

Council of Europe International Conference on Protection of Human Rights in Montenegro

USE OF DOMESTIC REMEDIES, JUDICIAL AND NON-JUDICIAL MECHANISMS BY LEGAL PROFESSIONALS

CONFERENCE REPORT



INTERNATIONAL
CONFERENCE

Author:
Dagmara Rajska

PODGORICA,
28 june 2016

Funded
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Implemented
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on Protection of Human Rights in Montenegro

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28 June 2016
Podgorica, Montenegro

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¹ The European Programme for Human Rights Education for Legal Professionals (HELP) supports the Council of Europe Member States in implementing the European Convention on Human Rights at the national level.

Council of Europe: 2016

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Photos © Council of Europe

Layout and cover design:

3M Makarije

Published by the Council of Europe

F-67075 Strasbourg Cedex

www.coe.int

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Printed by 3M Makarije

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USE OF DOMESTIC REMEDIES, JUDICIAL AND NON-JUDICIAL MECHANISMS BY LEGAL PROFESSIONALS

28 June 2016
Podgorica, Montenegro

"European Court of Human Rights case law is like the air. It is the air of this case law that we should breathe with in all State institutions..."

Mr. Adam Bodnar, Ombudsman of Poland



„Opening speakers”, starting from left:

- Mr. Daniel Schmidt, Head of South East Europe and Turkey Unit, Human Rights National Implementation Division, Council of Europe
- H.E. Mr. Mitja Drobnic, Head of Delegation, European Union Delegation to Montenegro
- Mr. Philippe Boillat, Director General of Human Rights and Rule of Law, Council of Europe
- Ms. Desanka Lopacic, President, Constitutional Court of Montenegro
- Mr. Sucko Bakovic, Ombudsman of Montenegro

BACKGROUND

Judicial protection of human rights largely depends on the effectiveness of remedies provided at national and international levels in order to redress breaches of human rights guaranteed by international instruments such as the European Convention on Human Rights. Providing remedies at the national level is a priority laid down in the principle of subsidiarity. The principle of subsidiarity within the Convention's system depends to a large extent on the interaction between judicial and non-judicial legal structures, before cases can be submitted to the European Court of Human Rights (ECtHR). Access to international enforcement mechanisms, such as ECtHR is seen as a last resort, after the state had previously failed to redress the violation and to provide justice in the national legal system.

Protection of human rights can be achieved from addressing non-judicial mechanism to engaging action before a court. Domestic remedies are viewed as more rational and more effective legal means than international ones because, primarily, the national authorities understand better the contextual situation of victims of human rights violations in their country. Furthermore, access to the national remedies is more rational - the redress can be obtained faster, and making a claim before national authorities requires fewer resources than making a claim before an international body. The exhaustion of domestic remedies requires the use of available procedures to seek protection and prevention of future human rights violations (preventive dimension), as well as other models of satisfactory resolutions in case of the infringements, which would allow for elimination of its consequences in such way.

OBJECTIVES

The proposed one-day conference explored possibilities available at national level concerning the use of judicial and non-judicial procedures by legal practitioners in Montenegro. Moreover the conference explored the interaction, which is necessary to exist between these two structures and address the main challenges, which lead to optimising human rights protection at national level. The newly established system of constitutional complaint in Montenegro has been recognized as an effective domestic remedy at national level in the recent judgment of the ECtHR in the case of *Siništaj and Others v. Montenegro* (no. 1451/10) of 24 November 2015. This now means that applicants have first to exhaust this remedy before turning to the ECtHR if their claim has not been satisfied.

Moreover, the non-judicial structure which is available at national level with the Ombudsperson's institution,¹ has the right to initiate court proceeding in certain areas and under specific conditions, intervene and support the victim in strategic litigation (area of protection from discrimination) which is of the utmost importance for the victims of human rights violations.

In this context, the conference aimed to provide a platform for exchange of experiences at national level among key stakeholders in charge of the protection of human rights. The participants of the conference benefited from the comparative experiences of countries where non-judicial structures also exist.

¹ The author uses throughout the text well recognized name of Ombudsman or modern variations of this term: Ombudsperson or, if it is appropriate, Ombudswomen.

In Montenegro, judicial structures are comprised of both:

1. Courts with general jurisdiction and specialized courts with jurisdiction in civil and administrative disputes and in criminal and misdemeanour procedures, whose actions directly influence the protection and realisation of human rights.
2. The Constitutional Court.

The conference explored the aspects of accessing the courts, which is in some cases poses a problem, especially for economically marginalised persons, vulnerable persons or those who live in remote areas. The judicial mechanisms, which are the most efficient tools in many situations, are often not accessible to those who need them and frequently complicating and postponing the way of resolving human rights-related disputes.

An ombudsperson acts in court proceedings (for example engaging judicial actions in the context of discrimination issues) and in the non-judicial disputes resolution mechanism between the state and individuals, i.e. acts in the restrictive mandate in regards to relations between individuals. Its fundamental role is to enhance the protection of human rights. Ombudspersons' work completes this protection by providing informal methods of dispute resolution and non-legally binding problem prevention. These actions undertaken by the Ombudsperson's office result in recommendations, which have an added value to the legally binding assessments of the judiciary. For instance, the Ombudsperson's own-interest investigations and non-binding recommendations are a considerable contribution to the protection of human rights, in addition to those attained by judicial mechanism.

The conference focused on exchanges of experiences with the main stakeholders in Montenegro, such as the Constitutional Court, legal practitioners and representatives of the Ombudsperson's Office. The Council of Europe invited keynote speakers, who identified good practices with regard to the setting up and the implementation and use of such remedies. It also provided a unique forum to discuss the concept of national remedies within judicial and non-judicial mechanisms, and the principle of exhausting national legal remedies before seeking international protection. The emphasis of the conference was on the interaction between the relevant stakeholders, such as the Constitutional Court, the Supreme Court, the Ombudsperson's Office, practicing lawyers and NGOs. The discussion also focused on the leading role of constitutional courts and their efficiency as a national "filter" for cases before they reach Strasbourg depending on the effective and appropriate use of available national legal remedies.

The following three challenges were the focus of the discussions:

1. Accessibility of judicial and non-judicial models of legal protection and their use by legal practitioners;
2. The respective advantages of judicial and non-judicial mechanism;
3. The popularisation of the use of judicial and non-judicial domestic remedies.

The conference was enriched with the participation of representatives coming from countries where similar structures operate: Bosnia and Herzegovina, Croatia, Georgia, and Serbia. Considering that the Council of Europe has identified challenges in these countries through on-going co-operation projects, the conference provided a platform for communication among these countries and exchange of practical experiences, which is one of the pillars that contributed to the building of institutional legal capacities and strengthening efficient implementation of human rights at national level. The constitutional Court Presidents from Bosnia and Herzegovina and Croatia presented the best practices of judicial mechanism existing in their countries, while the Constitutional Court of Montenegro will hosted their presence while celebrating the success and recognition of the constitutional complaint as effective domestic remedy.

The participation of Polish Ombudsperson's Office was seen in a view of exchanges of experiences. The Polish Ombudsman has similar but stronger legally grounded competencies compared to the Montenegrin Ombudsperson's office that can engage in judicial actions and have good experience in strategic litigation. The other Ombudspersons' offices such as Ombudspersons' offices from Bosnia and Herzegovina and Georgia are also considered as good source for best practices exchanges.

EXPECTED RESULTS

- Better understanding of both mechanisms and their complementarity;
- Raised awareness and dissemination of good practices about the use of available domestic remedies for the protection of human rights;
- Increased networking and partnerships among relevant stakeholders;
- Commonalities of stakeholders with similar legal culture, and best national solutions for the national implementation of human rights in areas identified through comparative analyses based on open peer-to-peer discussions.

