STRENGTHENING THE HUMAN RIGHTS OMBUDSMAN TO FIGHT DISCRIMINATION

A COLLECTION OF PAPERS PRESENTED AT THE CONFERENCE

Exchange of Best Practices in Addressing Human Rights Violations with a Special Focus on Combating Discrimination

Sarajevo, 15 and 16 February 2018

Horizontal Facility for Western Balkans and Turkey

Funded by the European Union and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Implemented by the Council of Europe

http://horizontal-facility-eu.coe.int

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This document has been produced using funds of a Joint Programme between the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe.

FOREWORD

The papers gathered in this collection were presented at the regional conference *Exchange of Best Practices in Addressing Human Rights Violations with a Special Focus on Combating Discrimination*, held in Sarajevo on February 15 and 16th, 2018. The conference was jointly organized by the Council of Europe, OSCE Mission to Bosnia and Herzegovina and Institution of Human Rights Ombudsman of Bosnia and Herzegovina.

The conference was focused on the national human rights institutions, and its main goal was to serve as a platform for the exchange of views and experiences of key actors responsible for the protection of human rights in the region, especially as regards the possible ways to improve the effectiveness of these institutions in the performance of their numerous competencies and authorities. Special attention has been paid to examining the role of national human rights institutions in judicial and administrative proceedings, specifically from the perspective of various institutional actors: the national human rights institutions or equality bodies in the region themselves, representatives of the judiciary, academic community and non-governmental organizations. Also, broader matters of relevance to the work of these institutions have been addressed, such as the key challenges and obstacles in the exercise of their mandate, their role in combating discrimination and cooperation with the civil society, as well as the possibilities of a more regular regional cooperation and the sharing of positive experiences and good practices in facing the increasing challenges faced by these institutions.

As indicated by the papers presented in this collection, the conference pointed out to the different experiences and practices of national human rights institutions in terms of their role in court proceedings. Presentations of experiences from the region have shown that some of these institutions have broader powers in this domain, so they have the right of action to address the constitutional court with a request for constitutional review, or to initiate strategic litigation in discrimination cases. However, it was shown during presentations and discussions that, even when they have such powers, these institutions must carefully balance between the great expectations of the public and other actors involved in the protection of human rights, the need to preserve, by means of a measured approach, the uniqueness of their own role as an authoritative advisory body in the domain of human rights and the independence of the judicial branch of power, and frequently limited human and financial resources available to them. In parallel, it was pointed out that these institutions in the region generally have broad powers and authorities, and that their careful and coordinated use can achieve significant results in the protection of human rights.

The collection includes only a part of the papers presented at the conference, i.e., all those papers that have been prepared in the appropriate written form and submitted to the organizers. As already mentioned, several papers in this collection speak of the ombudsman's role in court proceedings, both from a comparative perspective and based on the practice of some institutions from the region that already have such experiences. Some of the papers are devoted to some particularities and open issues regarding the role of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina in the administrative procedure. Several appendices focus on the field of protection against discrimination, presenting the general experiences of equality bodies in this field, particularities of proving discrimination, that is, the practice, advantages and challenges of strategic litigation in the field of combating

discrimination. Finally, part of papers also speaks about the role of civil society organizations in the context of activities of national human rights institutions, either generally or through the prism of the National Preventive Mechanism (NPM) against torture.

It should certainly be emphasized that papers in this collection are published, as a rule, in the form in which they were delivered to us; therefore, without a standard editorial process and editorial interventions, and with significant technical and stylistic diversity. However, they are doubtlessly valuable contributions mapping the current situation in this field, but also offering a framework for discussion and important guidelines for action-taking by national human rights institutions in the region in the coming period.

The publication was made within the framework of the Council of Europe project *Strengthening the Human Rights Ombudsman to Fight Discrimination*, which is implemented in Bosnia and Herzegovina and which is an integral part of the European Union/Council of Europe cooperative programme: *Horizontal Facility for Western Balkans and Turkey*, a three-year programme (May 2016 - May 2019), focusing on three themes: ensuring justice, fighting corruption, economic crime and organized crime, and combating discrimination and protecting the rights of vulnerable groups.

