently manage to bring into doubt the plausibility of what the plaintiff needed to prove (counter-evidence), but also if he/she manages to prove that it is more plausible that what the plaintiff needed to prove does not exist (evidence to the contrary). Namely, it would be unacceptable to assume that the defendant would have to prove at the level of certainty that there had been no violation because the plaintiff had made it plausible at one stage of the proceedings that his/her claims are accurate – either because there is no right, or because the right has not been violated since there is no action via which it would be violated, etc. (evidence to the contrary). The defendant would have to be able to bring into doubt, via subsequent proof, the plausibility of what the plaintiff had made plausible; i.e. prove that the opposite is more plausible. In this regard, it would be possible to conclude that the burden of proof should lie with the party whose claim on the existence or non-existence of discriminatory assumptions is less plausible.

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288 Arg. ex Article 19(2) ADA

289 Article 20(1) ADA. This provision is not applied in misdemeanour and criminal proceedings (Article 20(2) ADA). According to general rules, in order for the court to decide on the foundation of the request for the provision of legal protection in civil court proceedings, the court must, as a rule, determine the facts upon which its decision will be based with certainty (arg. ex 221(a) CPA). A fact is deemed to be determined with certainty if there is no reasonable doubt as to the correctness of the conclusion reached by the court as regards the existence or non-existence of that fact. In exceptional situations, a lesser degree of persuasion of the court regarding the existence of facts is sufficient for reaching competent decisions that are founded upon these facts – the plausibility of their existence suffices. As a rule, when reaching the decisions of procedural character, it is sufficient to make it plausible that assumptions upon which such decisions are based actually do exist.

290 Article 221(a) CPA
In this context, the concept of plausibility should be interpreted within the meaning of *prima facie* evidence — a legal standard that is not actually known or applied in Croatian law and jurisprudence. This issue has to do with the forming of a judgment on the existence of discrimination on the basis of existence of a typical flow of events that, based on the rules of experience, points to a causal link with discriminatory conduct, or responsibility for such conduct. An indirect conviction is formed on the existence of something, which is different from a conviction formed on indications and based on the type of rules of experience that would be applied in the formation of the conclusion on discrimination. What is clear is that the difference between determination of facts on the basis of indications and *prima facie* determination of facts is connected with the rules of experience applied. In the first case, the judge would primarily apply one’s own life experience (possibly improved by the knowledge of expert witnesses); in the latter case, rules of experience of the legal community would be applied as well. What is more important, however, is the fact that the declared goal in *prima facie* evidence is the facilitation of proof for the party bearing the burden of proof, by decreasing the extent (level) of proof (determination, conviction). In this regard, we are talking about prevailing plausibility. However, such an approach relies upon the assumption that the level of determination is considered to be sufficient based on the relevant provisions of substantive law, and that the plausibility is considered to be a sufficient prerequisite to reach a given decision, to take a point of view on an issue, and even to transfer the burden of proof. The issue of whether there is *in concreto prima facie* evidence would depend on the assessment of presented evidence.

There are two ways in which the defendant might fight the proof of plausibility – via counter-evidence, which would bring into doubt the effect of the proof of plausibility or which would eliminate plausibility, proving that there is no room for the application of rules of experience valid for typical development of events, or proving serious atypical nature of the specific situation, or via evidence to the contrary, where one proves, at a higher plausibility level, that, despite the fact that the discriminatory basis was made plausible, there is, regardless of that, no discrimination.

### 4.2.3.9 Participation of third parties

Litigation on discrimination-related complaints can include the participation of various entities as intervenors on the side of the plaintiff in a discrimination case, such as a body, organisation, establishment, or another person dealing, within its scope of work, with the protection of the right to equal treatment in regard to groups whose rights are decided upon in proceedings. This is where the abstract legal interest - because it is based on registered activity, a common goal - for the protection of the right to equal treatment constitutes the foundation of legitimacy for these entities to intervene in the specific proceedings. When it comes to the participation of intervenors, the court will decide on this matter by appropriately applying CPA provisions on intervenors in litigation. The court, however, will be allowed to permit the participation of intervenors only with the consent of the plaintiff. The intervener would be allowed to undertake actions in proceedings, and will have all the rights in proceedings belonging to the intervener.

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291 Anscheibeweis

292 In this context, Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC refer to the transfer of the burden of proof onto the defendant, as soon as the plaintiff, as the alleged victim, submits the so-called *prima facie* evidence.

293 According to the Austrian judicature, *prima facie* evidence would lose force when the proof of the atypical nature of the event would result in at least the same level of plausibility.

294 Ordinary – Article 206 CPA; Article 21 ADA
The institution of intervenor is thus resolved slightly differently in proceedings on discrimination complaints, as compared to regular proceedings.\footnote{295}{Articles 206 – 208(a) CPA} These provisions pertain only to ordinary intervenors, and not to those in the position of a single co-intervenor\footnote{296}{Article 209 CPA} – namely, it would be unconstitutional to disbar someone from becoming involved as intervenor in a position of a party to litigation in which the reached decision would have direct effect towards that person. If the plaintiff opposes ordinary intervention of the third person, the judgment reached in the proceedings could not produce the so-called intervention effect towards that person.\footnote{297}{Article 209(a) CPA}

Even though this is not explicitly resolved, we should take into account the possibility of intervention on the side of the defendant, the alleged discriminator, with the corresponding application of the rules valid for intervenors on the side of the plaintiff.\footnote{298}{In principle, intervention in litigation should also be permitted to associations for the protection of alleged (possible) discriminators - e.g. employers' associations, which should register their activity in this regard - on the side of the alleged discriminators - that would stem from the principle of equality (Articles 3, 14, 26. URH).} The opposite view would clearly be unconstitutional, because it would bring parties to the proceedings in unequal position.

It should be taken into account that, in discrimination disputes, there is the possibility to notify the third party on the litigation, e.g. a person who directly performed discriminatory actions for which the defendant is held liable.\footnote{299}{Article 211 CPA}

**4.2.3.10 Deadline for the fulfilment of obligations, enforceability**

With regard to discrimination complaints, the court may decide that an appeal shall not withhold enforcement or it may determine a shorter deadline for complying with obligations imposed on the defendant.\footnote{300}{Article 22(1) ADA} The appeal can, therefore, be non-suspensory, which would depend on the decision of the court. The court might shorten, but not extend the deadline for the fulfilment of obligations, as determined by general rules.

**4.2.3.11 Extraordinary legal remedies**

In discrimination proceedings, audit shall always be allowed,\footnote{301}{Article 23 ADA} which is to be taken to mean the so-called regular revision of Article 382(1) CPA.

**4.2.3.12 Joint legal action for protection against discrimination**

Provisions of Article 24 ADA determine the institution of joint legal action in discrimination matters – the scope of subjects authorised to bring joint legal action in abstracto, preconditions
for the recognition of procedural legitimacy in concreto, claims that can be submitted in such a complaint, subject-matter jurisdiction and territorial jurisdiction for determination at first instance in regard to the complaint, and subsidiary sources of procedural law.

Associations, bodies, institutions or other institutions that are:

(1) set up in line with law, and (2.1) having a justified interest in protecting collective interests of a certain group or (2.2) those which within their scope of activities deal with the protection of the right to equal treatment (actively legitimised subjects for bringing joint legal action in abstracto) may bring a legal action against a person that has violated the right to equal treatment (passively legitimised subject) if (3) they make plausible that the defendant's conduct has violated the right to equal treatment of a larger number of persons who predominantly belong to the group whose rights the plaintiff defends (additional assumptions for the recognition of procedural legitimacy in concreto).

Joint legal action may seek:

(1) to establish that the defendant's conduct has violated the right to equal treatment in relation to members of the group;

(2) to prohibit the undertaking of activities which violate or may violate the right to equal treatment, or to carry out activities which eliminate discrimination or its consequences in relation to members of the group;

(3) to publish in the media the ruling establishing violation of the right to equal treatment, at the defendant's cost.

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302 It would be sufficient to have subjects that are, as such, established in accordance with the law, irrespectively of whether the law foresees their right to participate in anti-discrimination matters.

303 The interest should be evaluated from the point of view of their function, violation or threat to the position of group members, suitability of the requested legal protection in terms of its aim of the protection of rights being fulfilled.

304 In regard to the fulfilment of this assumption, the issue of the meaning of the legal standard of "a larger number of persons" remains open. It seems that one should be relatively permissive in this regard, at least in the beginning of implementation of new anti-discrimination regulations. In addition, one should also take into account the (assumed) number of members of the discriminated group. As for the meaning of the request that discriminated persons predominantly belong to the group whose rights the plaintiff defends, this request might be understood as the request that the majority of discriminated persons must consist of the members of the group whose rights the plaintiff defends, who would not have to be members of the association. If that were not the case, this request would remain unfulfilled. However, if we equate the request regarding the violation of the right to equal treatment of a larger number of persons, and the request that the majority of them should belong to the group that the plaintiff defends, the problems decrease significantly. Among the larger number of persons whose rights have been violated, the plaintiff should outline those who are in the majority of members of the group whose right the plaintiff defends. See Article 24(1) ADA.

305 It remains open whether these persons may be named in the pronouncement of the judgment.

306 This would be joint legal action in regard to exposure and omission.

307 Article 24(2) ADA
Even though this is not publicly stated in full, this action would have the meaning of an action directly seeking **abstract legal protection**, and indirectly seeking the protection of rights of affected individuals.

Joint legal action at first instance is decided upon **electively** by the county court which has the general territorial jurisdiction over the defendant, or by the county court of the place where discrimination took place, or by the Zagreb County Court. The Supreme Court of the Republic of Croatia decides on appeals against decisions of the first instance court in a chamber composed of three judges, with the possibility of deciding in a chamber composed of five judges on the issue of revision against own second-instance decisions.

With regard to joint legal action proceedings, procedural provisions of ADA foreseen for the resolution of individual discrimination disputes would apply.

One issue remains open, however. Supposing that the content of the judgment is favourable for them, could the content of the judgment (secundum eventuam litis) be invoked by persons whose right has been violated according to the judgment – in terms of aiming to fulfil some of their rights? There is also one separate issue: could they ask for execution in order to forcibly implement the issued prohibitions, and in connection with the publication of the judgment? *De lege ferenda*, that should certainly be foreseen, because only that would give true meaning to the possibility of using joint legal action in order to seek legal protection.

When it comes to joint legal action as an instrument of protection against discrimination, we should also take into account special CPA provisions on the procedure for the protection of collective interests and rights, introduced into the Act by Changes and Amendments of 2011, in continuation of CPA Article 502.

### 4.2.3.13 Preventative and repressive complaints of the alleged discriminator

Even though this is not explicitly prescribed, the alleged discriminator, according to general rules, should be permitted to submit a complaint against the alleged victim of discrimination, but also against the association authorised to submit joint legal action, where the alleged discriminator would request the **determination that he/she did not violate** the plaintiff's right to equal treatment, or that the action taken or omitted **cannot** directly result in the violation of the right to equal treatment (complaint for the determination of non-existence of discrimination). The alleged discriminator should prove the existence of special legal interest in

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308 Article 24(3) ADA

309 Article 34(d)(1) CPA

310 Article 44(1) CPA

311 Article 44(3) CPA

312 Article 34(d)(2) CPA

313 Article 24(4) ADA

314 Official Gazette NN 57/11

315 Title Thirty Two: Complaint for the Protection of Collective Interests and Rights; Articles 502(a)-(h)
order to submit such a complaint.316

The alleged discriminator should also be granted the right to ask that the alleged victim of discrimination be forbidden to express statements or imputations that he/she has been subjected to discrimination or been threatened by the alleged discriminator in this regard. The alleged discriminator – based on general rules – should also be granted the right to request compensation of damages caused by the alleged victim of discrimination. One should also take into account that the alleged discriminator should have the possibility of requesting the publication of the judgment concluding that there has been no discrimination.

Such an approach to the rights of the alleged discriminator would be needed due to the principle of equality before the courts; however, it is also conditioned by the general rules of substantive and procedural law.

4.2.3.14 Execution

Execution for the purpose of fulfilling the condemnations reached in discriminatory litigation depends on the type of claim determined by these condemnations.

When it comes to non-monetary claims, it would be desirable to start using the institute of court penalties in a more serious manner, but also the possibility of using monetary fines, and even prison sentences, in order to suppress impermissible conduct.

4.2.4 Complaints in regard to exposure and omission

4.2.4.1 Complaints in regard to exposure

4.2.4.1.1 General outline

As a rule, anti-discrimination complaints are capable of producing their direct anti-discrimination effect via judgments accepting the claims in regard to exposure and omission. Judgments accepting the claims for compensation of damages will achieve this goal only indirectly. This is precisely why complaints in regard to exposure and omission have a special position in the system of anti-discrimination legal protection. We will dedicate particular attention to these institutes, because they are fairly neglected in domestic doctrine and judicature.

A claim towards a certain person, in terms of that person having the duty to be exposed to certain actions of another person or persons may be founded upon the law or legal transaction. The essence of that claim would lie in the omission (exercise of restraint), in terms of disabling or obstructing certain persons in the undertaking of their actions, possibly in a certain manner (by certain means), at a certain time, and in a certain place (modalities of exposure).