METHODOLOGY

The one-day conference provided an outline of the available judicial and non-judicial structures through half-day plenary sessions, with keynote speeches provided by Council of Europe experts and consultants. In-depth discussions were held in the afternoon, with a mixed composition of judges, lawyers and representatives of the Ombudsperson's Office and NGO representatives. Each session finished with a set of conclusions, which were subsequently presented at the closing session at the end of the conference.

Materials of the Conference, including summaries of the issues discussed and presentations by keynote speakers will be made available online.

PARTICIPANTS

Participants were representatives of the Constitutional Court of Montenegro, the Supreme Court of Montenegro, the Ombudsperson's Office of Montenegro, Bar Association of Montenegro and NGOs. Other participants include representatives of judicial and non-judicial mechanisms from Bosnia and Herzegovina, Croatia, Georgia and Republic of Serbia, judges of the ECtHR, lawyers of its Registry and the Council of Europe Secretariat. The average number of participants was of 40-60.

VENUE AND LANGUAGES

The Conference was hosted by the Constitutional Court and the Ombudsperson's Office of Montenegro. All sessions took place in the premises of Hotel Ramada. The working languages were English and Montenegrin with simultaneous interpretation provided.

9:30	Registration
	Welcoming - International commitments, national visions and achievements
	European Union Delegation to Montenegro; H.E. Mr. Mitja DROBNIC, Head
10:00	Council of Europe; Mr. Philippe BOILLAT, Director General of Human Rights and Rule of Law
	Constitutional Court of Montenegro; Ms. Desanka LOPICIC, President
	Ombudsman of Montenegro; Mr. Sucko BAKOVIC
10:50 - 11:00	Coffee break
	The constitutional appeal - An effective domestic remedy according to the European Court of Human Rights?
11:00	Research Division of the European Court of Human Rights; Ms. Ana VILFAN-VOSPERNIK
	Third party interventions - A common and effective tool used before the European Court of Human Rights?
11:20	Office of the Commissioner of Human Rights of the Council of Europe; Mr. Furkat TISHAEV
11:40	<i>Discussion</i>
	<i>Chaired by Mr. Daniel SCHMIDT, Head of South East Europe & Turkey Unit, Human Rights National Implementation Division, Council of Europe</i>
12:00 - 13:30	Launch
13:30	Session 1 - Judicial Mechanisms
	The concept of domestic remedies, application of judicial and non-judicial mechanism in experience of Croatia
13:40	Ms. Jasna OMEJEC, Former President of Constitutional Court of Croatia
	The concept of domestic remedies, experience of Bosnia and Herzegovina
14:00	Mr. Mirsad CEMAN, President of the Constitutional Court of Bosnia and Herzegovina
14:20	<i>Discussion</i>
	<i>Chaired by Ms. Milica VESOVIC, Project Co-ordinator, Human Rights National Implementation Division, Council of Europe</i>

**15:00 -
15:15**

Coffee break

13:30 **Session 2 - Non-Judicial Mechanisms**

13:40 **Implementation of the ECtHR by national level main challenges, use of non-judicial mechanism - Polish experience**

Mr. Adam BODNAR, Commissioner for Human Rights, Poland

14:00 **Use of non-judicial mechanisms, experience of Bosnia and Herzegovina**

Mr. Ljubinko MITROVIC, Ombudsman, Bosnia and Herzegovina

14:20 *Discussion*

Chaired by Mr. Sergey DIKMAN, Project Co-ordinator, Human Rights National Implementation Division, Council of Europe

**15:00 -
15:15**

Coffee break

15:20 **Conclusions**

15:30 *Discussion/open floor*

Chaired by Mr. Andrey ESIN, Project Manager, Council of Europe Office in Pristina, Human Rights National Implementation Division

16:30 **End**

17:00

Cocktail reception

LIST OF PARTICIPANTS

Bosnia and Herzegovina

1. Mirsad Ceman, President of the Constitutional Court of the Bosnia and Herzegovina
2. Ljubinko Mitrovic, Ombudsman of Bosnia and Herzegovina

Croatia

3. Jasna Omejec, former President of the Constitutional Court of the Croatia

Georgia

4. Meri Kochlamazashvili, Public Defender's Office of Georgia
5. Eka Khutsishvili, Public Defender's Office of Georgia

Kosovo¹

6. Isa Hasani, Deputy Ombudsman of Kosovo*

Montenegro

Constitutional Court of Montenegro

7. Desanka Lopacic, President of the Constitutional Court of Montenegro
8. Miodrag Ilickovic, Judge of the Constitutional Court of Montenegro
9. Hamdija Sarkinovic, Judge of the Constitutional Court of Montenegro
10. Mevlida Muratovic, Judge of the Constitutional Court of Montenegro
11. Dragoljub Draskovic, Judge of the Constitutional Court of Montenegro
12. Milorad Gogic, Judge of the Constitutional Court of Montenegro
13. Budimir Scepanovic, Judge of the Constitutional Court of Montenegro
14. Slavka Maras, Constitutional Court Advisor, Constitutional Court of Montenegro
15. Gorica Dozic, Constitutional Court Advisor, Constitutional Court of Montenegro
16. Sandra Mikulic, Constitutional Court Advisor, Constitutional Court of Montenegro
17. Marija Ivezic, Constitutional Court Advisor, Constitutional Court of Montenegro

¹ All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

18. Maja Jankovic, Constitutional Court Advisor, Constitutional Court of Montenegro
19. Nerma Dobardzic, Constitutional Court Advisor, Constitutional Court of Montenegro
20. Drazen Dosljak, Constitutional Court Advisor, Constitutional Court of Montenegro
21. Ivan Radojicic, Constitutional Court Advisor, Constitutional Court of Montenegro
22. Sonja Korac, Constitutional Court Advisor, Constitutional Court of Montenegro
23. Milan Vukcevic, Advisor, Constitutional Court of Montenegro
24. Slavko Glavatovic, Advisor, Constitutional Court of Montenegro
25. Dijana Drobnjak, Advisor, Constitutional Court of Montenegro
26. Jelena Novakovic, Advisor, Constitutional Court of Montenegro
27. Marko Markovic, Advisor, Constitutional Court of Montenegro
28. Ana Vuksanovic, Advisor, Constitutional Court of Montenegro

Government of Montenegro

29. Zoran Pazin, Minister of Justice
30. Mladen Dragasevic, Ministry of Foreign Affairs and European Integration
31. Valentina Pavlicic, State Agent of Montenegro to the European Court of Human Rights in Strasbourg

Ombudsperson's Office

32. Sucko Bakovic, Ombudsman of Montenegro
33. Zdenka Perovic, Deputy Ombudsman of Montenegro
34. Petar Ivezic, Deputy Ombudsman of Montenegro
35. Milana Bojovic, Head of Department for External Relations

Judiciary/Legal professionals

36. Vesna Medenica, President of Supreme Court of Montenegro
37. Miras Radovic, Judge of the Supreme Court of Montenegro
38. Senka Danilovic, President of the Managing Board, Centre for Training in Judiciary and State Prosecution Service
39. Masa Adzic, Head of Department for in-service training, Centre for Training in Judiciary and State Prosecution Service
40. Sinisa Gazivoda, Lawyer
41. Bojana Franovic, Lawyer

Civil society

42. Nenad Koprivica, NGO Centre for Democracy and Human Rights
43. Boris Raonic, NGO Civic Alliance
44. Tea Gorjanc Prelevic, NGO Human Rights Action
45. Mirjana Radović, NGO Human Rights Action
46. Vlado Dedovic, NGO Centre for Monitoring and Research