THE ROLE OF THE HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND HERZEGOVINA IN COURT PROCEEDINGS

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The Institution of Human Rights Ombudsman of Bosnia and Herzegovina

Abstract

Principles relating to the Status of National Institutions (The Paris Principles), adopted by the United Nations General Assembly Resolution 48/134 of 20 December 1993, provide a framework for the establishment and operations of state institutions for the promotion and protection of human rights. In order to achieve the basic function, the state institution is given the widest possible mandate, which is clearly defined in the constitution or legislative text. The Paris principles also establish a standard of seeking an amicable settlement through mediation and reconciliation as a priority for the realization of human rights. This approach opens the question of the role of national institutions in court proceedings that are conducted when the disputes over the exercise of rights could not be solved in any other way. Human Rights Ombudsman of Bosnia and Herzegovina is a national institution for the protection and promotion of human rights, established by Annex VI of the Dayton Peace Agreement, which is, in line with the provisions of the Law on Prohibition of Discrimination, also the central anti-discrimination protection agency. The aim of this paper is to present some aspects of the possible actions of the Human Rights Ombudsman of Bosnia and Herzegovina in court proceedings.

Key words: *Paris Principles, national human rights institution, protection, court proceedings*

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Introduction

The development of a national mechanism for the protection and promotion of human rights in Bosnia and Herzegovina has followed the historical changes of the state of Bosnia and Herzegovina since its establishment as an independent state. [2] Two peace agreements that were signed have a major impact on this process: the Washington Agreement[3] and the Dayton Agreement[4], concluded with a view to ending the 1992-1995 war in Bosnia and Herzegovina.

Both peace agreements paid great attention to human rights, granting the enjoyment of rights established by international standards to every person in the territory of Bosnia and Herzegovina, without discrimination on any ground.[5] In order to assist in the implementation of the rights and freedoms set forth in the Constitution, the Washington Agreement established the function of the Office of the Ombudsman in the Federation of Bosnia and Herzegovina appointed by the Organization for Security and Cooperation in Europe from every recognized group: Bosniaks, Croats and others[6]. Annex VI of the Dayton Agreement established the Human Rights Ombudsman of Bosnia and Herzegovina[7] (hereinafter: Ombudsmen BiH) as an institution whose decisions have the authoritative character but their recommendations are not legally binding on BiH authorities.

In addition to the Human Rights Ombudsman of BiH and the Ombudsman of the Federation of BiH, in 2000, the Institution of Ombudsman was also established in Republika Srpska. In April 2006[8] amendments to the Law on the Human Rights Ombudsman of BiH were adopted establishing a single structure of the Ombudsman, which implied the termination of the work of the Institutions of Ombudsman of the Federation of Bosnia and Herzegovina and of Republika Srpska. The justification for this reform lies on the fact that by

[2] 1 March 1992, while the Republic of Bosnia and Herzegovina was admitted to the membership of the United Nations on 22 May 1992.
[3] The Washington Agreement is a peace agreement between warring Croats from Bosnia and Herzegovina and formal representatives of the Republic of Bosnia and Herzegovina, signed in Washington and Vienna in March 1994. This document established the Federation of Bosnia and Herzegovina, one of the two BiH entities under Annex 4 of the Dayton Peace Agreement.
[4] Dayton Agreement was initialed in Dayton, the United States, on 21 November 1995 and signed in Paris on 14 December 1995, ending the war in Bosnia and Herzegovina. The agreement consists of the General Framework Agreement and the Annex that regulates certain important issues such as military aspects, borders, elections, human rights, refugees, displaced persons, etc.