A claim towards the defendant that he/she has the duty to be exposed to certain actions of (in principle) the plaintiff or (extraordinarily) third parties will regularly be pursued by asking the court to order the defendant to be exposed (to convict the defendant to exposure, to render the judgment that the defendant has the duty to be exposed) to certain actions of the plaintiff and/or third parties, depending on the content of the claim. That claim may be pursued by requesting the court to prohibit the defendant from undertaking any activity that he/she might use to disable or obstruct certain actions of the plaintiff or third parties. The first of these methods of

316 Article 187(2) CPA
pursuing claims would correspond to the literal content of the claim. However, the latter method would result in the same aim of legal protection.

In doctrinal terms, an opinion has been expressed that complaint in regard to exposure is different from complaint in regard to omission, insofar as the complaint in regard to exposure should individually determine the measures to which exposure is needed, while the complaint in regard to omission should specify actions (or conduct) the omission of which should be ordered of the defendant. However, we need to bear in mind that the content of the specific claim in regard to exposure would determine whether the process of defining the matters to which exposure is needed would also require a clearer specification of actions that the defendant should restrain from, i.e. determination of the method in which certain actions should not be undertaken by the defendant, so that the agent could undertake his/her actions. Such might be the transitional forms between the complaints in regard to exposure and omission.

The need, inherent in the protection of rights, to request legal protection in regard to exposure would assume (cumulatively) the maturity of the claim in regard to exposure, if the content of the legal relations is such that the obligation of exposure should begin in the future. By analogy, as in the case of complaints in regard to omission, one would have to assume the danger of repetition of actions that would prevent the agent from undertaking the actions for which he/she is authorised (repressive-preventative function of the complaint in regard to exposure), or danger that the defendant might for the first time engage in conduct that might prevent the agent from undertaking these actions (preventative-repressive function of the complaint in regard to exposure).

4.2.4.1.2 Execution
Execution on the basis of the judgment, aimed at fulfilling the obligation of exposure, would be achieved by a prescribed monetary or prison sentence, non-suspended penalties, and repeated threat of such penalties and their non-suspended issuance and execution, until the resistance of the obliged person is broken. However, the total duration of prison sentences against execution debtors in regard to the same enforcement title document cannot exceed six months. Execution for the purpose of eliminating the changes caused by actions of the defendant, undertaken against his/her obligation, would as a rule be achieved via execution with the aim of establishing the prior state of affairs.

4.2.4.2 Complaints in regard to omission

4.2.4.2.1 General outline
Participants in certain civil law relations can be authorised, on the basis of these relations, to require other participants in these relations not to do something, to refrain from undertaking certain actions, to not behave in a manner that would violate or might violate their rights, or, in some cases, rights of third parties as well. Such claims in regard to omission can be founded directly on the law, or legal transaction.

Complaints in regard to omission require the court to order the defendant (to sentence the

317 German: Duldungsklage

318 German: Unterlassungsklage

319 Arg. ex Article 233 EA

320 Article 233(6.2) EA

321 Article 234 EA
defendant, to conclude that the defendant has the duty) to omit certain individually specified actions that violate or that might violate the rights of the plaintiff and/or (in exceptional circumstances) a third party. Complaints in regard to omission can also be submitted as complaints requesting the prohibition of a certain current and/or future (threatening) conduct.

Situations due to which complaints in regard to omission may be submitted can vary, and they determine the content and structure of complaints, as well as the factual situation used as their justification. In certain cases, there is a need to state other claims in addition to the claims in regard to omission, e.g. claims in regard to the elimination of harmful consequences of the undertaken unlawful action, etc.

4.2.4.2.2 Complaint in regard to omission in case of actual violations
The first possible situation on the occasion of which a claim in regard to omission may be submitted is a situation in which the plaintiff claims that the defendant is violating certain rights of the plaintiff, and that these rights will continue to be violated unless such conduct is prohibited to the defendant (state of acute violation). In such a situation, the complaint could certainly be used to request that the defendant ceases to undertake actions violating the legal position of the plaintiff, but it could also be used to order the defendant not to undertake such (or corresponding) actions in the future; in such a situation, there is a possibility for the plaintiff to seek the elimination of consequences caused by already undertaken actions. In this regard, for example, everyone has the right to request the court or other competent body to order the cessation of action violating a personal right, and the elimination of consequences caused by the action.322 A person whose right to equal treatment is violated can request the prohibition of the undertaking of activities which result in violation, but also the carrying out of activities eliminating discrimination or its consequences, including compensation for proprietary and non-proprietary damage.323 The aims of the complaint in regard to omission, in terms of the protection of rights, would be twofold. The order to stop certain conduct should result in the elimination of the actual source of the existing condition of violation and a state of being violated (repressive effect of the complaint in regard to omission and of the judgment that would order certain actions to be omitted); the prohibition of possible repetition of such (or similar) actions in the future should prevent violations of the right of the plaintiff (and/or) third parties in the future (preventative effect of the complaint in regard to omission, and of the judgment ordering omission).

In such a situation, the plaintiff should substantiate his request that the defendant be ordered to cease certain actions by claims stipulating that the plaintiff or (in extraordinary circumstances) a third party has the right to expect the defendant to behave in a certain manner, and that the actual conduct violates the determined legal position. In this context (according to the Austrian judicature and doctrine), there would be no need to determine that this is a result of the defendant's fault. The request seeking the prohibition of violating conduct in the future would have to be substantiated by the plaintiff, specifically by the claim that there is a danger that the defendant, upon being forced to cease the undertaking of violating actions, might restart undertaking these actions, or actions corresponding to these actions. In the Austrian doctrine, two approaches have crystallised in regard to the issue of whether the plaintiff seeking the prohibition of certain future conduct of the defendant has the duty to determine and prove the existence of the danger of reoccurrence of such conduct, or whether, alternatively, it would be up to the defendant to provide evidence to the contrary. According to one interpretation, the plaintiff would face the burden of claim and proof; according to the other interpretation, the defendant would face the burden of proof that further violations (actions that would commit the violations) will not materialise.

322 Article 1048 ZOO

323 Article 17(1) ADA
It seems that, from the point of view of Croatian law, the first solution should be selected in principle. The right to request the prohibition of certain violating actions (conduct) in the future includes the assumption of danger (probability) of such actions being undertaken. The circumstance that a violating action has been committed and that it may also last for a certain period of time would not, on its own, necessarily indicate the possibility (probability) of its continuation (reoccurrence) in the future. Some actions, by their virtue, are one-off events, or not likely to be repeated, which means that the danger of their reoccurrence is negligible. Therefore, the legal assumption that a certain action, because of the fact that it has been undertaken (presumptive basis), includes the assumption that it would (again) be undertaken in the future (presumed fact), would not necessarily be a natural assumption. In addition, this assumption is not founded upon the general structure of the institute of the burden of proof, according to which each party should carry the burden of proof in regard to the existence of those facts upon which the litigation success of the party in question depends, including the classical rule of *negativa non sunt probanda*. On top of that, this assumption also has no foundation in special circumstances of legal situations from which the right to prohibition of certain conduct in the future would stem. It is only in extraordinary circumstances that the state of violation, or the right to prohibition of certain conduct in the future, is assumed. Thus, if we were to literally interpret the provision of Article 22(11) LA, it would be up to the employer to face the burden of proof that the determined violation of dignity has not occurred. When it comes to Article 30(4) GEA, even if we interpret the provision literally, it would be sufficient for the plaintiff claiming the violation of his right to equal treatment to present facts justifying the suspicion of discriminatory conduct, for the burden of proof to be transferred to the respondent. When it comes to Article 20(1) ADA, the party claiming the violation of his/her right to equal treatment in court proceedings or other proceedings would have the duty to make it plausible that discrimination has taken place; in this case, the burden of proof that there has been no discrimination would be transferred to the opposite party. It is precisely this latter case that shows how, even in sensitive issues of averting discrimination, the allegedly discriminated party is requested to, at the very least, make it plausible that the action of discrimination has taken place and that discrimination is ongoing. In principle, therefore, the plaintiff should make it plausible that the danger of possible recurrence of the violating action by the defendant exists, in order for the court to prohibit the defendant, who already committed violating actions, from committing such actions in the future.324

4.2.4.2.3 Complaint in regard to omission upon the undertaking of violating action

Another possible situation in which a complaint in regard to omission might be submitted would be the situation in which the defendant has undertaken the violating action, but the violating action does not impose the situation of lasting violation of the legal position of the plaintiff or a third party. In such a situation, the complaint would actually seek to prohibit the defendant from repeating the violating action in the future (which would be a so-called regular complaint in regard to omission). In this complaint, the plaintiff should determine that the defendant has violated a certain right of the plaintiff and/or right of a third party via a certain action, and that there is danger of recurrence of such action, and thus also danger of violation of

324 That is how we should understand the provision of Article 22(1) of the Act on Ownership and other Real Property Rights, according to which possessors whose possession was obstructed arbitrarily are authorised to protect their possession in court, requiring the court to determine the act of obstructing their possession, order the re-establishment of possession as at the time of obstruction, and prohibit such or similar obstruction in the future. Of course, one possible interpretation could also be that a specific assumption is in play when it comes to the obstruction of possession – given the fact that the obstruction had already occurred, and the defendant can repeat it on the basis of same or similar actions, there is a certain likelihood that the obstruction might be repeated in the future, which means that corresponding actions should, therefore, also be prohibited pro futuro.
the right in the future. The existence of the danger of recurrence of violating action could, by
definition, only be made plausible. In this situation as well, the issue of the burden of proof in
regard to the danger of future violation of the right should be resolved in the same manner as in
the first outlined situation.

4.2.4.2.4 Preventative complaint in regard to omission
The third situation would be the situation in which there is only the danger of future violation of
the legal position of the plaintiff and/or a third party, where the legal position is threatened by
the possibility of the defendant undertaking certain violating actions. In such a situation, the
plaintiff would only request that the defendant be prohibited from undertaking certain actions
that might violate the plaintiff's legal position (preventative complaint in regard to omission). In
order for such a complaint to be accepted, one would have to determine the existence of the
actual need to prevent directly threatening actions of the defendant, i.e. that the violation of
right is a serious threat. According to the prevailing opinions in the Austrian and the German
discipline and judicature, this is a special form of the need for the protection of rights, which
would not have the meaning of a procedural prerequisite, but of prerequisite the absence of
which would necessitate the rejection of the complaint. This danger would be foreseen by
substantive law regulations as one of the prerequisites for the claim to be processed by courts;
it would not be a prerequisite determined by a provision of procedural law, which would be
used to condition, in general terms, via the existence of the legal interest, the right to seek
appropriate form of protection, as is analogously foreseen when it comes to the request for
declaratory protection, or complaints in regard to the fulfilment of due obligation in the future.
In this context, in Croatian law, everyone can ask from another to refrain from activity that
would result in harassment or threat of damage, if harassment or damage cannot be prevented
by appropriate measures,325 and the court, at the request of the interested party, will order that
appropriate measures be undertaken in order to prevent damage or harassment, or to eliminate
the source of danger at the cost of the possessor of the source, if the possessor does not
of their own accord.326 The discriminated person can request that the undertaking of activities
which may violate that person's right to equal treatment be prohibited.327

4.2.4.2.5 Specificity of actions whose omission is requested
A particular problem in regard to the preparation of complaints in regard to omissions pertains
to the specificity of the proposed complaint. In fact, the issue lies in the specificity of actions
which should be omitted, the condemnation of which is requested; or in the possibility of
seeking that the prohibition covers not only these actions, but also actions corresponding to
these actions, which could also violate the right of the plaintiff and/or a third party in
essentially the same manner. Namely, a question arises: how should the issued prohibition of a
certain conduct be interpreted when assessing certain subsequent conduct of the defendant, in
regular manner in execution procedure? The reasons of legal certainty and prevention of illegal
conduct, but also conscientiousness and fairness, would suggest that these prohibitions be
interpreted in a relatively benevolent manner, as having a wide scope. In this regard,
prohibition should be understood as covering not only actions that are not explicitly prohibited,
but also those actions that would essentially, in a corresponding manner, violate the right of the
plaintiff or a third party, independently of whether the prohibition of "similar" actions would
explicitly be stated in the judgment or not.

325 Article 1047(1) ZOO

326 Article 1047(2) ZOO

327 Action for prohibition of discrimination – Articles 17(1),(2) ADA, founded upon the right to request
others to refrain from discriminatory conduct.
One of the provisions indirectly supporting this view is the provision stating that possessors whose possession was obstructed arbitrarily are authorised to protect their possession in court, requiring the court to determine the act of obstructing their possession, order the re-establishment of possession as at the time of obstruction, and prohibit such or similar obstruction in the future.

4.2.5 Procedure in disputes in regard to protection of collective interests and rights

4.2.5.1 Introduction

Article 49 of the Act on Changes and Amendments to the Civil Procedure Act of 2011328 added the new Title Thirty Two following Article 502 of CPA, “Complaint for the protection of collective interests and rights”, with Articles 502(a)-(h). The provisions of these Articles define the general legal framework for the initiation and conduct of proceedings for the protection of so-called collective interests and rights, but also for the initiation and conduct of proceedings by subjects alleged to breach these interests and rights. This enables, or at the very least facilitates, the initiation and conduct of litigation proceedings in all those cases where, as foreseen by law, court protection may be sought in order to protect various categories of collective interests and rights. In this sense, the provisions of the new Title will serve as (subsidiary) legal basis for the conduct of proceedings in regard to discrimination complaints, consumer complaints, “joint legal actions”, and other legally permissible initiatives aimed at the protection of collective interests and rights. Clearly, these provisions will not be applied in cases where special acts foresee other forms of procedure in regard to complaints for the protection of collective interests and rights.329

Where the new Title does not contain special provisions, the remaining CPA provisions apply to litigation in regard to complaints for the protection of collective interests and rights.330

4.2.5.2 Active and passive legitimacy

Based on the provision of Article 502(a)(1) CPA, associations, bodies, institutions or other organisations established in accordance with the law, dealing with the protection of collective interests and rights of citizens determined by law, within their registered or legally determined activity, may, if such authorisation is explicitly foreseen by special law, and under the conditions foreseen by this law, submit a complaint (complaint for the protection of collective interests and rights) against a natural person or legal entity which, by performing certain activities, or in general by its work, actions, including omissions, gravely violates or seriously endangers such collective interests and rights.