International organisations

47. Tomica Paovic, Democratic Governance Team Leader, UNDP Montenegro
48. Ana Bukilic, OSCE Mission to Montenegro

Poland

- 49. Mr. Adam Bodnar, Ombudsman of Poland
- 50. Ms. Dagmara Rajska, Human Rights consultant

Serbia

- 51. Bratislav Djokic, Judge of the Constitutional court of the Republic of Serbia
- 52. Milan Stanic, Judge of the Constitutional court of the Republic of Serbia
- 53. Tomislav Stojkovic, Judge of the Constitutional court of the Republic of Serbia
- 54. Dusan Ignjatovic, Bar Association of the Republic of Serbia
- 55. Jugoslav Tintor, Bar Association of the Republic of Serbia

Council of Europe

- 56. Philippe Boillat, Director General of Human Rights and Rule of Law, Council of Europe
- 57. Daniel Schmidt, Head of South East Europe and Turkey Unit, Human Rights National Implementation Division, Directorate General of Human Rights and Rule of Law, Council of Europe
- 58. Milica Vesovic, Project Coordinator, Human Rights National Implementation Division, Directorate General of Human Rights and Rule of Law, Council of Europe
- 59. Sergey Dikman, Project Coordinator, Human Rights National Implementation Division, Directorate General of Human Rights and Rule of Law, Council of Europe
- 60. Ana Vilfan-Vospernik, Lawyer, Research Department, Registry of the European Court of Human Rights
- 61. Furkat Tishaev, Advisor to the Commissioner for Human Rights, Council of Europe
- 62. Silvija Panovic Djuric, Project Manager, Council of Europe Office in Belgrade
- 63. Andrey Esin, Project Manager, Council of Europe Office in Pristina
- 64. Boris Ristovic, Senior Project Officer, Council of Europe Programme Office in Podgorica
- 65. Ana Krusic, Project Assistant, Council of Europe Programme Office in Podgorica



Participants

OPENING

1. H.E. Mr. Mitja Drobnic, Head of Delegation, European Union Delegation to Montenegro

Effective protection of human rights allows us to live in diverse societies in which every individual is equal in exercising rights freely. Human rights are an indivisible part of the rule of law. On its path to the EU, Montenegro must ensure that adequate legal instruments are in place to guarantee the protection of human rights for everyone. Most importantly, these instruments should be effectively applied in practice by the legal professionals, in particular the judicial authorities and the Ombudsman.

Montenegro is gradually shifting its focus from incorporating EU standards into its legislation to improving its institutional framework and supporting activities that make the protection and enforcement of human rights possible. However, that lack of a uniform approach and low levels of penalties in the area of human rights violations create legal uncertainty. It is therefore of crucial importance that all human rights institutions are further reinforced.

The EU supports Montenegro in many different ways by enhancing the efficiency of relevant institutions to promote and protect human rights of marginalised groups, such as LGBTI, Roma and other ethnic minorities or people with disabilities. The two most concrete examples of assistance are the two projects with which the institutions are familiar: "Support to the Ombudsperson's Office and the Constitutional Court in applying the European Human Rights Standards", as well as the "Support to National Institutions in Preventing Discrimination in Montenegro." The fact that the EU has provided over 1 million euros for these two projects reflects the high commitment to the issue of protection of human rights.

The European Union will continue to support Montenegro in ensuring effective protection of human rights, the ownership of this process must be with Montenegro and its institutions. Human rights must be protected not simply because of the process of Montenegro's EU integration, but first and foremost because of its citizens.

2. Mr. Philippe Boillat, Director General of Human Rights and Rule of Law, Council of Europe

The Council of Europe is the leading Human Rights, Democracy, and Rule of Law pan-European Organisation. Montenegro, being a Member State of the Council of Europe is rightfully faced with high expectations to live up to this mission statement.

Progress has been achieved in the last nine years, since Montenegro joined the Council. The national legislative framework and court practice relating to human rights and the rule of law has been considerably improved.

There are two concrete examples of these positive achievements concerning judicial and non-judicial mechanisms dealing with human rights violations, respectively a constitutional complaint mechanism and Ombudsperson Institution.

Their introduction in Montenegro is based on the requirement that Human Rights are first of all and best protected at home, at the national level. Based on the principle of subsidiarity, states have to ensure that all those whose rights and freedoms are violated shall have an effective remedy before a national authority. Access to international enforcement mechanisms, such as the Strasbourg Court, has to be seen only as a last resort, after the State has previously failed to redress the violation and provide justice in the national legal system. This is the expression of the condition of the exhaustion of domestic remedies, which is a prerequisite for the admissibility of an application before the Strasbourg Court.

Constitutional complaint

In 2007, an amendment to the Constitution established a mechanism of constitutional appeal. This new remedy allows for a complaint of an alleged human rights violation to be lodged before the Constitutional Court following the exhaustion of all other domestic remedies.

However, this mechanism was not considered fully effective by the European Court of Human Rights. Hence, it was still for the Court in Strasbourg to deal with a large number of complaints, as the national system of Human Rights protection was considered insufficient.

Eventually, and after the adoption of the Montenegro Constitutional Court Act in 2015, the Strasbourg Court recognized the system of constitutional complaint in Montenegro as an effective domestic remedy at national level in the recent judgment of *Siništaj and Others* (no. 1451/10) of 24 November 2015.

This means that applicants have first to exhaust this remedy before turning to the Strasbourg Court if their claim has not been satisfied. This is a significant achievement and pays off the effort that the Constitutional Court has been investing in order to provide protection of human rights at national level.

To make it even more powerful, this judicial remedy has to be seen in the interaction with non-judicial remedies.

Ombudsperson Institution

The ombudsperson provides an important non-judicial dispute resolution mechanism between the state and individuals. Its fundamental role is to enhance the protection of human rights. This mechanism provides informal methods of dispute resolution and non-legally binding problem resolution.

The Ombudsperson enjoys a rich mandate in the areas of the fight against ill treatment, torture and anti-discrimination. To fulfil the broad mandate, the Ombudsman has worked hard to overcome or at least mitigate the challenges faced by the institution. These challenges included limited resources, increasing caseload, and the need to build capacity in new thematic areas.

These two mechanisms, the judicial and the non-judicial, unfold their full potential only if they are seen in complementarity.

The Ombudsman has the right to initiate court proceedings in certain areas such as protection from discrimination and under specific conditions, to intervene as a third party and support the victim in strategic litigation. This function is of utmost importance for the victims of human rights violations. This practice of *amicus curiae* gives certainly more weight to the case. At Strasbourg Court level, the Commissioner for Human Rights has a possibility to become a third party intervenor before the European Court of Human Rights.

The project of the Council of Europe as regards Constitutional Court of Montenegro and the Ombudsperson Institution is realised thanks to the financial support from the European Union. Mr. Philippe Boillat, Director General showed appreciation to the European Union for this important contribution.

It is clear that in addition to the judicial mechanisms as represented by different courts, it is equally important to strengthen the non-judicial mechanisms, represented by the Ombudsmen. The latter are often the first contact points for victims of human rights violations. Based on the Montenegrin cases under the supervision of the Committee of Ministers for execution, there is room for potential improvement in particular in these areas: ill treatment and lack of effective investigations, excessive length of civil and administrative proceedings, and general lack of enforcement of domestic decisions.

When it comes to Human Rights Protection, the Council of Europe is known for setting important standards and monitoring their implementation. The monitoring helps to identify implementation gaps in individual member states. These gaps are not abstract. They affect the people in their daily lives. To fill these implementation gaps, the Council supports its Member States through cooperation activities. These are very concrete opportunities for cooperation to meet obligations, like today in the framework of this conference and the project activities to come.