[5] Article V of the Washington Agreement and Article II of the Constitution of BiH (Annex IV of the Dayton Agreement).
[6] Article V.6. of the Washington Agreement.
[7] Article II.1.
[8] Law on Amendments to the Law on the Human Rights Ombudsman, Official Gazette of BiH, 32/06.

reducing the number of Ombudsmen from nine to three rationalization will be achieved and thereby savings, and it will also eliminate confusion among citizens as to which institution they can address (Džumhur, 2016, page 225).[9] The process of unification of the three institutions was completed in May 2010, from when the Ombudsman for Human Rights has operated as a national institution for the protection and promotion of human rights in Bosnia and Herzegovina.

The basis for work and functioning of the Human Rights Ombudsman of BiH is provided for, in addition to Annex IV and Annex VI of the Dayton Agreement, in the Law on Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter: the Law on Ombudsman). The Ombudsman of BiH is an independent institution set up in order to promote good governance and the rule of law and to protect the rights and liberties of natural and legal persons, as enshrined in particular in the Constitution of Bosnia and Herzegovina and the international treaties appended thereto, monitoring to this end the activity of the institutions of Bosnia and Herzegovina, its entities, and the District of Brčko, in accordance with the provisions of the present Law.[10]

The Ombudsmen consider cases involving the poor functioning of, or violations of human rights and liberties committed by any government body, and act either on receipt of a complaint or *ex officio*.[11]

The Ombudsman of BiH also has special powers and competencies according to the provisions of the Law on Prohibition of Discrimination. Article 7 of the Law defined the Ombudsman as the central institution for prevention of discrimination - the body for equality[12]. Under the Laws on Freedom of Access to Information[13], the Ombudsman is defined as the central institution for ensuring the freedom of access to information.

[9] Unification of these institutions was one of post-admission commitments of Bosnia and Herzegovina to the Council of Europe

[10] Article 1 paragraph 1 of the Law on Human Rights Ombudsman of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 32/00, 35/04 and 32/06).

[11] Ibidem, Article 2.

[12] The role of Ombudsman is to act upon complaints; provide information on the rights and obligations, possibilities of judicial and other forms of protection; initiate process of mediation; collect and analyze statistical data on discrimination cases; report and inform public; investigate on his/her own initiative, give opinion and recommendations and suggest some legal solutions to relevant institutions of BiH, have the right to initiate and participate in proceedings for protection from discrimination for violations prescribed by the Law on the Prohibition of Discrimination; monitor legislation and advise the legislative and executive bodies; promote the Law, inform public, raise awareness, conduct campaigns and otherwise actively promote

Furthermore, the Ombudsman of BiH has no mandate to change the decisions of public authorities, nor it may assume the role of the body that acts and decides on complaints, nor can it interfere with court decision-making procedures. Also, the Ombudsman of BiH cannot represent the complainant before the public bodies, nor write submissions or complaints on their behalf, nor can he/she award compensation for the established violation of human rights.[14]

The role of the Ombudsman in proceedings before the Constitutional Court

The Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) was established on the basis of Article VI of Annex IV of the Dayton Agreement and because of the lack of a constitutional basis for regulating the procedure and organization of the Constitutional Court, this issue is regulated by the Rules of the Constitutional Court adopted by the Constitutional Court[15]. These rules stipulated that the institution of the Constitutional Court of Bosnia and Herzegovina is founded as an independent guardian of the Constitution and as an institutional guarantee for the protection of human rights and fundamental freedoms laid down in the Constitution of Bosnia and Herzegovina and the instruments referred to in Annex I to the Constitution and furthermore that the Constitutional Court of Bosnia and Herzegovina is not a part of the legislative, executive or ordinary judicial authority, but has been positioned by the Constitution of Bosnia and Herzegovina as a special independent and autonomous authority which, on the basis of the Constitution, acts as a remedy for the other three segments of authority (Džumhur, 2016, page 231)

Pursuant to the provisions of Article VI.3. of the Constitution of Bosnia and Herzegovina, the Constitutional Court is competent to uphold the Constitution of Bosnia and Herzegovina and has exclusive jurisdiction to decide whether any provision of an Entity's constitution or law is consistent with the Constitution.[16] The Constitutional Court also has

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antidiscrimination for the purpose of its prevention; improve policies and practices aiming to ensure equal treatment; cooperation with civil society and assistance to individuals and groups in international protection.