There are several conclusions that can be derived from this provision:

1. Active legitimacy for seeking the protection of collective interests and rights is enjoyed (only) by certain legal entities and bodies, which must be established in accordance with the law. Such legal entities can be associations and institutions, but also other organisations established in accordance with the law, e.g. foundations, companies, cooperatives, chambers, etc. When it comes to bodies, they can be state bodies, but also

328 Official Gazette NN 57/11; ZIDZPP 2011, Changes and Amendments 2011
329 Article 502(a)(3) CPA
330 Ibid.
331 And legal entities – arg. ex Article 502(c)
bodies of regional or local self-government. A special role in this matter can be played, and is played, by various people’s ombudsman offices. Natural persons do not have legitimacy to seek the protection of collective interests and rights.

(2) All these legal entities and bodies, within their registered or legally determined activity, must deal with the protection of collective interests and rights of citizens determined by law (abstract capacity of dealing with the protection of certain collective interests and rights). If these subjects are not registered, or explicitly authorised by law for the protection of certain collective interests and rights, they do not enjoy active legitimacy.

(3) These persons and bodies must be explicitly authorised by law to seek certain protection of certain collective interests and rights, with the fulfilment of conditions prescribed by that law (active legal legitimacy for seeking certain litigation protection).

(4) This protection is achieved via a complaint (complaint for the protection of collective interests and rights).

(5) Passive legitimacy in litigation for the protection of collective interests and rights includes natural persons or legal entities that (1) by performing a certain activity or in general by their work, activity, including omissions, (2.1) gravely violate or (2.2.) seriously endanger such collective interests and rights. When it comes to violations by bodies, liability for them would be held by the legal entities to which they belong.

It is not possible for natural persons to submit a complaint for the protection of collective interests and rights – natural persons can only seek the protection of their individually violated subjective rights. In this regard, the Croatian law did not opt for the system of the so-called class actions, existing in some legal traditions.

4.2.5.3 Interests and rights that can be protected

Interests (and rights) that can be protected by a complaint for the protection of collective interests and rights may include interests pertaining to the human natural and living environment; moral, ethnic, consumer, anti-discrimination and other interests guaranteed by law. In order for these interests to be protected, they – according to the claims in the complaint – must be gravely violated or seriously endangered by the activity or, in general terms, the conduct of the person against whom the complaint is submitted.332

4.2.5.4 Available legal protection

Unless special laws prescribe otherwise, the submitter of a complaint for the protection of collective interests and rights may request the following:

(1) to determine that certain actions, including omission by the defendant, led to the violation or threat to collective interests and rights of persons protected by law that the plaintiff is authorised to defend (request for the determination of breach or threat).

Actions that may result in violations or threat to interests and rights of persons that the plaintiff is authorised to defend may include the reaching of certain rules on the conditions and method of performing the activity of the defendant or corresponding

332 Article 502(a)(2) CPA
practice of the defendant, construction of certain facilities, failure to install prescribed protective devices, etc.; 333

(2) to prohibit the undertaking of actions violating or threatening the interests or rights of persons that the plaintiff is authorised to defend, including the use of certain contractual provisions or business practices (request for the prohibition of undertaking of violating or threatening actions);

(3) to order the defendant to undertake actions in order to eliminate resulting or possible general harmful consequences of impermissible actions of the defendant, including the establishment of the previous condition, or a condition that most closely corresponds to that condition, or a condition in which possible violation of protected collective interests or rights could not arise (request for the undertaking of actions in order to eliminate "general" resulting or threatening harmful consequences). When it comes to the concept of "general" harmful consequences in this context, we should bear in mind abstract harmful consequences, consequences that do not pertain to individual subjects suffering due to impermissible conduct of the defendant, but pertain to the group whose interests and rights the aim is to protect;

(4) to publish the ruling in the media accepting any of the claims stipulated in items of this paragraph, at the defendant's cost (request for the publication of the ruling).

All these claims can be pursued independently or cumulatively; there is also the option of pursuing them in possible subsidiarity.

4.2.5.5 Expansion of subjective boundaries of finality of the judgment in regard to protection of collective interests and rights

Natural persons and legal entities in special litigation for the compensation of damages may invoke the legal determination from the judgment accepting the requests from the complaint for the protection of collective interests and rights, that certain actions, including omissions of the defendant, resulted in the violation of or threat to the collective interests and rights of persons that the plaintiff is authorized to defend. In this case, the court will be bound by these facts determined by the judgment in the litigation in which these facts are invoked.

This is a specific expansion of the subjective boundaries of finality of judgments that accept the claims for the protection of collective interests and rights – only if individual claims for protection are accepted, and only in favour of natural persons and legal entities whose interests and rights the plaintiff defends (indirectly, by seeking abstract legal protection). Expansion of the subjective boundaries of finality would, therefore, depend on whether the judgment is favourable or unfavourable for the defendant (secundum eventum litis).

Individual natural persons and legal entities in their litigations may invoke, first and foremost, the conclusions that certain actions, including omissions by the defendant, violated or threatened the legally protected collective interests and rights of persons that the plaintiff is

333 Article 502(b)(2) CPA
334 Article 502(b)(1) CPA
335 Article 188 CPA
336 Article 502(c) CPA

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authorized to defend; i.e. they may invoke decisions accepting the claim for the determination of the violation or threat. They may also invoke judgments accepting the claims for the issuance of corresponding prohibitions, or orders for positive obligations – when these prohibitions or orders correspond in content to what they wish to protect.

### 4.2.5.6 Intervention

When it comes to the procedure in regard to complaints for the protection of collective interests and rights, and assuming that the plaintiff agrees, the position of intervenor as single co-litigant on the side of the plaintiff may be assumed by other authorised submitters of such complaints. These intervenors must fulfil all the conditions for independent submission of such a complaint. Intervention can also be limited to only some of the claims.

If several persons authorised for the submission of complaints for the protection of collective interests and rights submit such complaints before the same court, their consolidation may be ordered.

If several persons authorised to submit complaints for the protection of collective interests and rights submit such complaints before the same court or a different court, the court where litigation would ensue following these complaints could request the plaintiff to prove their legal interest for independent litigation by the need for such litigation. The situation will depend on the attitude that the plaintiff who initiated the litigation takes in regard to the other person's intervention in litigation. If that plaintiff agrees with the intervention, engaging in subsequently initiated litigation would no longer be permissible. If the plaintiff objects, the other plaintiff would have the legal interest to engage in this litigation.

The legal interest to engage in any litigation with the corresponding content of claims would no longer exist if these claims are accepted with finality in one of the litigations, provided that the plaintiff in litigation which is not yet final is authorised to request execution on the basis of positive final judgment.

When it comes to proceedings in regard to complaints for the protection of collective interests and rights, so-called ordinary intervenors can include natural persons and legal entities whose collective interests and their protection constitute the reason why the complaint has been submitted.

### 4.2.5.7 Local jurisdiction

When it comes to the protection of collective interests and rights, based on the provisions of Title Thirty Two, the competent court in the first instance is the court with general territorial jurisdiction for the defendant, or the court on whose territory the action violating collective

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337 Article 209 CPA
338 Article 502(d)(1) CPA
339 Article 313 CPA
340 Article 206 CPA
341 Article 502(d)(2) CPA
interests and rights that the complaint seeks to defend has been committed, unless special regulations prescribe otherwise.\[342\]

### 4.2.5.8 Non-suspension of appeal

In its judgment accepting the claims from the complaint for the protection of collective interests and rights, the court may decide that the appeal shall not stay the execution, or the court may determine a shorter deadline than the prescribed deadline in order to execute the obligations imposed on the defendant.\[343\]

### 4.2.5.9 Temporary measures

Prior to the initiation, or in the course of proceedings on the basis of the complaint for the protection of collective interests and rights, the court may, at the proposal of the plaintiff, determine temporary measures as foreseen by the Execution Act, if the plaintiff makes plausible the following:

1. that the defendant acted in a manner which violated or seriously threatened collective interests or rights the protection of which is sought by the complaint; and

2. that the determination of measures is required in order to eliminate the danger of irreparable damage or prevent violence.\[344\]

The motion for determination of temporary measures can be used in order to request the court to temporarily determine the rules according to which the defendant will act within his/her activity, in accordance with the requested change or amendment of their rules or practice (regulatory temporary measure).

### 4.2.6 Complaint or counter-claim of the opposite party

#### 4.2.6.1 Complaint of the opposite party

Natural persons or legal entities performing a certain activity, in regard to which persons authorised to submit the complaint for the protection of collective interests and rights express claims that this activity violates or threatens collective interests or rights of persons that the submitter is authorised to defend via such a complaint, have the possibility of submitting a complaint which will request:

1. to determine that certain actions, including omissions, do not violate or threaten these collective interests or rights, or that they do not violate or threaten them in an impermissible manner (complaint of negative determination);\[345\]

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\[342\] Article 502(e) CPA

\[343\] Article 502(f) CPA

\[344\] Article 502(g) CPA

\[345\] Article 502(h)(1.1) CPA
(2) to prohibit the person authorised for the submission of a complaint for the protection of collective interests and rights to engage in certain conduct, in particular to engage in certain public statements;

(3) compensation of damages; and

(4) publication of the judgment, at the defendant’s cost, in public media.  

The opponent of the person authorised to submit the complaint for the protection of collective interests and rights, in its role as plaintiff, can also cover – as defendants – those persons who are authorised to represent the person authorised to submit the complaint for the protection of collective interests and rights or who are members of his bodies, but also his possible members (e.g. of an association) who act in public on that person’s behalf. This would represent a special case of co-litigation, which could, in individual cases, also have the characteristics of (ordinary) substantive co-litigation. The plaintiff may have the same claims towards all defendants, but also different claims.

4.2.6.2 Counter-claim

The opponent of the person authorised for the submission of the complaint for the protection of collective interests and rights may pursue his/her claims in the counter-claim in litigation initiated against him by that complaint.

The opponent of the person authorised for the submission of the complaint for the protection of collective interests and rights may request, as counter-claimant, that the person authorised for the submission of the complaint for the protection of collective interests and rights, and the persons authorised to represent that person, be ordered to compensate special damages, the level of which is decided by the court according to its free assessment, if it is shown that the complaint for the protection of collective interests and rights was clearly unfounded and that the litigation in regard to this complaint, and particularly its coverage in the public media, has significantly damaged the reputation and business interests of the opponent.

The person authorised for the submission of the complaint for the protection of collective interests and rights could submit a counter-claim in litigation initiated against him by the person against whom the person authorised for the submission of the complaint for the protection of collective interests and rights could pursue this complaint, and this counter-claim could include some of the requests that could otherwise be included in that person’s complaint.

346 Article 502(h)(1.2) CPA
347 Article 502(h)(2) CPA
348 Article 196(1.1) CPA
349 Article 502(h)(3) CPA
350 Article 223 CPA
351 Article 502(h)(4) CPA
5 Step by step instructions for implementing equality law and policy in Croatia

5.1 Achieving civil law anti-discrimination protection in courts - Activities to be undertaken

5.1.1 Preliminary preparatory actions

5.1.1.1 Identifying discriminatory violations and persons actively and passively involved in discrimination

Prior to the initiation of court proceedings, the following matters must be considered:

(1) Has there been a discriminatory action, and if so, what does it consist of?

(2) Has this action been committed by a person to whom the law prohibiting such actions applies (person legally liable in discrimination terms; passive legitimacy)?

(3) Has the action been committed in regard to the person with the status of a protected person (person authorised to seek protection against discrimination; active legitimacy)?

(4) Is the action direct or indirect discrimination (legal qualification of discriminatory conduct, violation)?

5.1.1.2 Determining the content of anti-discrimination protection (remedies) to be sought

Prior to the initiation of court proceedings, it is important to examine what sort of protection (remedies) in regard to the identified discriminatory conduct may be sought, and can be achieved. In this regard, it is important to determine whether there is room for the following, or if the following will be requested:

(1) (Self-)declaration (determination) of discriminatory conduct;

(2) Prohibition of certain discriminatory conduct and ordering of certain actions for the purpose of elimination or prevention of such conduct in the future;

(3) Compensation for damages. In this context, it is important to examine what sort of damage is at stake (property damage, non-property damage, etc.), and what its level should be;

(4) Publication in the media that a certain person, via a certain conduct, committed a discriminatory violation against a certain person;

(5) A combination of all or some of the above remedies.
5.1.1.3 Parties and representatives

During the stage of preparation for the initiation of court proceedings, the following should also be considered:

(1) Is the person who intends to seek court protection authorised to do so, and which particular forms of protection and/or remedies can be requested?

(2) Who has the authority to represent the person seeking protection, and on what basis? It needs to be clarified whether the court protection is individual or collective; is the person to act as agent authorised for that, given the CPA provisions on agents (attorney; trade union member, associations, close relative, etc.); when it comes to joint legal action, has it been signed by the authorised representative, or has he/she provided the power of attorney.