The Council of Europe's well-known HELP Programme aims to ensure that human rights training provided throughout the European space is of good quality and meets the specific needs of judges, prosecutors and lawyers. It is obvious that the necessary precondition for achieving effective human rights protection requires that those responsible for it know how to apply European human rights standards in concrete situations. HELP precisely provides the methodology and tools to ensure the development of new knowledge, skills, and I even want to say, mind-set.

Montenegro's aspirations to become a member of the European Union will also accelerate the fulfilment of its obligations towards the Council of Europe and strengthen its position within. As before, the Council of Europe stands ready to provide support within its mandate to Montenegro, to successfully master the reform processes deemed necessary to achieve its ambitious goals.

3. Ms. Desanka Lopicic, President, Constitutional Court of Montenegro

The President of the Constitutional Court of Montenegro, Desanka Lopicic, said that the analysis of the practice of the Constitutional Court showed that, since the adoption of the Constitution in 2007, the constitutional complaint had become an important mechanism for the protection of human rights and freedoms in Montenegro. Therefore, the Constitutional Court proceeded with a large number of constitutional complaints.

During the last two years, there have been 1,881 constitutional complaints lodged at the Constitutional Court. It represents 90% of all of the cases finished by a final judgment before the national courts. The number of constitutional complaints increased significantly due to the fact that the constitutional appeal was declared an effective remedy by the European Court of Human Rights.

At the same time, the number of applications against Montenegro decreased before the European Court of Human Rights.

4. Mr. Sucko Bakovic, Ombudsman of Montenegro

The Ombudsman of Montenegro, Mr. Sucko Bakovic, said that the control of public administration is the principal role of the Ombudsman in Montenegro. This control of public administration consists of the protection of rights and legal interests of citizens before its institutions. Therefore, the complaints lodged to the Ombudsman's Office involve violations of citizens' rights and freedoms by the public administration. Every year, there is a growth in the number of complaints lodged to the office by the citizens. The Ombudsman said that, in most of the cases, experience shows that the public authorities recognize the importance of human rights and confirms their commitment to and interest in cooperating with the Ombudsman institution in Montenegro.

In many cases, the authorities recognized committed omissions which led to the violations of citizens' rights and informed the Ombudsman that they had taken measures to remedy these omissions and violations.

In 2015, the authorities took appropriate and effective measures against the violations of citizens' rights, which occurred in 70% of the cases submitted to the Ombudsman. It protects the citizens from unnecessary costs and long waiting times for a judicial decision. The Ombudsman's protections contribute to the efficiency of national remedies and exercising of citizens' rights within the legal system of Montenegro, without having to seek international protection.

The Ombudsman's competencies are limited to abuse of procedural powers and non-enforcement of court decisions as regards to the involvement in court proceedings. The Ombudsman said that citizens often complain about delays in judicial proceedings, it means violation of the right to trial within a reasonable time.

There are many dilemmas concerning the role of the Ombudsman in society and the non-binding nature of actions. However, it should be noted the judgments of the European Court of Human Rights are binding and it often refers to the Ombudsman's opinions in its case law.

The role of the Ombudsman in the context of anti-discrimination is stronger, because he has a competence to engage legal proceedings or join the proceedings engaged by the person who has suffered from discrimination.

The Ombudsman institution contributes to the reduction of the influx of cases lodged at the European Court of Human Rights in accordance with the objectives of the reform in the organization and functioning of the Court proclaimed in the Interlaken (2010), Izmir (2011), Brighton (2012), and Brussels (2015) Declarations.

I. COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS AND EUROPEAN COURT OF HUMAN RIGHTS APPROACH

**5. Chair: Mr. Daniel Schmidt, Head of South East Europe and Turkey Unit,
Human Rights National Implementation Division, Council of Europe**

**6. Ms. Ana Vilfan Vospernik, Senior Lawyer, Research Division,
European Court of Human Rights**

*The constitutional appeal – An effective domestic remedy according
to the European Court of Human Rights?*

The principle of subsidiarity and the effectiveness of national legal remedies enshrined in the European Convention on Human Rights (Article 13 – right to effective remedy and 35 – exhaustion of domestic) are at the heart of the reforms of the European Court of Human Rights.

The experience of the Member States shows that a constitutional complaint can be a highly effective safeguard for human rights and an effective filter in the Convention system. The ECtHR welcomes the tendency to introduce an individual complaint before the Constitutional Court. In Montenegro, the legislative amendments led to judgment *Siništaj v. Montenegro* (no. 1451/10), in which the Court recognized the constitutional appeal as an effective remedy as regards the standards established in its case law as of 20th March 2015.

Montenegro is now among the countries, which have established a mechanism for a constitutional complaint, which is similar to a complaint lodged to the ECtHR. Indeed, this constitutional complaint mechanism exists in Germany, Spain, Czech Republic, Georgia, Slovakia and Turkey.

The constitutional complaint was also recognized as an effective remedy in the following cases concerning the respective countries of former Yugoslavia: *Mirazovic v. Bosnia and Herzegovina* (no. 13628/03), *Omerović v. Croatia* (no. 36071/03), *Osmani and others v. the Former Yugoslav Republic of Macedonia* (no. 50841/99), *Vinčić v. Serbia* (no. 44698/06) and *Švarc and Kavnik v. Slovenia* (no. 75617/01).

The European Court of Human Rights was involved in legislative reforms on the constitutional complaint in Turkey. In 2013, the ECtHR recognized the constitutional complaint as an effective remedy in the case of *Uzun v. Turkey* (no. 35623/05).

The Court considers that the remedies, which should be exhausted, are those which are in place when the complaint is introduced to the Strasbourg system. If there is a systemic problem, and when the remedies are introduced in response to that, the Court takes as a date of introduction of

a new remedy, the date from which such remedy should be exhausted. In this way, the Court can also send back to Member States cases which are already pending in front of the European Court.

The Court follows closely the work of the Venice Commission, for example the opinion on individual access to constitutional justice (*85th Plenary Session of the Venice Commission, CDL-2010(039) rev., 17-18 December 2010*). Even if Montenegro doesn't have systemic violations identified by the ECtHR, there are systemic violations of human rights in other countries.

The Polish case *Broniowski v. Poland* (no. 31443/96) was a breakthrough for the Strasbourg court. The facts of constitutional justice are not limited to individual cases and constitutional rulings but may go far beyond the confines of the instant case. The constitutional courts are the best place to analyse and resolve the structural problems that lay at the root of repetitive applications to Strasbourg.

The Slovenian Constitutional Court which is celebrating its 25th anniversary relied on Strasbourg case law even before Slovenian accession to the Convention in 1994. It has been a very successful filter of cases.

The Supreme Court judges in Slovenia followed the standards of ECtHR case law, mainly in the filing of criminal law, and indeed very few cases passed this filter and came back from Strasbourg. The only problematic areas in which the constitutional complaint was not considered as an effective remedy are Articles 2, 3 (including effective investigation) and 8 (right to family life) of the Convention. There should be an effective mechanism, so different State bodies should adequately respond to such violations. At the same time, the analysis of the Constitutional Court was very helpful as regards to systemic violations in four or five ECtHR judgments concerning systemic violations against Slovenia. Montenegro has similar problems; the effective mechanisms should be introduced in the areas protected by Articles 2, 3 and 8 of the Convention.

In 1999 and 2013, the Slovenian Constitutional Court carried out an analysis concerning the abstract review of constitutionality, which was very effective and useful in the judgment *Kurić and others v. Slovenia* (no. 26828/06). The respective judgments of the Chamber and Grand Chamber put stress on the fact that the legislator did not implement these Constitutional judgments.

Therefore, the Constitutional Court gave the responses but the legislator failed to follow up in due time and it was also on account of this delay to the limitations of the Constitutional judgments that the Strasbourg Court found a violation in *Kurić and others*.

In other cases concerning specially protected tenancy, for example *Berger-Krall and Others v. Slovenia* (no. 14717/04), the Court found that the analysis made by the Constitutional Court also gave adequate answers whether or not the housing reform struck a fair balance between the general need of the community and the individual right to property. Therefore, the Court found that there was no violation in this case and, therefore, several thousand applicants received negative answers from Strasbourg.

Article 36 of the Convention provides for third party intervention before the Strasbourg Court, and the Council of Europe Commissioner for Human Rights in Strasbourg has made many useful interventions. In the process of reforms there is also Protocol No. 15, which has not yet come into force, but it is a reform introducing the principle of subsidiarity and margin of appreciation in the Preamble of the Convention.

Therefore, the concepts in the Convention, which lead to the implementation of Protocol No. 15 are currently being developed. The key notion is the role of domestic courts in the way they follow the

standards developed by the Strasbourg case law. There is a need for dialogue between the ECtHR judges and the national judges. For example, in the cases of *Von Hannover v. Germany* (no. 59320/00) and *Von Hannover v. Germany no. 2* (no. 40660/08) there was a very efficient dialogue between the Strasbourg court and the domestic courts. The national courts reacted to the ECtHR judgment, but the ECtHR also changed its case law in response to the judgment of the domestic courts.

Mr. Dean Spielmann and Mr. Guido Raimondi, Presidents of the European Court of Human Rights established and developed a network of exchange of information with the Supreme and Constitutional Courts (Jurisconsult Office).

Protocol 16 will introduce a possibility for the highest courts and tribunals of Member States to submit requests for advisory opinions to the ECtHR. However, these advisory opinions will not be binding for Member States.

Council of Europe educational recordings such as those on admissibility criteria, asylum and terrorism can strengthen knowledge of the case law. There are ECtHR thematic guides and factsheets on the most problematic areas of the case law, which are very useful externally and internally. There is also a programme on translation of the most important ECtHR judgments into the national languages.

7. Mr. Furkat Tishaev, Lawyer, Office of the Commissioner for Human Rights, Council of Europe

Third party interventions - A common and effective tool used before the European Court of Human Rights?

The Council of Europe Commissioner for Human Rights is an independent, impartial and non-judicial institution, which was established by the Committee of Ministers Resolution in 1999 (Resolution no. 99(50), 7 May 1999). This resolution establishes the scope of the mandate of the Commissioner.

The Commissioner fosters the observance of human rights, assists in setting human rights standards and mechanisms, including the European Convention on Human Rights and identifies the human rights shortcomings in the Council of Europe Member States.

The Commissioner raises awareness about different topics related to human rights issues in Europe. The specific role of the Commissioners' mandate is to deal with issues of systemic character, but cannot deal with complaints of individual character. However, the Commissioner can intervene in individual cases.

The Commissioner's own methods and tools of work include: country monitoring, which is enabled by country visits; publication of country reports containing recommendations; thematic work, for example the issues papers, human rights comments, opinions etc.; third party interventions before the European Court of Human Rights.

According to Protocol No. 13, the Commissioner can participate in the proceedings before the ECtHR only at the invitation of the President of the Court.

Protocol No. 14 granted the Commissioner the additional power and initiative to intervene in proceedings. The current wording of Article 36 § 3 of the European Convention on Human Rights is as follows: *"In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings"*. It is up to the Commissioner to decide whether to intervene or not and how to select the cases for intervention. This leads to a question of criteria, which should be used by the Commissioner to select these cases-candidates for third party intervention.

The Explanatory Report to Protocol No. 14 gives two main criteria for third party intervention: *"The Commissioner's experience may help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the respondent or other High Contracting Parties"* (Explanatory Report to Protocol No. 14 amending the control system of the Convention, No. 194, 13 May 2004, § 87). The Commissioner has the right to intervene as a third party with a view to protecting the general interest more effectively (Explanatory Report, § 87).

There are two main criteria, which are taken into account by the Commissioner: The experience and systemic nature of the issue at stake, which must raise the general interest. If we speak about the systemic issues, we can refer for example to migration problems.

The Commissioner has recently intervened in the case of *S.O. and A.A. v. Austria* (nos. 44825/15 and 44944/15) in which the applicants challenged their transfer to Hungary Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013.

The Commissioner concluded that the current Hungarian asylum law and practice are not in compliance with international and European human rights standards.

At the moment, nobody can access international protection in Hungary. The asylum procedure is too fast and lacks essential safeguards as regards the length of asylum procedure and detention conditions. The generally negative climate fostered by the authorities is not conducive to the integration of asylum seekers and refugees in Hungarian society. This issue clearly outlines the systemic nature of the problem of migration. The second example is that of human rights defenders, which is one of the priorities of the Commissioners' work.

In 2015 and 2016 the Commissioner has intervened six times in Azeri cases and cases related to the prosecution of Azeri human rights defenders, for example *Rasul Jafarov v. Azerbaijan* (no. 69981/14). The Commissioner concluded the following: *"This restrictive legal framework constitutes an integral part of the pattern of judicial harassment and reprisals against human rights defenders currently prevailing in Azerbaijan"* (CommDH(2015)8, § 46).

As regards the general interest, the Commissioner intervened in *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (no. 47848/08). In this case, the Commissioner presented an opinion on locus standi of the applicant, who had died, because the case raised a question of general interest?

The Commissioner decided to intervene as a third party before the EctHR, more often than at the beginning of the mandate following the country visits to the majority of Member States and after having done a lot of thematic work. This experience provides value at the Court. Statistically, there are about three to four interventions by the Commissioner every year.

The human resources of the Commissioner for Human Rights Office are limited as the office is composed of thirty people. Therefore, the Commissioner must be strategic and selective when

selecting cases, even those, which reveal a priori systemic violations. The Commissioner prefers to intervene in cases of priority areas which are: migration, human rights defenders, counter-terrorism measures, disability rights, media freedom, children rights, gender equalities etc.

The strategic approach allows the highlighting of the long-standing problems such as for example the hostile environment for human rights defenders in the North Caucasus. Recently, the Commissioner intervened in the case of *Khadija ISMAYILOVA v. Azerbaijan (Application No. 30778/15)*, case which relates to the institution of criminal proceedings against the applicant, her remand in custody and her request for the replacement of pre-trial detention by house arrest or release on bail. It also relates to the alleged use of these restrictions for purposes other than those prescribed in the Convention, and in particular as a means to silence the applicant as an investigative journalist and civil society activist who is the prominent human right defender in the North Caucasus.

The Commissioners' interventions before the European Court bring added value, and put individual cases into boarded account as is the case with migration. In the case of *Rasul Jafarov v. Azerbaijan (no. 69981/14)*: *"the Court agrees that in recent years the legislative environment regarding the operation of non governmental, non-commercial organisations, including the regulation of matters relating to their State registration, funding and reporting requirements, has grown increasingly harsh and restrictive" (...)* *"The Court takes note of the third parties' argument that the above circumstances drove a number of NGOs to operate on the fringes of the law in order to continue securing funding for their activities. While the Court is not called upon to give a judicial assessment of the general situation outlined above in the context of the present complaint, it nevertheless considers that this background information is extremely relevant to the present case and calls for particularly close scrutiny of the facts giving rise to the charges brought against the applicant"* (§ 120).

8. Discussion 1

The question concerning deadlines to submit a third-party intervention by the Commissioner of Human Rights and the NGOs before the European Court of Human Rights.