(3) Against whom is the protection requested.

5.1.1.4 Court jurisdiction

Prior to submission of the complaint, it is important to examine which court has subject-matter and territorial jurisdiction; is the so-called international jurisdiction of Croatian courts also applicable?

5.1.1.5 Legally relevant facts and evidence

When preparing the complaint, and starting from the regulations defining and sanctioning certain discriminatory conduct, one should examine which facts would be legally relevant for seeking a certain form of protection, and whether these facts have occurred in the specific case, and in which manner. In connection with this, one should determine which evidence might be used to support the claims regarding these facts (individualisation and collection, if possible; e.g. of documents, recordings, evidence).

5.1.1.6 Perpetuation of evidence

Prior to litigation, the procedure for perpetuation of evidence should be examined and, if possible, initiated.

5.1.1.7 Temporary measures

Prior to the initiation of litigation, it is important to examine whether temporary measures can be requested in connection with the protection to be sought, and, if so, which temporary measures:

(1) In order to ensure monetary claim;

(2) In order to ensure non-monetary claim;

(3) In order to temporarily regulate the relations among parties;

(4) Will temporary measures be requested prior to the initiation of proceedings, or (together with the complaint) in the course of litigation?
5.1.1.8 Intervention

Prior to the initiation of litigation, it will be useful to examine who might intervene in litigation, and under which conditions (e.g. the people’s ombudsman, a certain association, some other interested parties, etc.).

5.1.1.9 Estimation of costs and collection of funds

Prior to the initiation of litigation, one should prepare an indicative estimate of the possible costs of litigation, and also of possible costs to be compensated to the opponent in the event of defeat. Such an estimate may prove crucial in terms of the selection of attorney, establishing links with other associations within a joint legal action, undertaking activities in order to collect the required funds, etc.

5.1.1.10 Anticipation of the court decision on non-suspension of appeal

Prior to the submission of the complaint, one should examine whether it would be possible to include within it the proposal that the court in its judgment decides that the appeal shall not stay the execution.

5.1.2 Joint legal action

When preparing a joint legal action, the following matters should be examined:

(1) Is the submitter established in accordance with the law?

(2) Does the submitter have a justified interest in submitting such a complaint?

(3) Is the submitter engaged in the protection of the right to equal treatment within their activities?

(4) Has the right to equal treatment of a large number of persons been violated, with these persons predominantly belonging to the group whose rights the plaintiff defends?

(5) Is what is requested truly what can be requested via such a complaint?

(6) Has the defendant behaved in such a manner that he/she

   a. violated the right to equal treatment in regard to;
   b. members of a protected and represented group?

(7) Is there room to request prohibition of the undertaking of actions that violate or that may violate the right to equal treatment?

(8) Should the publication of the judgment in the media be requested, and have the conditions for this been met?
5.1.3 **Execution**

Having obtained the executable decision in litigation procedure, the following should be examined:

1. Have the conditions been met to request execution in order to obtain monetary or non-monetary claims, claims in regard to strictly personal actions, claims in regard to positive actions that can be performed by another person, claim in regard to exposure or omission?

2. Can court penalties be requested?

3. Can various forms of execution be requested?

Following these steps, corresponding proposals should be prepared for execution, and execution procedures should be initiated.

5.1.4 **Disputes against the state**

In disputes against the state, preliminary procedures should be undertaken with the aim of attempting a peaceful solution to the dispute.\(^{352}\)

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\(^{352}\) Article 186(a) CPA
5.2 Preparing an individual anti-discrimination complaint – concise instructions

5.2.1 Content of the Claim

Every complaint must contain:

1. the name of court;
2. the name, occupation and permanent or temporary residence of the parties;
3. their legal representatives and agents, if any;
4. the designation and value of the dispute;
5. facts upon which the plaintiff bases the claim;
6. evidence to support these facts;
7. a specific claim regarding the merits and incidental claims; and, finally,
8. the signature of the submitter.353

In regard to the legal grounds of the complaint, it must be noted that the provisions of Article 186(3) CPA is subsidiarily applied in anti-discrimination disputes. According to this provision, the court shall proceed in regard to the complaint even if the plaintiff has not stated the legal grounds for the complaint, and if the legal grounds are stated, the court is not bound by this.

5.2.2 Jurisdiction

When it comes to proceedings with regard to the special complaint for protection against discrimination stemming from Article 17 ADA, initiated by the victim of discrimination,354 the municipal court has subject-matter jurisdiction. In cases where the special complaint is submitted together with some other claim whose subject-matter competence would be held by another court (e.g. the commercial court), the other court has the jurisdiction for proceedings.

The territorial jurisdiction of the court is electable, in the sense that the plaintiff can chose whether to submit the complaint to the court of general territorial jurisdiction (based on the place of residence or temporary residence of the defendant, or the location of headquarters in the case of legal entities), or to the court in whose territory the plaintiff has their place of residence or temporary residence, or to the court with jurisdiction over the location where the alleged violation or discrimination occurred.

5.2.3 Parties and the intervenor on behalf of the plaintiff

5.2.3.1 The plaintiff

Every person as a victim of discrimination, or person who considers that his/her rights have been violated due to discrimination, is authorised as plaintiff to submit a complaint in regard to protection against discrimination to the court. This means that the victim of discrimination has active legitimacy in anti-discrimination disputes. The plaintiff can also be a person to whom grounds of discrimination determined by law do not pertain (gender, race, political persuasion, etc.), if that person is placed in a less favourable position due to relation by kinship or other relationship to a person who has such a characteristic.355 In specific situations, a legal entity can also be placed in a less favourable position, for example because of the ethnic affiliation of its

353 Articles 106; 186 CPA
354 Article 18(1) ADA
355 Article 1(2) ADA; for example, if one spouse is placed in a less favourable position because another spouse has AIDS
owner, in which case such legal entities has active legitimacy to submit a complaint for protection against discrimination.

The complaint can be submitted in person, or through a legal representative or agent. In proceedings before the court, the plaintiff can participate in person, or can have an agent in the form of an attorney, a person in an employment relationship with the plaintiff, or a blood relative in a legal line, brother, sister, or spouse, under the assumptions foreseen by CPA.356

Associations, institutions or other organisations dealing with protection of the right to equal treatment in their activities are not authorised to submit a special anti-discrimination complaint instead of the victim of discrimination on his/her behalf, nor are they authorised to represent such a person in the dispute (they are authorised to submit joint legal actions). Such legal entities, in this type of proceedings, can join the plaintiff as intervenors, with the plaintiff's consent.

According to the provisions of Article 16 ADA, special procedures for protection against discrimination in the sphere of labour and employment are considered labour disputes, which is why labour disputes in regard to protection against discrimination are subject to the provisions of Article 434(a) CPA (special procedure in labour disputes), based on which the worker, here as plaintiff, can be represented by an agent who is employed by the trade union to whom the worker belongs, or by the trade union confederation to which the union of which the worker is a member is affiliated.

5.2.3.2 The defendant

In a dispute concerning protection against discrimination, the passively legitimised person, or the defendant, is a person who, according to the plaintiff’s claims, placed the plaintiff in a less favourable position via the defendant's conduct, actions, omissions or deliberate enticement to discrimination, which means that the right of that person to equal treatment has been violated in regard to other persons in a comparable situation, or that the dignity of the plaintiff has been violated due to intimidating, hostile, degrading or offensive conduct.357

The defendant in a dispute regarding protection against discrimination can be a natural person or a legal entity (including an employer in anti-discrimination labour disputes). According to ADA, it is explicitly stated that the Act applies to the conduct of all state bodies, bodies of local and regional self-government units, legal persons vested with public authority, and to the conduct of all legal and natural persons.358 When, according to the claim of the plaintiff, discrimination in a wider sense of that concept (harassment, segregation) is caused by a state body, the complaint is submitted against the Republic of Croatia In such cases, if bodies of local and regional self-government are implicated, the defendant is the corresponding unit of local or regional self-government (municipality, city or county).

In accordance with the provisions of Article 186(a) CPA, a person who intends to file a complaint against the Republic of Croatia is obliged, before filing the complaint, to first submit a request for a peaceful solution to the dispute to the municipal public prosecutor’s office which has territorial jurisdiction in the area of the court to which the complaint would be submitted, except in cases for which special regulations prescribe a certain deadline for the submission of the complaint (for example, in disputes on the basis of Article 130 of the Labour

356 Article 89(a) CPA
357 Article 3 ADA
358 Article 8 ADA
Act). The request for a peaceful solution to the dispute must contain the claim in regard to the protection of rights, and facts and evidence upon which the claim is founded.

Prior to the submission of a complaint in regard to the protection of the dignity of the worker against harassment and sexual harassment to the court, the worker must first complain to the employer with regards to the specific discrimination experienced. On the basis of this complaint to the employer, the employer must examine the complaint and undertake all required measures in order to prevent the continuation of discrimination, within a maximum period of eight days. If the employer rejects the complaint, or does not undertake necessary measures for the prevention of harassment or sexual harassment within the prescribed deadline, or if measures undertaken are clearly inappropriate, the worker has a further eight-day period in which to request court protection. The period of eight days for requesting court protection is preclusive, which means that a complaint submitted after the expiry of that time period will be denied. The worker does not have a duty to submit the complaint to the employer only when it is not justified to expect that the employer would protect the dignity the worker.

5.2.3.3 Intervenor on behalf of the plaintiff

In an effort to provide the plaintiff with better a procedural position and expert assistance in anti-discrimination disputes before the courts, ADA provides the opportunity for a third party to participate in proceedings as intervenor for the plaintiff. Intervenors for the plaintiff may include bodies, organisations, institutions, associations or other persons that, within its scope of their activities, deal with the protection of the right to equal treatment in relation to those groups whose rights are to be decided upon in the proceedings. In order for a third party to participate as intervenor for the plaintiff, it does not have to prove a legal interest in the plaintiff's success in the ongoing litigation. It is sufficient that the intervenor, in its line of activity, deals with the protection and promotion of the interests of those groups (e.g. children, women, national minorities, persons with disabilities, etc.) whose protection is sought by the plaintiff via his complaint in the dispute; however, in order for the intervenor to participate, the consent of the plaintiff is necessary.

The intervenor may present his/her request to participate in litigation early on, together with the complaint. However, the intervenor may also join the litigation later, until the litigation is finalised. The intervenor in proceedings is authorised to submit proposals and to undertake other litigation activities, the same as the plaintiff. The participation of intervenors in litigation is subject to subsidiary implementation of CPA rules.

5.2.4 Factual claims and proposal of evidence in the complaint

Regardless of the motion submitted by the victim of discrimination, the complaint must outline the facts and offer evidence that the defendant undertook the action due to which the defendant is sued.

359 Article 130(4) LA
360 Article 21(1) ADA
361 Articles 206-208 CPA
According to the provision of Article 20(1) ADA, if a party in court or other proceedings claims that his/her right to equal treatment has been violated, he/she shall make it plausible that discrimination has taken place. In this case, the burden of proof will be carried by the respondent, in terms of proving that there was or is no discrimination.

In accordance with this, the plaintiff is not obliged to prove with a degree of certainty in the complaint or in the court proceedings that inequality of treatment has been motivated by the prohibited grounds of discrimination. Instead, the plaintiff should make it plausible that his personal characteristic (ethnic affiliation, gender, medical condition, etc.) "placed that person in a less favourable position, and that it is possible (based on regular rules of experience and based on the characteristics of that specific case) that this situation has been caused due to direct or indirect discrimination".362

The victim of discrimination does not have a duty to prove the legal interest for the complaint in order to submit a complaint in regard to discrimination.

### 5.2.5 Motion for the complaint

A motion for the special complaint for the protection against discrimination can include the following (based on Article 17(1) ADA):

1. to establish that the defendant has violated the plaintiff’s right to equal treatment or that the action which the defendant has undertaken or failed to undertake may directly result in the violation of the right to equal treatment;

2. to prohibit the undertaking of actions which violate or may violate the plaintiff’s right to equal treatment, or to carry out actions which eliminate discrimination or its consequences;

3. to compensate for proprietary and non-proprietary damage caused by the violation of the rights protected by this Act;

4. to publish in the media the ruling establishing the violation of the right to equal treatment, at the defendant’s cost.

The plaintiff can have several claims stemming from ADA Article 17(1) in one motion for the complaint (for example, to determine the existence of discrimination and prohibition of future discrimination). Alternatively, such a claim can accompany the complaint in another dispute, provided that the claims are interrelated.

In addition to the main claim, the plaintiff can request that the court orders the defendant to compensate the costs of litigation to the plaintiff.

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5.2.5.1 Complaint for determination of discrimination

Via a complaint in regard to determination (declaratory complaint), the victim of discrimination requests that it be determined that the victim's right to equal treatment has been breached. A declaratory complaint will be submitted by the discriminated person in a situation where the discriminator believes that he/she has the right to engage in discrimination, or when he/she creates or maintains the state of discrimination, or because his/her activity might result in discrimination (e.g. if a public job competition includes the condition that the applicant must not have a disability among the conditions for employment). The legal effect of the final judgment determining the existence of discrimination lies in the fact that any doubt among parties is definitely eliminated as to whether certain conduct of the defendant towards the plaintiff constitutes discrimination. Furthermore, in a possible future dispute, in which a victim of discrimination would request a certain prohibition, or imposition of an obligation to the defendant due to discrimination whose existence has been determined with finality via the court judgment, it would no longer be possible to engage in determining, even in the form of preliminary questions, whether a certain action constitutes discrimination. The deadline for the fulfilment of obligations is not introduced into the declaratory complaint, because no obligation is requested from the defendant.