The Commissioner can have the initiative to intervene but has in principle a deadline of twelve weeks to inform the Court of the intention to make an intervention. Later, there is an additional six weeks to present the observations. According to Article 44-4 (b) of Rules of the Court: *"the time limits may exceptionally be extended by the President of the Chamber if sufficient cause is shown"*. The NGOs should also request the authorisation of the President of the Court to intervene as a third-party intervener.

The ECtHR is very strict as regards the deadlines. As from 1st January 2014, there is a special application form, which needs to be signed by the applicant and the representative, the facts and the allegations must be presented on two pages. The applications have to be submitted in the deadline, and they are rejected even if they are submitted with a one-day delay. That is why the rules also have to be strict as regards the deadlines for other parties or participants in the proceedings. For example, in the case *Kurić and others v. Slovenia (no. 26828/06)*, the UNHRC sent the observations very late, on the last day. It was accepted but one day later it would not have been accepted. That is why it is worth following Hudoc, which is a very useful tool. The cases communicated to the Government are also published on Hudoc, so it very easy to follow the most recent developments. The parties do not receive judgments, but only the information that the judgment has been published. That is why there is no reason to inform other bodies or institutions individually.

II. JUDICIAL AND NON-JUDICIAL MECHANISMS

9. Chair: Ms. Milica Vesovic and Mr. Sergey Dikman, Project Co-ordinators, Human Rights National Implementation Division, Council of Europe

10. Ms. Jasna Omejec, Former President of the Constitutional Court of Croatia

The concept of domestic remedies, application of judicial and non-judicial mechanism in experience of Croatia

Europe would not be what it is today without the Council of Europe. The Council of Europe monitors the implementation of human rights.

The recognition of constitutional complaint as an effective remedy by the European Court of Human Rights is a success for the judges of the Constitutional Court in Montenegro.

The judicial mechanism needs to wait until the complaints are lodged at the courts. The non-judicial mechanism prevents human rights violations before the complaints reach the courts. It doesn't consist of binding decisions but advices, analysis, and recommends in order to improve the legislative framework.

The ECtHR judgments are binding for parties to the proceedings and the pilot-judgments have broader impact. The non-judicial mechanisms have systemic impact in the State. These institutions apply human rights in reality and that is why they are good at setting legal standards. That is why both Constitutional Courts and Ombudsperson institutions have important roles. The Montenegrin and Croatian systems are similar.

Croatia introduced the institution of Ombudsperson for children, Ombudsman for Gender Equality and the institution of Ombudsperson for persons with disabilities.

The non-judicial mechanisms are sometimes considered weaker than judicial mechanisms because primarily their decisions are not binding. A court can deliver a binding decision. The non-judicial mechanisms are complementary to judicial mechanisms.

As regards the Croatian experience, the Ombudsperson institution is a highly respected institution. In December 2015 Ms. Lora Vidovic, the Croatian Ombudswoman was elected as a President of the European Network of Human Rights Institutions (ENNHRI). The Croatian Ombudswomen recently submitted a report for 2015 with 50 thematic areas.

The report was rejected by the Parliament. The report was of high quality and it proposes how to improve the situation in many areas. A month after that, the Ombudsman for children submitted the same report and it was again rejected. The former President of the Court said that the situation is considered as highly unacceptable, politically arrogant and antidemocratic while considering that the Constitution becomes a mean for short-term political party goals. In 2013 Croatia joined the European Union and several months after this accession, a referendum on the definition of marriage was organized. The Parliament announced that it considers that the result of the referendum is not binding for the Parliament.

Transition to democratic society should be irreversible. However, there is social and political instability in transitional countries in relation to this transition. Post-communist constitutions offer democracy as a model of life to people who lived for years in very rigid communist regimes. Freedom was considered as liberation from communism and not as protection of the individual. The principle of the separation of powers wasn't considered as the objectification of political power and putting it within a legal framework, but as the rejection of one party dictatorship. The market economy was not considered as social ground but was wrongly understood to mean the consumer way of life. Corruption was understood as a way of life as regards better medical treatment or putting children in schools etc. The new Constitutions stayed empty, whereas they were supposed to be filled through democratic elections. The Constitutional Court tried, in a difficult time of social crisis, after Croatia had joined the EU, to protect joint grounds of the united Europe and accepted the European common standards in its judgments.

However, the youngest Members of the EU are very fragile in building these democratic capacities. Regarding the institutions, the political elites can still be critical towards them, which are independent and autonomous. Even if the standards of the EU are respected, it doesn't mean that the country is politically mature.

11. Mr. Adam Bodnar, Ombudsman of Poland

Implementation of the ECtHR by national level main challenges, use of non-judicial mechanism - Polish experience

It is important to share the different experiences of the different institutions, which are crucial in terms of the protection of rights and freedoms in terms of developing standards of democracy, rule of law and human rights.

In Poland, the Ombudsman institution was established two years before the democratic transformation of 1987. The institution immediately gained in prestige during the two first years of its activity. Thirty years later, the Ombudsman in Poland has many different competencies.

It is a National Preventive Mechanism under the Optional Protocol to the Convention against Torture (OPCAT). It is an equality body and monitoring body under the UN Convention on the Rights of Persons with Disabilities.

The Ombudsman office employs three hundred people, mostly lawyers, specialists in different fields of operation. In Poland, there is also the Ombudsman for Children, the Inspector General for Protection of Personal Data, the Financial Ombudsman, and the Commissioner for Patients' Rights.

One of the most important powers of the Ombudsman is to bring cases to the Constitutional Court. The Ombudsman can make abstract motions, to request declarations whether certain provisions are or are not in compliance with the Constitution. He also has a possibility to join the constitutional complaint procedure brought by an individual citizen to the Constitutional Court.

Why is the constitutional complaint in Poland not an effective remedy according to the ECtHR standards? In Poland, the constitutional complaint is a complaint on invalidity of the provisions and not the application of these provisions in a particular case.

The applicant lodges a constitutional complaint when a legal provision, which was the basis for an individual legal or administrative decision or court judgment in his/her case, is supposed to be contrary to the Constitution.

The Ombudsman has a lot of judicial powers and he may join all kinds of proceedings before common and administrative courts. The Ombudsman can bring cassation appeals, for example in criminal cases with verdicts other than imprisonment (financial penalty, restriction of liberty). In such situations, the Polish Ombudsman is one of two institutions which can make an appeal. There are three thousand people per year who ask the Ombudsman to lodge a cassation appeal.

The Ombudsman has the power to seek clarification of the case law in the civil, criminal, and administrative field. The Ombudsman has the right to send a letter to the President of the Supreme Court, when the case law is considered to be divergent on a particular issue, and ask for an interpretative resolution by seven judges in this certain area of the case law. It is very useful because the interpretation can be asked in abstracto without a need of a specific case.

The Ombudsman has a number of non-judicial competencies where the so-called “general statements” can be made and when there are presumable problems with the operation of the State, interpretation of the legislation, or negligence by public authorities, which may bring damage to human rights standards. The authorities are obliged to respond to these statements and, sometimes, they change some provisions or practice to comply with these general statements.

The Ombudsman can achieve good results if judicial and non-judicial competencies are used. Every year, the Ombudsman makes from 250 to 300 general statements, which for example concern the lack of experts contributing to the excessive length of proceedings. A general statement opens an exchange of letters and it is also a part of the annual report submitted to the Parliament.

The Ombudsman also plays an important role in the implementation of ECtHR judgments. As regards Poland, these judgments mainly concern prison conditions, dangerous detainees, pre-trial detention, length of proceedings, reprivatisation, increasing rent of private apartments etc.