The Declaratory motion for the complaint might be prepared as follows:

"It is hereby stated that the defendant (name), as employer, violated the right of the plaintiff (name) to equal treatment, by determining a lower salary to the plaintiff for performing work tasks in the position of "warehouse worker" compared to the salary received by male employees for the same kind of work in the same position."

5.2.6 Complaint for the prohibition or elimination of discrimination

5.2.6.1 Complaint for the prohibition of discrimination

This may contain the request that the defendant be ordered to cease undertaking actions (complaint in regard to omission) that place the plaintiff in a less favourable position with regards to a comparable group, or to refrain from undertaking actions that violate the dignity of the plaintiff in regard to belonging to a protected entity (e.g. racially-motivated verbal insults). Such a complaint may include the request that the defendant be prohibited from certain existing and future discriminatory conduct.

A complaint for the prohibition of discrimination (complaint in regard to exposure) may be used in order to request that the defendant be prohibited from undertaking actions that would disable or obstruct the undertaking of certain actions by the plaintiff or third parties (e.g. a prohibition of disabling the plaintiff's ability to exercise a right, and the obligation of the defendant to be exposed to the fact that the plaintiff, despite the fact of belonging to the Roma population, is using a public pool.363

The complaint for prohibition of discrimination can be submitted as long as there is a danger that the action representing discrimination will be conducted or repeated.

363 See, e.g. Dika, M. "Sudska zaštita u diskriminacijskim sporovima" [Court Protection in Discrimination Disputes] in Primjena antidiskriminacijskog zakonodavstva u praksi [Implementation of Anti-Discrimination Legislation in Practice], Center for Peace Studies, 2011.
A Motion for the complaint for prohibition of discrimination might be prepared as follows:

“The defendant (name) is prohibited from discriminating against the plaintiff on the grounds of ethnic affiliation because the plaintiff is Roma, by preventing him from entering in and using the catering establishment 'A' in A., owned by the defendant.”

5.2.6.2 Complaint for elimination of discrimination

Via the complaint for elimination of discrimination (complaint in regard to obligation), the plaintiff requests that the defendant be ordered to undertake a certain action in order to eliminate the state caused by ongoing discrimination (e.g. to remove an architectural obstacle rendering access impossible to persons with disabilities). The complaint should specify the action that the defendant is obliged to undertake, as well as the deadline for the fulfilment of the obligation, in order to be able to determine the date of execution of the judgment.

A Motion for the complaint for elimination of discrimination is prepared as follows:

“The defendant(s) is/are ordered to remove wire fencing from the property where two camping trailers are located for the housing of the plaintiff and his family of Roma ethnicity, placed on April 30, 2012, and to bring the property to the condition that existed prior to the placement of wire fencing, all within the time period of 8 days, and the defendant(s) is/are prohibited from undertaking such or similar discriminatory actions in the future.

The defendant is ordered to compensate the litigation costs of these proceedings to the plaintiff, in the amount of (...) within 15 days.”

5.2.6.3 Complaint for compensation of damages due to discrimination

A victim of discrimination has the right to compensation of proprietary damage only if, due to the discrimination experienced, the victim’s property decreased (ordinary damages), or if his/her property has not increased as expected (lost profit). In addition, the victim also has the right to compensation for non-proprietary damage, due to the violation of personal rights (physical and mental health, dignity, honour, reputation, etc.) The obligation of the person potentially responsible for damage – the person who performed the action of discrimination – to compensate damage to the plaintiff exists only if the damage has been caused due to his/her fault (deliberately or due to carelessness), and the person potentially responsible for damage has the duty to prove that he/she is not at fault.

In the complaint, the injured party – the plaintiff – must outline the facts and evidence pertaining to the discriminatory action and what consists of, the causal link between that action and the occurred damage, as well as the level of specific damage. The very fact that the plaintiff is a victim of discrimination does not necessarily mean that the plaintiff thus suffered damage.

The complaint for the compensation of damages can be cumulated with any request in regard to the protection of rights based on Article 17(1) ADA.

A Motion for the complaint for compensation of damages is prepared as follows:

"The defendant is ordered to pay to the plaintiff. kunas in total, with penalty interest calculated as of …. (maturity date) until the payment, at the rate of 14% per year (See: Article 29 of the Civil Obligations Act). In case of change of the penalty interest rate, the discount rate of the Croatian National Bank valid on the last day of the semi-annual period preceding the current semi-annual
period shall apply, increased by five percentage points, from the change of the interest rate until the payment within 15 days.

The defendant is ordered to compensate the litigation costs to the plaintiff in the amount of..., with penalty interest (as in the paragraph above), within 15 days."

5.2.7 Complaint with a request to order that the judgment determining the violation of the right to equal treatment be published in the media at the defendant's cost

When discrimination occurs via the media, the victim of discrimination has the right to request from the court to order that the judgment determining the existence of discrimination be published, in whole or in part, at the defendant's cost, in the medium via which the discrimination was caused. However, if the media carried only the information on discriminatory actions, the victim of discrimination may request from the court to order that the same medium publishes the judgment determining the existence of discrimination at the defendant's cost. However, in the latter case, the court will order the publication of the judgment only if the court determines that this is needed in order to fully compensate the damage suffered by the victim of discrimination, or because of preventative protection against discrimination in future cases.

Given the fact that this complaint requests the publication of the judgment determining the existence of a violation of the right to equal treatment, this complaint is necessarily cumulated with the declaratory complaint.

The publisher of the medium ordered to publish the judgment has the duty to proceed based on the order of the court, contained in the judgment, regardless of the fact that he/she did not participate in proceedings, and the publisher has the right to request the compensation of costs of publication from the defendant.

A Motion for the cumulated complaint might be prepared as follows:

1. It is determined that the defendant violated the right of the plaintiff to equal treatment by ... (specific description of the discriminatory action).

2. The publisher of the weekly magazine 'A' is ordered to publish this judgment in the first due edition of the weekly, in the actual place in the publication where the text resulting in the violation of the right of the plaintiff to equal treatment, stated in item 1 of this judgment, had been published.

3. The defendant is ordered to pay the costs of publication of this judgment to the publisher, upon the delivery of the invoice for publication by the publisher.

5.2.8 Temporary measures

Prior to the submission of the complaint, or in the complaint, the plaintiff may propose that the court determines temporary measures, under the condition that the plaintiff makes it plausible that his/her right to equal treatment has been violated, and that the determination of the temporary measure is needed in order to eliminate the danger of irreparable damage, a particularly grave violation of the right to equal treatment, or in order to prevent violence.

364 For example, one particular paper described one member of the Croatian Parliament as a "female goose"
365 Article 17(4) ADA
6 Applying law and policy techniques to achieve effective progressive change in anti-discrimination standards in Croatia

6.1 Public advocacy and strategic litigation strategy in protection of human rights

6.1.1 Why strategy and what it is about?

It is generally accepted that a well designed strategy significantly increases the chances of success of any activity dedicated to resolution of a major problem which requires a long-term commitment. A strategy defines the problem in a way that clearly indicates its causes and the factors which affect it. Based on this, it determines the solution and what is to be done to solve the problem. It sets the solution as the goal; in accordance with it, a strategy determines the actions which should be carried out for its realisation, foresees resources necessary to achieve the goal, defines the functions, tasks and responsibilities of the participants, and sets the timeline of stages in their implementation.

A good strategy will also try to anticipate unforeseen developments that could impede the realisation of the goal, because a strategy – unlike a project – deals with a long-term problem whose solution may take years or even decades, thereby reaching to a relatively distant future. It includes an idea about those who could be interested in preventing or impeding the realisation of the goal, about how influential the opponents are, about their motivation and strength and what moves and actions could be expected from them.

Despite uncertainties and opposition, according to the predominant understanding a strategy implies control over essential conditions of realisation of the goal, i.e. solution of the problem, which enables a group, organisation or another agent of strategic planning to determine in advance what they will do, what resources (human and material) will be used and how long it will take. Even when it encounters future changes or action of an opposition, which cannot be anticipated precisely, a strategy tries to take them into consideration at least approximately, in possible or probable variants, and foresee possible responses. Thus it enables the organisation to prepare solutions to problems that may appear and to keep the initiative even in an uncertain environment and to reach the goal/solution more or less within the expected timeframe, with anticipated expenses (not only financial, but also 'expenses' of time, human efforts etc.).

This is an ideal image of a strategic way of thinking and problem-solving. It rests on the assumption that it is possible to control conditions of human action to a considerable extent, if not by direct influence, then at least virtually – by anticipating future developments as accurately as possible and preparing the action within various probable scenarios. There are powerful actors that may exercise such control to some extent, such as governments, military commanding staffs, big companies, etc., - in short, those who already control their respective environments to a great extent and who can afford research and expertise which will give them a good overview of the situation and future developments as a basis to make comparatively reliable projections of possible changes.

Thus conceived, the concept of strategy has become rather distant from its original, military sense developed in ancient Greece. What it meant then – as opposed to tactics – was an attempt to found military actions on anticipation of possible phenomena and activities of an enemy which was not well known. Such combination of empirical judgement and sometimes just intuitive anticipations was only partly based on experience from which conclusions on patterns in behaviour of an actual or potential enemy were drawn; a great deal consisted of what nowadays would be called "educated guesswork". While a good tactician had to make his moves according to the arrangements and movements of the enemy troops which were in a clear sight
(or on which he had reliable information), a strategist had to prepare operations directed at an enemy which was still beyond the horizon, and whose force, intentions, movements, and positions he could only forebode. If he was successful, he managed to avoid unpleasant surprises, commit sufficient forces for attack or defence, and choose the most favourable positions and locations for battle. In short – he was able to keep the initiative and leave the enemy to make a do with forced solutions.

6.1.2 Strategy in protection of human rights

This essential element of uncertainty in the original sense of the “strategy” concept is precisely what characterises the situation of civil society actors committed to protection of human rights. There is a substantial difference between these civic defenders of human rights, who are not ‘authorised’, and the ‘nominal’ ones, equipped with public powers – police, judiciary, administration and other governmental and public institutions. While the latter have at their disposal resources which provide for a high degree of control over their field of action, the civic actors only have their knowledge, skills, and good will, and sometimes some financial support.

That is why it is questionable whether one can talk about strategy when it comes to civic commitment. Not only do civic actors not have power to control and anticipate processes, acts and events which have a heavy impact on the ‘object’ of their action – human rights in all their dimensions (moral, legal, practical, etc.); for the most part they do not have the initiative either. In most cases they have to react to violations of human rights, and in doing so they are not independent. They cannot foresee when, where and how a violation of human rights will happen. And when they react and try to help the victims, they typically do it by turning to institutions which are empowered and responsible to provide effective protection; to these institutions they direct their demands or pressure. They depend, therefore, on the response of the institutions, which is often inadequate (because, if it were not so, the involvement of the civic actors would not be necessary).

So, is there any reason to even think of a strategy of protection of human rights ‘from below’? Is this a mere rhetorical question, the answer to which is already known, and it reads: it does not make any sense because civic groups or organisations can neither control the ‘field’ of human rights violations nor can they have initiative there?

Still, in a way it does make sense to talk about strategy in defence of human rights even if the key actors are not authorised but voluntary civic activists. The sense is based in the fact that – in the famous words of Polonius in “Hamlet” – there is a system in the madness of violation of human rights. While it is true that, unfortunately, there are too many individual acts of violence, discrimination, illicit trespassing and other abuses and violations which are entirely contingent (which are perhaps foreseeable to some extent only through a good continuous police investigation, or on the basis of crime statistics and criminology), two factors play important roles in breaches of human rights:

1) The first factor is violation of human rights motivated by an interest or ideology. Precisely due to the motivation which is not occasional but ‘ordered’ by certain attitudes and notions, such violation can be considered systematic. There are plenty of examples, most of them very familiar: the interest of an employer in infringing their workers’ rights to appropriate salaries and social benefits; an investor’s interest in utilising the space and natural resources, not taking care of sustainability and without covering the damage inflicted on the environment; the nationalistic ideology which leads to discrimination against ethnic minorities; a conservative ideology which incites the exclusion of sexual minorities; etc.
2) The second systematic factor human rights abuses is that very institutional complex charged with the formal, normative responsibility for their protection. There are two ways in which it takes part in the systematic violation of human rights:

a) simply by misusing power based on authority, that is, as an active violator; and

b) passively, by not performing, or not sufficiently performing all those things following from the responsibility to actively and effectively protect human freedom, dignity and safety.

Seen as a systemic and systematic phenomenon, a significant part of the violation of human rights becomes foreseeable and, potentially at least, manageable. However, this is not sufficient for civic actors. Although they can foresee such systematic violations, they do not have the power to control those phenomena, to master them and eventually to eliminate them.

6.1.3 From moral imperative to legal obligation

Therefore, a strategy for the improvement of protection of human rights should be directed precisely at those systemic factors of violations. Here we should primarily focus on the instrument from the classical arsenal of the modern state: democracy as control of government by citizens, and rule of law.

Thus, the first step in the systematic protection of human rights includes good laws, which will envisage those situations and/or relationships wherein there is a misbalance of power and the interest of the more powerful party to infringe upon the rights of the weaker. They should provide legal means to prevent such infringement. Implementing mechanisms, e.g. bylaws and policies, are the second step; parallel to such mechanisms, the second step also includes improvement in the capacities of implementing institutions.