The Ombudsman is only one of the actors pushing for changes, but there are a number of other actors like NGOs. The Ombudsman should also establish good contact with the media. There is a good trend to establish special committees and sub-committees working on the implementation of judgments in the Parliament. However, the Government must coordinate this implementation. In Poland, a special body emerged discussing how to resolve certain issues. Therefore, cooperation between the Ombudsman and the Government is very important for the implementation of the judgments. Today, the Constitutional Court held a hearing upon my motion about the people under guardianship who are being placed in social foster homes without their consent. The principle of legality established in the ECtHR case law, for example in the case of *Kędzior v. Poland* (no. 45026/07), requires the consent of the court to place an incapacitated person in a social foster home. As the Government didn't resolve the problem, a motion was submitted to the Polish Constitutional Court raising the fact that the relevant legal provisions are contrary to the Constitution.

The Ombudsman submits twenty to twenty-five motions per year and ten to fifteen third-part interventions by joining constitutional complaints. Hence, the Constitutional Court has a chance to incorporate certain standards into the case law of the Court.

As Poland faces a constitutional crisis, certain abstract motions will wait up to three years according to the political circumstances. Meanwhile, they will have impact on the legal system – both politicians and lawyers. The Ombudsman should use not only the judicial mechanisms, but also the legal arguments, which can be used by other actors of the legal system.

The Ombudsman presented comments on the draft of the antiterrorist law and the amendments to the criminal code, which are contrary to the Constitution and the European Convention on Human Rights. However, these comments should probably be restricted to the most serious breaches of human rights as there is a strong antidemocratic trend in Poland.

There are also standards created by other international human rights bodies. These standards are created under the UN Convention on the Rights of Persons with Disabilities (CRPD) and the EU anti-discrimination directives. The anti-discrimination issue can't be interpreted without taking into account the case law of the Court of Justice of the European Union.

The Ombudsman also has to follow the standards established by the UN Committee against Torture (CAT), which are even more interesting in its field than the case law of the ECtHR.

The Ombudsman has to think strategically how to diminish the human rights violations taking into account the machinery which is available. The Ombudsman should cooperate with the Government, the Parliament and the courts.

The Ombudsman should also raise awareness of legal professionals on international human rights standards, but not only by translating judgments, organising training or conferences, or distributing leaflets, but also by joining proceedings as a third party to show how practically to convince the domestic courts how to use ECtHR standards.

ECtHR case law is like the air. It is the air of this case law that we should breathe with in all State institutions. The German Constitutional Court built its case law and human rights notions, for example, freedom of expression, during the last fifty years. There wasn't such a possibility in Poland. A provision of the Constitution has to apply the standards of ECtHR case law. The Ombudsman can only transmit these standards by suggesting their application at the domestic level. The rule of law was a challenge to the current Ombudsman in the past ten months.

There is a belief that a legal system with existing legal remedies will defend itself. There is this faith in the ECtHR, which implies that when a remedy is considered effective according to its standards, the breach will be repaired. The remedy can be effective in the long term, but not necessarily to repair the reality of the person who is concerned.

The Grand Chamber recently delivered a judgment *Baka v. Hungary* (no. 20261/12). Baka was President of the Supreme Court of Hungary. The Court was later renamed to Curia and the President's term was shortened from six to two years. The former President won the case before the national courts four years later and he obtained reparation. However, the circumstances had changed, the shift of power and control over the judiciary took place and he was no longer in a position to be reinstated as President of the Supreme Court, renamed in the meantime, Curia. That is also why the length of proceedings is so important for the efficiency of the whole system and the constitutional complaint.

12. Discussion 2

The first question concerned the interpretation of legal provisions as a tool in harmonisation of legal practice. The second question was about the motions submitted to the Supreme Court. The speaker asked of it happened that the Supreme Court refused to deliver the interpretation.

In Poland, a same-sex partner has the right to be referred to in criminal proceedings as the closest person of the person who is subject to the criminal proceedings. There were courts interpreting this situation that the same partner is the closest person, so this person has to refuse the testimony. Other courts said that it is not the closest person and he can't take advantage of the privileges established by the Code of Criminal Proceedings. There was a motion on this issue transmitted to the Supreme Court. The Supreme Court answered that even if it is not registered relation, the person should be considered as the closest person, which means that this person can refuse to give testimony. However, to request such an interpretation, the divergences in the case law have to be proven. The Supreme Court and the Administrative Court can proceed with this kind of interpretation of provisions and judicial practice. This measure is used in average three to four times per year, respectively in both of the two above-mentioned courts. The courts defend themselves before these questions, as these interpretations are final measures.

There always has to be a dialogue between institutions. If the Ombudsman is too active, the courts refrain from accepting too many cases. Sometimes, the courts pretend that there is no divergence in the case law, so they refuse to proceed with the case. There is also a cassation appeal but the level of legal quality required by the Supreme Court is a real obstacle to the success of the case.

If there are miscarriages of justice and you intervene as a third-party intervener, what is your role? What more can you do, particularly in the situation of systemic violations?

The idea of an institution is to suggest solutions and not to replace a judge. If you lose one case, you look for other similar cases and you raise your arguments again. You are bound by the principle of legality, but you can suggest that the NGOs or the Bar Association pleads a case before the European Court of Human Rights. One can become a third-party intervener, but can be easily treated as acting against the state at international level particularly if this competence is not expressly foreseen by the national legislation.

How the Constitutional Court resists different pressures? Is constitutional teaching one of the concepts?

Constitutional teaching consists of interpreting constitutional judgments and decisions, explaining the principal parliamentary operations and the rule of law through a comparative approach.

Constitutional teaching is extremely important. There is a constitutional crisis in Poland as the Constitutional Court was attacked for blocking some potential legislative reforms which were going to be implemented. Ordinary people do not understand what the Constitutional Court is. Even if they understand, they always find some judgments that they do not like and at the end it becomes only elites who defend the Constitutional Court and its independence. It should be explained to the people why the rule of law does not exist without the Constitutional Court.

Can an Ombudsman represent a party at the judicial proceedings?

The Ombudsman is notified about all the cases, which passes a filter of first formal control in the Constitutional Court. There are then thirty days to join the case. However, if a case is joined, it means

that the Ombudsman supports it and thus has thirty days to submit observations. The set of constitutional provisions raised by the defendants are often not the ones that the Ombudsman would raise before the Constitutional Court. Unfortunately, in these kinds of cases, the Ombudsman doesn't join the proceedings, because the case will be lost since it is badly written by the applicant. The predecessor for example did not join the proceedings concerning the provision of offense of somebody's religious beliefs, which are sanctioned even by a penalty of imprisonment. The case is still not solved, but the present Ombudsman cannot intervene because there has been a restricted lapse of time after which declaration can be made.

13. Mr. Mirsad Ceman, President of the Constitutional Court of Bosnia and Herzegovina

The concept of domestic remedies, experience of Bosnia and Herzegovina

The Constitutional Court takes into consideration the case law of the European Court of Human Rights and the principles established in the European Convention on Human Rights, which has been consciously ratified and implemented since 1997. The position of the Court is that the Convention has supremacy over other legislative instruments. In the situation of conflict of norms, the Convention is applied. The Constitutional Court hasn't accepted the Ombudsman as a third-party intervener before its jurisdiction. However, the Ombudsman follows the work of the Constitutional Court and the Constitutional Court follows the work of the Ombudsman.

14. Mr. Ljubinko Mitrovic, Ombudsman of Bosnia and Herzegovina

Use of non-judicial mechanisms, experience of Bosnia and Herzegovina

The Ombudsman of Bosnia and Herzegovina thanked the Council of Europe for the project, which will be implemented in the next months with focus on building capacity of the Ombudsman.

There are three Ombudsperson institutions in Bosnia and Herzegovina: one for the Bosnian community, one for the Croatian community and one for the Serbian community.