At first glance, all this may look like a mere formalism, but it is not easy to get good laws, and this 'job' is never done. In almost a quarter of a century of formal democracy in Croatia, it took huge efforts to enact at least such formal instruments of protection of human rights; nowadays it is still necessary to amend them and to keep improving mechanisms for their implementation.

After these first steps, we encounter new challenges and disappointments follow. As we can see from the example of Croatia (which certainly isn't the only case), the existence of laws and institutions still does mean that there is effective rule of law. Enactment of a legal norm, and especially its implementation, requires much more than a formal arrangement. It requires a certain relation of forces in the society which enables the society to abide by its regulations, so that they also impose obligations and limitations on the governmental functionaries, officials, and institutions, not only on the citizens. Many regulations and institutional arrangements relevant for human rights protection have been adopted not so much owing to demands of relevant societal groups, but under considerable influence coming from the international environment, under the imperative of adjustment to broader norms of the United Nations, Council of Europe, and European Union. Perhaps it is not an exaggeration to say that the international impact was decisive, at least in some cases, and that some important legislation (for instance, the Anti-discrimination Act) was passed even though some influential parts of Croatian society were against it.

In such context there is a deep gap between the formally valid regulations and their real validity in practice. In addition, many legal and implementing regulations themselves are not sufficiently sensitive and complete to provide full guarantees of rights and equality before the law.
The power of civic groups committed to human rights certainly is not sufficient to mobilise social pressures which would result in quick improvement, complement and change in the normative and institutional system. However, those groups have at their disposal another tool: their rich, specific knowledge about numerous individual cases in which the discrepancy between the formally valid norms and the real need for protection directly affect real human beings. They inform the public in many cases when they need support to help the victims. In their annual or periodic reports they also present the aggregate incidence and types of violation, similar to the practice of the ombudsmen. Such information sources teach painful lessons on poor regulations, on good regulations without 'teeth' (i.e. appropriate sanctions and effective implementation/enforcement mechanisms), as well as on the rules which are neglected or tacitly neglected by the implementation system.

However, except in some individual cases that succeed in drawing public attention, such information does not possess a motivating force for change, at least not in the culture of rights which exists in Croatia and similar countries. For a while, it was possible to use the aforementioned external impacts to 'translate' knowledge of violations into improved regulations and institutions (and, to a smaller extent, into practical implementation). That is, it used to happen that warnings by the human rights defenders resulted in negative judgments in international reports on Croatia, or that influential foreign governments warned their Croatian counterparts on such issues. But such opportunities have diminished as the process of integration of the country into supranational associations has almost finished, therefore, the potential of conditionality set by those associations is almost exhausted. That is why it is necessary to make the best possible use of the instruments and mechanisms available in the existing situation.

6.1.4 Strategic litigation – what is it and what is it for?

One of the ways to utilise the existing means in protection of human rights is called “strategic litigation”.

This is simply an attempt to initiate a judicial procedure based on an individual case of human right violation in order to effect justice (or legal satisfaction) not only for the specific individual victim or victims of violation of a certain right, but for all others who could be affected by similar violations, and indirectly even for the whole of society. This is why strategic litigation is also called “impact litigation”, because it is also an attempt to influence the legal system, not only an individual case. It is also called “public interest litigation”, because it aims not only at satisfaction for an individual victim but also at accomplishing greater justice in the society as a whole.

By approaching a court, an effort is made to use the judiciary as an instrument both for an individual or a group and for legal changes of significance for a whole social category of individuals or for the whole of society. Cases selected for this purpose should be exemplary cases suitable to demonstrate some substantial flaws in the system of human rights protection. These could include situations where:

- a law demonstrates discrepancy with, or is even contrary to, a fundamental right guaranteed by the constitution or an international norm ratified as part of the national law;
- an implementing regulation demonstrates discrepancy with, or is opposite to a law or the constitution;
- a right founded in morality which is not adequately covered even by the constitution, let alone by legal regulations or bylaws;
• a law which recognises a right, but does not effectively guarantee it, i.e. it does not include appropriate mechanisms of implementation – sanctions, defined responsibilities of implementing institutions, etc.;
• a formally adequate law, but neglected in jurisprudence (both by judges and prosecutors) because of ignorance or lack of confidence among its potential beneficiaries (victims of breaches of rights), ignorance of the judiciary, or even because of tacit obstruction;
• the prosecution or the police do not investigate all aspects of a rights violation (e.g. those which might suggest that the case in question does not only include individual violation but discrimination);
• courts are not sufficiently unbiased or independent.

With appropriate support outside the courtroom, initiating such procedures can attract significant public attention – and, as a consequence, the attention of the judiciary and the executive and legislative authorities – to a discrepancy between the formal (normative and institutional) system of rights protection and real life situations wherein such protection is absent, belated or insufficient, or it does not entail adequate help and compensation for the victims.

If well conducted, strategic litigation can achieve, or help in achieving some of these goals:

• improvement of the legal system by the passing of necessary legislation, amending or supplementing the existing laws and establishing effective mechanisms of implementation;
• system 'learning' – creating jurisprudence which clearly demonstrates how to apply a general norm to specific cases, developing interpretation of regulations, advancing a culture of human rights in the judiciary;
• public 'learning' – demonstrating how insistence on an individual right can advance its wider protection; also, advancement of the culture of human rights as something belonging to everybody;
• empowerment of marginalised groups exposed to specific violations of human rights, as well as demonstration of how they can achieve equality and get legal satisfaction in cases of violation through the existing (or improved) system;
• creating a basis for citizens to advocate for their own rights using the newly established jurisprudence.

6.1.5 The role of civic actors

On the face of it, it seems that strategic litigation is a job for professional lawyers – either theorists who explore new legal possibilities, or practitioners – attorneys who represent victims. However, there are several important roles for non-lawyers and activists for human rights.

The first role appears during the early stage of selecting the cases which will be brought before the court with a strategic purpose in mind. From their practice and experience, activists know the areas in which discrepancies appear most often, which makes strategic litigation necessary. Firstly, such areas include those from which the biggest numbers of complaints are received from citizens of violations of their rights. Furthermore, it is important to look at areas where there is a sudden increase of the number of complaints or other indications of violations, even if their total number forms a comparably small portion of all human rights violations. Such 'quantitative' indicators certainly suggest that something is wrong either with the relevant regulations or with their implementation, because the numbers of complaints (after 'filtering out' those which are obviously unfounded) typically do not spike arbitrarily.
For example, in the 1990s, particularly in the first half of the decade – when human rights organisations were just being established and the victims of violations were still discovering those who could help them – the numerous complaints of various kinds of ethnic discrimination (massive layoffs, forced evictions, and later difficulties with reconstruction of destroyed houses and repossession of property, etc.) were an accurate indicator of widespread violation of rights determined by the type and action of the whole political and legal system. In later periods, an increased number of complaints about labour or social rights indicated another important area where strong pressures on human rights exist, while the system does not provide adequate protection. As an example of not so numerous, but rapidly growing complaints, the rights of prisoners should be mentioned; apparently, they had endured violations for a long time, but did not know where to turn to; another case in point is the rights of small shareholders who were cheated during the ownership transformation and privatisation.

An increase in the number of complaints does not necessarily mean that the frequency of violations is growing; it is possible that the victims of a certain category only recently became aware of the possibility of approaching organisations for assistance in defending their human rights, although violations had also existed previously. In such cases a sudden increase in the number of complaints is still an important indicator, which shows not only that rights are violated, but also that the victims could not previously get information on possible sources for help.

Apart from these quantitative indicators, active defenders of human rights in associations and other groups also have valuable ‘qualitative’ experience which may help in discovering problems that require strategic litigation. One of these is directly opposite the quantitative. The same way that regulations which are violated too frequently can be considered problematic, it is also the case that those which are almost never violated can be particularly problematic. It could be that the laws which protect rights are drafted in a manner which is so ill-defined and/or narrow in scope that the supposed beneficiaries almost never use them. For instance, this is the case with the act on same sex partnership.

There are also regulations whose violations are not recorded because the victims are so disadvantaged that they lack knowledge, support, and/or confidence necessary to make the very first step in protection of their own rights, by turning to somebody or initiating a legal procedure. Therefore, organisations for human rights can draw many important notions and lessons from cases which are not frequent, but even a single such example can show how poorly protected people can be who are simultaneously victimised by violation of their rights and by grave social circumstances. Thus, just recently we have witnessed a rise of awareness of the situation of persons deprived of the capacity to contract, whose rights are almost entirely unprotected; the public would not be aware of this if somebody didn’t try to do something about the seemingly rare cases of such a ‘marginal’ problem. The situation is similar with regards to police violence against Roma or with violations of the rights of other marginalised social groups.

The second ‘qualitative’ indicator available to civic defenders of human rights is related to how easy or difficult it is to help victims who approach them to really assert their right. There are plenty of ways in which human rights organisations try to help the complainants, most of them having nothing to do with administrative or judicial proceedings. In many cases they try, using direct and informal contacts with relevant institutions, to find out why the person(s) in question cannot get what they are entitled to, and appeal to those in charge to do their job. While doing so, they may discover various obstacles to effective recognitions of rights: unclear competences and/or responsibilities; opaque bylaws (various ordinances, instructions etc.); reluctance, ignorance, or incompetence of persons in charge; possible bias which may indicate corruption; deficient internal regulations or procedures in the institutions, due to which civil servants and clerks cannot be subject to effective disciplinary sanctions, etc.
As organisations for human rights often recourse to the public in their efforts to help the victims of violations, they acquire good and bad experiences and learn about the differential sensitivity of media to different rights and violation thereof. They also learn if this lack of sensitivity is caused by lack of knowledge or by implicit (sometimes even explicit) support of the rights violation in question.

All of these problems in protecting human rights are valuable indicators to be used in the choice of cases where judicial procedures, strategically initiated, could result in changes that go beyond an individual case.

Working primarily with the weakest (as others use professionals or their 'social capital', personal connections and influence when they need to protect their rights), human rights organisations acquire other important experiences as well. In close contacts with the victims, with people who have nobody else to turn to, they learn a lot about their destinies, including matters which were not part of the original complaint. Thus they can find that the person in question is not 'just' a victim of arbitrariness or violence, but also grave economic and social circumstances, wherein violations of personal rights are combined with unrecognised social rights; or that the victim's belonging to a minority category is an important part of their predicament, i.e. that the violations in question are not 'common' but are committed out of hate or other discriminatory motives. This could be additionally confirmed by comparing similar cases.

At the same time, through monitoring the work of the police, state attorneys and courts it can be established that such cases are treated just as individual violations, overlooking the 'factor' of multiple marginalisation or discrimination because of the victim's affiliation to a category which is subject to hatred and discrimination. This can happen, for instance, when the police fail to investigate the possible importance of the fact that a victim of an act of violence was homosexual, or Roma, or a member of a minority religious community. By failing to look into such factors the system itself becomes an accomplice to discrimination.

Activists working with people in specific positions/situations can also detect indirect discrimination. If such people need special efforts and means to get what is guaranteed to everybody by general rights, they are discriminated against even if there are no acts against them. For example, for a long time it was neglected (and sometimes it still is) that general traffic rules and public transportation are not enough for people with disabilities to use without obstacles the possibilities available to others. Or it is still neglected that regular education is still not accessible to a part of the Roma community because education in their first language is not provided; instead, they are expected to make a do with the majority language. There are many regulations that seem fair on the surface, treating everybody equally, which are indeed discriminatory in an indirect way, precisely because they ignore relevant differences which are not a matter of choice, so people cannot change them at will.

The detection of such differences and raising of the problem of their adequate legal recognition often begins with those who try to help individuals to realise their rights. In their encounters with real human destinies, the discrepancies between the formal law and the real conditions of its implementation come to the fore; what also may come to the fore are discrepancies between the law and the moral right, i.e. between rights recognised by the system and rights that should be recognised if we stick to the principles of human freedom, equality, safety, and dignity.

6.1.6 Analysis and criteria for case selection

As this short overview has shown, these discrepancies can have many different forms, which suggest different approaches to strategic litigation. When deciding on the case to be selected, a
through consultation between activists and legal experts is necessary, because this choice must integrate both solving real human problems and reaching the highest achievable legal and social effects.

The first thing to be determined is the nature of the essential problem. Experience in defending human rights suggests that this analysis should be focused on the following questions:

1. Which rights are problematic? indicated by:
   - frequent violations (additionally, followed by insufficient, slow and belated sanctions, or no sanctions at all);
   - violation 'below the radar' of the system;
   - a sudden increase in the number of complaints.

2. Why are they problematic?
   - not sufficiently recognised by law (which puts it in discrepancy with international norms, the constitution, or with moral principles);
   - the law does not define them clearly, does not take into concern all relevant causes of violation, or the instruments of implementation are missing (bylaws and institutions);
   - no relevant jurisprudence (and/or administrative practice): the police, administration, judiciary and other institutions in charge of implementation do not know the rights or are not sensitive to them;
   - the victims lack the knowledge or confidence to demand their rights; if they appear as plaintiffs or witnesses, the system does not protect them;
   - the public is not aware of the importance of the right in question, or even approves of its violation.

3. Who/what are the key actors (both active and passive) of significant violations of the human rights in question?
   - direct perpetrators are too numerous, powerful or able for the existing system capacities to cope with them;
   - the institutions responsible for the right’s protection (police, administration, judiciary, etc.) fail to carry out their duties and capacities – due to incompetence, unaccountability, bias and/or corruption;
   - institutions do not react to systemic weaknesses and do not make necessary changes.

4. What are the external conditions which obstruct or impede the appropriate protection of the right in question?
   - political impact or the influence of particular interests;
   - insufficient resources (budgetary limitations, inadequate personnel capacities and inadequately equipped institutions);
   - inadequate structures and organisation of institutions for human rights protection;
   - pressure of media and public opinion.

Even this list of open issues, which is relatively detailed, certainly isn’t complete, but it suffices to show what is at stake: these questions offer guidelines for analysis which should define the more general, systemic and social causes of major violations of human rights. It is precisely the actors, causes or factors found as the most significant which should be 'attacked' by strategic litigation. The objective is to help victims of individual violations, but also to eliminate or diminish everything that produces new violations or that does not prevent them.
Although strategic litigation case can accomplish many useful effects in a broader sense, such as 'learning' by the system and society, higher accountability of the authorities or empowerment of groups exposed to rights violations, it is essential to define the target which should be directly challenged through judicial procedure. Is it:

- in order that the attention of the public and authorities should be focused on a particularly grave legal issue?
- in order that jurisprudence should be developed for an underused regulation?
- a demonstration that a law needs substantial amending?
- to demand an acknowledgement of responsibility on the part of those who obstruct implementation of law by their poor conduct, failures or incompetence?

This should be decided on the basis of an analysis of each specific human rights issue.

Furthermore, the decision should be made on how far the action will go. Is it sufficient to carry on to the highest regular instance of the judiciary? Are the regular proceedings meant to create the basis for a constitutional complaint? Or is it foreseen that the desired outcome will not be accomplished even when all legal means in the national judiciary are exhausted and the case will be brought before the European Court of Human Rights or another international body? This decision depends primarily on the readiness of the victims of the rights violation and on expert legal estimate of the outlook, as well as on the time, money and work (both professional and voluntary) it would take and whether all necessary resources can be provided.

Finally, it is necessary to choose who will institute the proceedings of strategic litigation. Will the victim do it (with their legal representatives)? Is there an organisation with standing to commence an action? Is it possible and necessary to involve a third party (most often the ombudsman)? These answers depend on the legal situation and the judgement of the legal experts; it is important to keep in mind that it is not only the victims that have a standing to sue, and – where possible – civic organisations can also help.

The ultimate goal of strategic litigation does not have to be a victory in a judicial dispute (although it is desirable). If the assumption was that some legal acts or implementing regulations and mechanisms, or the practice of implementation, were not good, there is a real possibility that the litigation ends in defeat. But even such defeat can be turned into a victory if it manages to demonstrate that the right of the victim was really violated, but the existing system cannot handle such violation because of insufficient investigations, or because legislators failed to include appropriate prohibitions or sanctions, or that prosecutors and judges ignore the intentions of protection of rights.

Regardless of whether it is literally (by achieving a favourable or unfavourable verdict) successful or not, the venture of strategic litigation generally serves a purpose provided it

1. turns attention to a priority problem, leading to change;
2. potentially helps to remove causes of systematic violation of human rights;
3. helps in resolving an important legal issue;
4. makes a significant difference for a particular sector;
5. raises for scrutiny a rule or practice which compromises protection of rights;
6. contests indirect or multiple/intersectoral discrimination;
7. helps in considering and resolving a collision of different rights, etc.
6.1.7 Planning activities and support for strategic litigation

The correct instruments for agency will be chosen on the basis of the decisions listed above, keeping in mind the aforementioned possible goals. These instruments are above all legal, but also include everything that non-judicial actors – civil society organisations and others – can and should do for the strategy to achieve its aim. Here we will highlight the latter, but all activities should be planned and conducted in close cooperation between lawyers and activists.

6.1.7.1 Impact estimate

A was stated during the initial definition of strategic litigation, another name for it is "impact litigation", since its use is not only to give legal satisfaction to individual victims, but to influence the substantial context which brings about violations of rights. Hence, it is essential to assess the possible impact not only of the end result of litigation, but also of its very initiation. Other than the immediate, legal impact reflected in judgements and further possible changes in the system, this influence also holds an essential social and political dimension.

6.1.7.1.1 Attitudes in the social environment

There is a great difference between different kinds of cases. In some, there is an understanding in the social milieu that people are left without adequate protection or even exposed to repression in spite of having legitimate rights. In other cases the public is unaware of rights violations, or believes that the victims have themselves largely contributed to their troubles. Finally, there are cases in which society generally approves of certain rights being withheld. This may – and does – happen due to ethnocentric, xenophobic or other prejudices, because of authoritarianism, or because of insufficient solidarity.

Although people in judicial and executive institutions are not always completely and directly influenced by public opinion, and their attitudes aren't simple reflections of the majority opinion, some general determinants for interpreting social relations and human rights do influence them, as do some fundamental prejudices (especially subconscious ones). It is enough to mention chauvinism in policemen inclined to underestimate family violence, prejudices against the Roma or even the attitudes of judges who believe in the "victim's contribution". If one adds political influences and pressures to which all actors are more or less constantly exposed, and the influence of the media, who might be biased or prone to sensationalism, it clearly cannot be expected that the social milieu will automatically have understanding for the initiation of a strategically planned litigation procedure, nor for it to feel solidarity with the victims and their advocates. And it is precisely this understanding by the social milieu which is important for the case to have wider effects. One should never expect complete agreement (which, in a pluralist society, is not merely impossible, but undesirable); it is important to come to the realisation that there is a problem and that there is enough motivation in public to discuss it. In case of success, this will be the foundation for creating pressure to change the laws or the practice of their implementation.

6.1.7.1.2 The attitude of the victim

The attitude of the victims themselves is the flip side of the attitude in the social milieu and the relevant actors. When planning strategic litigation, all potential difficulties have to be taken into consideration together with the victims of rights violations on whose behalf the proceedings are being initiated: are these persons willing and ready to have proceedings initiated on their behalf, proceedings that will last a long period of time, which will put them under the spotlight of public and media attention, and – if it manages to stir some entrenched interests – may also expose them to inimical behaviour by their opponents, from verbal attacks, through slander, even up to violence? Depending on what the answers to these questions may be, counteractions,
measures of protection etc. have to be foreseen. The answer to a question listed above – how far do we want to go with the litigation proceedings – also depends on the victim’s readiness and acquiescence among other things.

This isn't merely a tactical, not even a strategic question. It is a fundamental moral obligation: in no version or stage of the proceedings may the victim become the means for so-called higher causes and wider values. Their case is of course among other things a means for influencing the system of rights protection, but the victims themselves, their interests and wellbeing may never be subordinated to this. Therefore, if the struggle to assure for the victim maximum legal satisfaction allows the achievement of wider and more far-reaching effects – all the better; but if achieving these inflicts additional suffering and trauma on the victim, without the victim having made a conscious, fully informed decision in favour of this option, without being manipulated, such proceedings immediately have to be cancelled. In arduous, complicated, protracted proceedings that come up against some powerful interests, there will be crises that will affect all other actors (both the lawyers and the activists), but will naturally affect the victims most, and all should be provided with the greatest possible assistance to overcome them. But at all times it should be completely clear, accepted as an explicit rule, that at any moment in time the victim has the right to give up and withdraw, and that he or she will be met with understanding and support, in order to avoid even implicit emotional or moral pressure.

If the victim was exposed to rights violations as a member of a particular group (ethnic or sexual minority, disabled persons, a certain faith etc.), that is if discrimination was at issue, it is important to establish whether other people in this group are in solidarity with him or her and whether their support in the course of the strategically initiated court proceedings can be expected. It is also important to know whether there are active organisations that gather members of this group to represent their common interests, to see whether they would be inclined to cooperate.

6.1.7.2 Support for the proceedings

6.1.7.2.1 Evidence and witnesses

Facts, documents and other material used as evidence in a lawsuit aren’t always easy to gather, especially with meagre resources for prosecuting the case. Data and documentation gathered by human rights organisations may prove valuable here. If organisations cooperate or if they are linked through networks, they can acquire other information as well.

Information on a wider spectrum of phenomena is especially significant in strategic litigation against discrimination. In order to achieve the transferral of the burden of proof on to persons or institutions in a position of power who give unequal treatment to people from various social categories, one has to have available reliable and verified data pointing to such treatment. Frequency of complaints, statistical data on the number of persons who were or were not provided a certain service, or to whom a certain regulated procedure may have been denied, can uncover patterns of practice by those in positions of authority, patterns which may give credit to suspicions of discriminatory behaviour even though a discriminatory stance wasn’t openly manifest in any individual case.

Likewise, the numerous problems of people who have indeed been deprived of certain rights, but cannot be subsumed under any legally defined category, may point to indirect discrimination. It is well-known that this form is not direct discrimination, where people with equal relevant characteristics are treated differently, but the other way round – equal treatment of people who differ from the majority in some significant attributes, which are not recognised by the general norms. In order to convince the court of indirect discrimination, it is necessary to
show that ignoring difference isn’t a matter of an individual case, and that there exists an entire special category of people suffering a deprivation because their specificity hasn’t been recognised. Organisations concerned with the rights of such categories may provide important insights on the basis of complaints they receive, knowledge acquired on the ground and attempts to help the victims. If their experiences show that while there are no violations of the law, certain persons nevertheless find themselves in an unacceptably difficult position; it is a strong signal that strategic action with the aim of improving the laws should be undertaken. The data established by these organisations will likewise represent strong support for such an action.

Insights achieved through the work of organisations dealing with hundreds or even thousands of cases annually aren’t only useful for detecting systematic violations of human rights, but also for uncovering weaknesses in the system designed to protect human rights. A police station that frequently receives complaints of violence, the management of a prison which is the source of an unusually large number of requests for help, an administrative body that doesn’t process regular demands by citizens, a centre for social care that doesn’t monitor the treatment of children and persons deprived of legal capacity, a court that hasn’t made any procedural steps in a case for years... these are all examples in which individual complainants will find it hard to prove that the ‘mistakes’ made are systematic, but a larger number of cases where similar, documented complaints are repeatedly made will paint a different picture. As it is normally difficult to prove that institutions for the protection of rights also significantly contribute to their violation, such data is often irreplaceable in a proceeding with strategic aims.

In some cases, civil society organisations also have the opportunity to conduct or commission an empirical study whose results may also be used in litigation.

What has been said about data, documents and other evidentiary material also goes for witnesses. The situation in which rights are violated has to be observed long-term and known inside-out in order to know who may be able to give relevant testimony, and especially to build these persons’ trust. A good and informed witness may fear exposure, and needs support and protection. Organisations and activists who have shown in deed that they are trying to help often can do more than a formal, still underdeveloped system of witness protection.

Activist groups and organisations may contribute to strategic procedures in some other essential ways; their actions may create cases that will additionally test the practice of institutions that are suspected of violating or insufficiently protecting rights – for example by applying for jobs using different names, typical of affiliation with the majority or minority group, in order to see whether employers react differently. Furthermore, international contacts and networks may provide insights into similar cases and ways of resolving them, or into the consequence of failing to do so.

6.1.7.2.2 Public engagement

Advocating understanding and social support for litigation in the name of human rights starts before the proceedings are initiated. In fact, it starts much, much earlier, with all that which makes up the development of the culture of human rights, improving knowledge of human rights, sensitivity to their violations and willingness to act in their defence. However, a specific case will always start with a situation in which these worthy causes are more or less far from being realised. Therefore, before proceedings are initiated, an awareness of the problem must be created in public in spite of the context being marked by a lack of solidarity, prejudice and insensitivity to discrimination.

The most direct route to achieving this aim is to inform the public about the injustice inflicted upon the victims. Here “informing” doesn’t mean giving abstract data on such-and-such
violations of rights as defined in the formal provisions of the rules that were breached, but a living tale of real people and what the violation of their rights actually mean in their everyday lives.

When the public has been acquainted with the situation, it can find solidarity with the victims, since everyone can imagine themselves in a similar situation. This arouses interest in the causes and nature of the infringement that the victims have suffered, as well as questions of who is responsible.

If such a specific case has come into the focus of public attention, it will be possible to effectively warn of more abstract, systemic causes such as inadequate legal norms or their poor implementation. In this context, it may also be easier to explain why initiating court proceedings holds strategic significance, that is, how their favourable outcome will help a more systematic elimination of this kind of injustice in the future.

Can we also count on public solidarity in cases where the victims concerned belong to a minority or marginalised group? For instance, if around 10 percent of the population are affected by some kind of disability, why should the other 90 percent imagine themselves in their position and accept that society has to recognise certain special rights to suit their specific predicament? Or if members of the Roma minority comprise less than 1 percent of the population, and a significant part of this minority lives far below the standards of housing, social protection, education etc. that are considered minimally acceptable in society, why should the majority accept their hardship as their own problem and support the struggle against their discrimination?

Experiences differ. People are capable of empathy with those who are different, that is, with those who live in very different conditions, if they have a real experience of them as they are, free of 'filters' and distortions. However, there are many 'filters' and distortions, and they affect everybody. The first one is the perfectly normal selfishness that prevails in an individualistic society in which everyone is vulnerable to economic and other uncertainty, and everyone needs the support and understanding of others. Especially in a society that suffers from a lack of human security and economic troubles to boot, many will react as if they were saying, "Yes, I know these people are in trouble, but so am I and nobody is helping me".