The Ombudsman mentions the problem of excessive length of judicial proceedings. There are over two million cases pending before the national court in Bosnia and Herzegovina. Certain cases have been pending for more than sixty years. As regards the Constitutional Court, it happens that it does not examine the case during three years since it has been introduced.

There are three languages in Bosnia and Herzegovina. The question of language is important for Bosnian people, as in the Constitution it is written: "Bosnian people language", but some institutions like schools try to interpret it as the "Bosnian language". This also has an impact on human rights standards implementation.

The Ombudsman was established in 1996. Since 2006, the Ombudsman has combined different functions and controls a budget of 2.5 million Mark convertibles.

In 2016, the Law on an Ombudsman for Human Rights was voted on in Bosnia and Herzegovina.

According to this law, the Ombudsman submits the report to the Parliamentary Assembly of Bosnia and Herzegovina. This year, for the first time in history, the report was adopted unanimously by the Parliament. On the 17th October, the Ombudsman will organise a big conference for the Ombudspersons and the Presidents of the Constitutional Courts.

The Ombudsperson has a capacity to access all the institutions like prisons and psychiatric institutions, in which the people are detained without all the procedural guarantees.

Why do people complain to the Ombudsman? Firstly, the procedure of complaint is very cheap. Secondly, it is an easily accessible remedy. The Ombudsman has a time limit, which is of four months, to examine a complaint according to the Law. This Law has also established a National Preventive Mechanism, which is very important and has already been established in Serbia, Montenegro, and Croatia.

In 2015, 2,966 complaints were lodged with the Ombudsman institution. That is 156 fewer complaints than in the previous year. In 30 cases, the Ombudsman engaged the proceedings at own initiative. The majority of complaints concern civil and political rights, with 1,790 complaints lodged against the courts in this field. A large number of complaints concerned the right to education, and social security. Many complaints concern the work of the courts, more particularly the length of proceedings, the independence of the courts, the lack of harmonisation of the case law, and the work of the administration. As a new Labour Law was voted on recently in Bosnia and Herzegovina, in the nearest future, we expect more complaints relating to labour laws.

Overcrowding is a problem, as Sarajevo prison is adapted for 80 prisoners while 130 are detained.

The Ombudsman made 324 recommendations and only 103 were implemented. It means that only one third of recommendations are implemented.

The Ombudsperson institution is financially dependent on the executive power and there is a problem of a lack of sufficient funds.

A separate Joint Committee on Human Rights of the Parliamentary Assembly of Bosnia and Herzegovina and the Ombudsman institution established good cooperation with this Committee.

The strengthening of the Ombudsman institution is a necessity for its future efficiency in implementation of human rights standards in Bosnia and Herzegovina.

15. Discussion 3

The Kosovo¹ Ombudsman can make recommendations to the Constitutional Court. New Law on Constitutional Court introduced a time limit of six months for the Kosovo Ombudsman to submit these recommendations. The introduction of this deadline was explained as having the objective of avoiding an abuse of power by the Ombudsperson. What are the deadlines for the Ombudsman in Bosnia and Herzegovina?

The Ombudsperson does not have such limits. The laws are as short as possible. They are supposed to be in compliance with the European Convention on Human Rights, but there are still violations of human rights. There is a tradition that the Ombudsman has a say concerning draft laws involving human rights, for example right to a fair trial.

¹ All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

CONCLUSIONS

16. Mr. Andrey Esin, Project Manager, Human Rights National Implementation Division, Council of Europe

The conference offered a great opportunity for dialogue between the two top mechanisms for human rights protection – constitutional courts (judicial) and ombudsperson's institutions (non-judicial). The discussion has revealed that although the two institutions actively interact in the countries of the Western Balkans region (and beyond), there are areas, which could be further improved.

While the ombudsperson's institutions have the same common functions – e.g. they act as equality bodies, NPMs and examine individual complaints – the example of the Polish Ombudsperson's institutions shows that there are other functions that could greatly enhance the role of the institution. For example, in Poland, the Ombudsperson can request the Supreme Court or the Supreme Administrative Court to resolve a divergence in judicial practice. The possibility of lower courts to bring such requests before the superior courts was extensively discussed during the conference. In addition, granting similar competences to an ombudsperson's institution is certainly an interesting and useful model, which could be considered by the countries of the Western Balkans.

All ombudsperson's institutions are engaged in dialogue with constitutional courts in their respective countries. However, dialogue is not institutionalised everywhere (e.g. in Bosnia and Herzegovina, the Ombudsmen cannot appear before the Constitutional Courts). A legal recognition of such institutional dialogue is extremely beneficial for better protection of human rights on the national level, as the example of Poland demonstrates (where the Ombudsman can bring cases to the Constitutional Court and act as a third party).

The measures proposed above may require legal amendments in the countries of the region. In that process, the countries can rely on the Council of Europe's support and legislative expertise.

The ombudsperson's institutions and the constitutional courts should intensify their cooperation. The former need to use their competences more actively while the latter should not discourage them by considering them as "overly active" or "misinterpreting" the legislation and human rights provisions. Once again, the Council of Europe stands ready to facilitate and assist the national institutions in their dialogue through national and regional events such as this.

Closer interaction with civil society can considerably improve the protection of human rights. While ombudsperson's institutions can use their informal contacts with NGOs and human rights activists to inform them of important cases to be brought to domestic superior courts or to Strasbourg, constitutional courts can spread the knowledge by way of "constitutional teaching" (according to Prof. Omejec's expression). This will help to explain and disseminate in their judgments, the human rights concepts contained in the Convention and the judgments of the ECtHR.

As a result, the above measures will help countries of the region to shift from direct implementation of the judgments of the Strasbourg Court to the creation of their domestic case law and practices based on the concepts and principles contained in the ECtHR, because the Convention mechanisms are subsidiary, and it is the state which should be the first and ultimate protector of human rights.



“Closing speakers”, photo showing from left to right:

- Ms. Milica Vesovic, Project Co-ordinator, Human Rights National Implementation Division, Council of Europe
- Mr. Sergey Dikman, Project Co-ordinator, Human Rights National Implementation Division, Council of Europe
- Mr. Mirsad Ceman, President of the Constitutional Court of Bosnia and Herzegovina
- Mr. Ljubinko Mitrovic, Ombudsman of Bosnia and Herzegovina
- Mr. Andrey Esin, Project Manager, Human Rights National Implementation Division, Council of Europe

Further reading:

- Dagmara Rajska, Zuzanna Rudzińska-Bluszcz, Ombudsperson Institutions in Europe - their role before national court, CoE and ECtHR (Example of Poland, Sweden and Montenegro)
- Foreword: George Tugushi, CPT Member and Klaudiusz Ryngielewicz, Head of Legal Division, ECtHR, Keyeditore, Italy 2016

Judicial protection of human rights largely depends on the effectiveness of remedies provided at national and international levels in order to redress breaches of human rights guaranteed by international instruments such as the European Convention on Human Rights. Providing remedies at the national level is a priority laid down in the principle of subsidiarity. The principle of subsidiarity within the Convention's system depends to a large extent on the interaction between judicial and non-judicial legal structures, before cases can be submitted to the European Court of Human Rights (ECtHR). Access to international enforcement mechanisms, such as ECtHR is seen as a last resort, after the state had previously failed to redress the violation and to provide justice in the national legal system.

The conference organized under the auspices of the Council of Europe on 28 June 2016 in Montenegro aimed to provide a platform for exchange of experiences at national level among key stakeholders: the Constitutional Court, legal practitioners and representatives of the Ombudsperson's Office in charge of the protection of human rights. The Council of Europe invited keynote speakers, who identified good practices with regard to the setting up and the implementation and use of such remedies. The conference was enriched with the participation of representatives coming from other countries: Bosnia and Herzegovina, Croatia, Georgia, Poland and Serbia.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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