There are also many prejudices regarding those who we classify as belonging to special categories, to 'others' who somehow stand beyond the majoritarian, 'normal' "Us". Why would we help refugees, or those in need of asylum, or the Roma; when they aren't doing anything themselves and are just waiting for someone else to help them? Why should we be welcoming towards minorities and hand them privileges, when they have all the same rights as we do? One of these prejudices is the attitude that many victims of human rights violations have somehow contributed to their troubles (like, for instance, women victims of rape), or that they have themselves chosen to be special and their way of life that separates them from the social mainstream (like sexual minorities).

In this Toolkit we cannot demonstrate how to deal with each of these barriers to achieving support from the social surroundings for strategic struggle against human rights violations. They are numerous, manifold and specific to each particular case. But it is important that in each specific case these barriers be taken into consideration, the condition for which is that they be studied - not only from experience and comments in the media, but also from social science research and critical theoretical analyses. When making public appearances intended to familiarise the public with the case, and prepare it to accept and follow strategic litigation, one has to anticipate explicit and implied questions and scepticism, have ready answers, and provide beforehand the information and insights that will help to give an overview of the
specific human situation behind the 'wall' of misunderstanding, mistrust and pre-judged notions.

Even if we cannot rely on the solidarity which comes from the ability to identify with the victim, we can rely on some generally accepted values. If everyone is guaranteed freedom of movement, then special means of transport have to be secured for those who, due to physical difficulty cannot use the common means of movement available to all. If all have an established right to an education, then minorities whose native language differs from the majority language or who don't sufficiently know the majority language have to be recognised as having the right to an education in their mother tongue. If people have the right to legally regulate their life as a couple through the institution of marriage, which allows joint disposal of assets, mutual care, child upbringing etc., then it is discriminatory to refuse this right to same-sex couples. Rights equality belongs among the basic elements of fairness, and with additional effort, it may be demonstrated to the public that fairness also includes special rights for those categories whose special nature precludes them from having what the majority receives on the basis of general rights alone.

6.1.7.2.3 **Relations with the media**

Just as the public's sensitivity has to be constantly developed in the course of all activities and actions, relations with the media as unavoidable intermediaries in public relations\(^{366}\) have to be continuously developed and maintained. They have to be informed of all significant activities and insights, and those outlets, journalists and editors who show the greatest interest in and understanding of the issues of human rights have to be noted. It is worth providing them with information of more than an ephemeral, quotidian significance, which they may find of use when researching the background to certain phenomenon.

If education for the media regarding a certain field of human rights is being provided, particular effort has to be made to involve editors as well, since without them even those journalists with a good understanding of human rights and sensitivity to their violations won't have enough opportunities to demonstrate these through contributions in the media.

When organising public discussions, panel discussions, roundtables, etc. around the issues of certain rights and social attitudes towards them, it is worth involving some of the editors as active participants or panellists in order to see the view 'from the other side', that is, in what ways the media select their topics, how they absorb information originating from 'civil' sources and how they present this, including what they leave out or modify.

6.1.7.2.4 **Following the proceedings**

**Informing the public:** before initiating strategic litigation proceedings, it is best to inform the public by means of a *press conference*. Otherwise, journalists' time should be respected, so press conferences shouldn't be called too often. They should be tied to a certain significant event, which is exactly how the strategic litigation should be presented. This isn't the initiation of any case proceedings, but a case that may potentially have consequences that reach beyond the individual. This should be clearly stated, and it should be shown on what basis this assertion is made; in other words, it should be shown what it is that renders the rights protection system in discrepancy with that which it should be protecting.

Since such an approach is relatively rare and new in Croatia, it is necessary to have direct contact with journalists, in which they can get to know the actors in this undertaking and seek

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\(^{366}\) The expression "public relations" is used in the original sense, as a name for a real active relationship with the public, informing, communicating and making effort to receive an active response, and not an euphemism for advertisement, manipulation and 'working' the opinion marketplace.
additional information and explanations. It is worth having a representative of the legal team representing the victim speak, in addition to - if he/she assents - the person or persons whose rights have been violated, so that the representatives of the media may get an immediate insight into the reasons why the injustice must be systematically rectified. If the rights violation at issue affects an entire social category or minority group, a representative of this group or minority or of an organisation dealing with these issues and familiar with the topic may also give useful information.

Attention should be paid to several essential elements in organising a press conference:

- **The announcement/notification should contain concise highlights of what is important and new** – a certain violation of human rights, as well as the strategic aim that the proceedings will have, not only to achieve individual but also social justice, that is, that the accused aren't only the immediate perpetrators of the violation, but certain components of the system itself. This should mark out the conference as a special event, while the invitation should not be burdened with information that is to be conveyed at the conference itself. Those journalists and editors with whom good relations have already been established can be additionally individually informed of the significance of the event and motivated to accept the invitation, but the main information should be left for the conference itself, so others wouldn’t feel that some were given privileged information earlier on.

- **The conference itself should have a moderator**, who will present the speakers, manages the duration of the individual speeches and asks the journalists to put forward their questions. A press conference isn’t a public discussion, and the speakers should be warned beforehand to talk briefly and concisely, with the focus on essential theses; the opportunity to say all the rest will come up in answers to journalists’ questions or, if some time remains, at the moderator's behest. It is best if the conference is managed by a person who is normally in touch with the media and who knows at least some of the journalists.

- **The journalists should be provided with brief written material** in which the most important data will be set out. Each speaker should provide a summary of their presentation, some 10 to 15 lines to be included in the written material. This helps journalists avoid mistakes in writing down data such as numbers, names, legal provisions or names of institutions, while it is helpful to the speakers to have set apart the essential elements beforehand. Information on reports, documents and other sources at the disposal of human rights organisations that support strategic litigation and who have organised the conference may also be included, which the journalists can receive on demand. If there an especially eloquent short document exists which demonstrates well the issues surrounding the case in hand, a copy may also be added. This written material should only be distributed to the journalists when the conference ends.

Press conferences can also be called in connection to other significant events in the course of the proceedings: following the first discussion; if a significant reversal occurs during the course of the proceedings; if an act of pressure, an utterance by a representative of institutions of authority that is out of order, or anything else that may put the regularity of the proceedings in question occurs; finally, following the first-degree judgement, when either further actions are to be announced in case of a favourable outcome, or an appeal and further actions if the outcome was unfavourable.
If the media take an interest, it is also possible to mediate through arranging interviews with significant actors, at least by helping journalists to establish contact. Naturally, this too cannot be done in the case of the victim of rights violations without her/his free and informed consent.

For all other information to be provided to the media, press releases can be used. As the media receive many such releases, there is always the danger that these may be ignored, so they are not recommended for new and especially significant occurrences, actions or events. However, after the case had already become familiar, and its actors gained credibility, press releases are sufficient for new information. When composing press releases, some essential elements of interest and relevance need to be taken into account:

- they have to have a **recognisable motive**, and not simply put forward opinions; opinions can and should be put forward, but in the form of responses, comments or reactions to a specific and current cause – someone's statement, action, an appearance of new information etc.; the response itself has to be substantiated with facts, quotes or data;

- **the main, 'punch' point has to be made at the very beginning**: this may be the occasion which triggers the reaction or an opposing view, and by no means some general proposition (for instance, "we all know that human rights have to be systematically protected"...);

- **all essential circumstances and other significant information have to be included**, but in the most succinct way possible;

- it is useful to **quote specific information** from an independent source that supports your stance, or (in direct quotation) a statement by a significant actor;

- a copy of a **significant and/or illustrative document**, information or photograph may also be attached to the press release.

**Other forms of reporting**: Reports on the state and violations of human rights are much more comprehensive than information aimed directly at the media. These are regular yearly reports produced by human rights organisations, analyses and reports on certain specific phenomena, parallel or shadow reports to international organisations and institutions, etc. All of these help to foster a better understanding of the context of the case in which strategic litigation is being initiated, to see its significance which reaches beyond the individual case, and to view the wider patterns of human rights violations.

This is why it is very important that the organisations which produce these reports allow them to be freely accessed by others. Naturally, the most convenient medium is the internet, which is easily accessible, allows targeted searches and extraction of relevant information, and doesn’t accrue additional costs associated with copying or printing.

Reports created in the context of monitoring compliance with international norms may hold special significance in acquiring international support for strategic litigation, if needed.

**Other public activities**: The media is not the only means of acting in public and reaching the public. Human rights organisations have a number of public activities they can organise themselves in their ‘repertory’:

- **Public discussions** – forums, panel discussions, roundtables, conferences, etc. These can serve to give more detailed and comprehensive demonstrations of the
issues linked to the case of strategic litigation, explain the reasons for its initiation and expectations regarding the results, to hear different arguments and give additional substance to the claim being represented when faced with these arguments.

- **Exhibitions**: visual material portraying the situation that served as a trigger for the strategic 'correction' of the system of protection of human rights could be presented to the public in a public space. This material may consist of depictions of the living conditions of the people exposed to rights violations, photographs of critical events, if they exist (this can be done in cooperation with the media or photographers), facsimiles of significant documents, video or audio recordings, etc.

- **Public performances or provocative actions** that symbolically depict the situation linked to systematic rights violations and enable citizens to take part in a symbolic way.

Of course, these are only some of the possible activities. Creative application of the experiences of civil society organisations provides many more possibilities.

Even the media themselves may be used in a way that is independent of the journalists and editors of news sections – for example by comments written by the participants in the strategic litigation actions themselves.

6.1.7.2.5 **Activities following the conclusion of the case**

In the case of a *favourable outcome*, two essential activities remain:

1. **Monitoring the implementation of the ruling**: even a final judgement isn't automatically followed by a by-the-book and complete implementation. Just as the institutions were shown to be untrustworthy when strategic litigation had to be initiated in order to protect a human right, so too can there be no confidence now that they will proceed conscientiously and fully implement its results. For example, not even a judgement by as high-ranking an institution as the European Court of Human Rights was sufficient to make the Croatian educational institutions stop segregating Roma pupils in separate classes, and the deadline foreseen in the national strategy to rectify this situation does not fall until the year 2020.

   Lawyers will be required to monitor the fulfilment of the judgement, while civic activists can 'breathe down the institutions' necks' in the same way that they do when trying to intervene on behalf of people who contact them with complaints of rights violations. In all this, it will be necessary to attract and maintain the public's attention.

2. **Using the judgement for systemic changes**: Relying on the fact that the court has established that strategic litigation was justified at the level of the specific case, specific initiatives to change the appropriate regulations have to be formed, or additional inspection of the causes of the systematic rights violations demanded in order to change the practice of their implementation. Strategic litigation is only fully successful with the execution of a legal reform or reform of the system of the implementation of laws. The results of the litigation also have to be used to educate the public, as well as those who enforce the law.

In the case of an *unfavourable outcome*, an essential question remains: **does the human right at issue remain without real protection even after all legal means have been exhausted?** In other words, were we in the right when we initiated the proceedings, or did its outcome show
that we laboured under a misapprehension? If it was a misapprehension, it should be honestly admitted, and we should express satisfaction that after all, adequate and efficacious protection of rights does function.

However, it is very possible that even following legal proceedings that were properly concluded certain rights of certain vulnerable groups are still not satisfied, while the judgement doesn't mean that this right has been adequately protected. The reason for this lies in the fact that positive regulations never fully operationalise the basic moral imperatives for which human rights have to be protected. If in addition to this, the practice of applying the law is dominated by legal positivism, that is, 'grammatical' interpretation of the rules, which doesn't see the moral intention in the foundations of formal regulations; that non-standard cases and even entire categories may fall through cracks. This is especially possible when the issue is of indirect discrimination, whose perception and regulation demand painstaking observation of the social reality and sensitivity to sustained special needs of certain categories of the population.

In such cases, the struggle simply goes on. Above all, the public has to be notified of the reasons for which not even the decision by the highest judicial body is considered legitimate and entirely satisfactory. These reasons will have to be explained in detail and with perseverance, not limiting oneself merely to informing the media, but using all the other listed ways of public agency.

However, there is one point where self-criticism is needed – not only to gain credit with the public, but above all for the sake of correctness. Relying on moral imperatives, although absolutely indispensable in advocating human rights, hides the possible trap of mistaking and replacing the moral imperative as a final justification for the subjective feeling of fairness. None of us are above being biased, even when there is no self-interest involved and when we are being selfless. Our own inclination, or perhaps antipathy towards those we perceive as the violators of rights may compel us to feel special solidarity with certain victims of rights violations. Against this, a rationally founded morality concerns intersubjective relations, in which all are appreciated as free subjects with equal rights and dignity, and their abstract equality is tied to sensitivity to all those specificities that cannot be changed at will, and which significantly impact one's access to social goods. It is possible to rationally define the meaning of moral imperatives in relation to specific cases, which means it can be done intersubjectively, through discussion, in which individual limitations and biases won't disappear, but may be brought to everyone's awareness in the confrontation of different standpoints, and thus to a certain extent neutralised.

This is the reason why it is necessary that an unfavourable outcome of strategic litigation, that is, the aforementioned question "were we right or wrong?" be thoroughly discussed with participants beyond our circle, who are also engaged with human rights and/or have expertise in the issues of human rights. If our conviction that the right in hand had to be strategically defended stands this test, we can continue our public struggle with full confidence.
### 7 Annex A: Accession, Succession and Ratification of Croatia to key relevant international human rights instruments

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<thead>
<tr>
<th>Treaty / Convention</th>
<th>Date of Signature</th>
<th>Date of Accession / Succession</th>
<th>Date of Ratification</th>
<th>Relevant Declarations or Reservations</th>
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