[13] Article 21 of the Law on Freedom of Access to Information of Bosnia and Herzegovina, Official Gazette of BiH, 28/00, 45/06,102/09 and 62/11, Article 21 of the Law on Freedom of Access to Information of the Federation of BiH, Official Gazette of FBiH, 32/01, 48/11 and Article 21 of the Law on Freedom of Access to Information of Republika Srpska, Official Gazette of RS, 20/2001.

[14] Article 15 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina

[15] Rules of the Constitutional Court of Bosnia and Herzegovina, revised text, Official Gazette of BiH, 94/14.

[16] Disputes may be referred to by a member of the Presidency, by the Chair of the Council of Ministers, by the chair or Deputy Chair of either chamber of the Parliamentary Assembly; by one-fourth of the members of either

appellate jurisdiction over issues under this Constitution arising out of a judgement of any other court in Bosnia and Herzegovina,[17] and it has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention on Human Rights and Fundamental Freedoms and its Protocols, or with laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.[18]

The analysis of the jurisdiction of the Constitutional Court indicates that a limited number of entities have the authority to initiate the proceedings for assessing the conformity of any provisions of the Constitution or the laws of an Entity with the Constitution, namely: a member of the Presidency of BiH, the Chairman of the Council of Ministers of BiH, the Chairman, or the Deputy Chair of either House of the Parliamentary Assembly of BiH ; one-fourth of the members/delegates of either House of the Parliamentary Assembly of BiH, or one-fourth of members of either House of the legislature authority of one Entity. The issue of the authority to initiate the procedure of assessment of constitutionality and legality has special significance given that the assessment of the constitutionality or legality of general acts, the so-called normative control usually constitutes the basic competence of the Constitutional Court. The importance of normative control, especially in a complex constitutional system such as the system in BiH, is of additional importance since it is a matter of subsequent control of the constitutionality of the law, which gives this instrument the power to prevent many human rights violations that are evident in practice, and occur as the consequence of non-compliance of the law with the Constitution of BiH (Džumhur, 2016, page 234).

Therefore, the initiation of the proceeding for assessment of constitutionality laid down in the BiH Constitution has two limiting factors, in relation to the entities that can initiate this procedure and in relation to the act whose assessment is sought. At the same time, we should not neglect the fact that it is normal for assessment of constitutionality as a normative control to be related not only to the issue of assessment of conformity of the law

chamber of the Parliamentary Assembly, or by one-fourth of members of either chamber of legislature of an Entity.

[17] Constitution of BiH, Article VI.3.b.

[18] Ibid, Article VI/3.c.

with the Constitution, but also to the assessment of the constitutionality and legality of all other regulations and general legal acts. With regard to abstract control of constitutionality, the Constitutional Court's jurisprudence is, as a rule, directed to the control of general legislative acts, and not to the acts of the executive authorities and administrative bodies.[19]

By comparing the way in which this issue has been regulated in some neighbouring countries, one can see a very restrictive approach in Bosnia and Herzegovina. From the aspect of human rights protection, it is important to note the importance in that the Constitution of the Republic of Serbia and the Constitution of the Republic of Croatia provide the possibility for a national institution for the protection of human rights[20] to initiate proceedings for assessing constitutionality and legality. Thus, in the Republic of Serbia, the Protector of Citizens can use this authority as a state body, while the Constitution of the Republic of Croatia explicitly noted that the Ombudsperson can file a request in order to exercise the mandate of promotion and protection of human rights and freedoms. The Constitution of Bosnia and Herzegovina, unlike the Constitutions of the Republic of Croatia and the Republic of Serbia, significantly limits the number of entities that may address the Constitutional Court seeking assessment of constitutionality and legality. Thus, the possibility for the Constitutional Court to initiate the proceedings on its own is not foreseen, nor it is possible for citizens to launch an initiative and neither is the Human Rights Ombudsman allowed to do so. This is not only important for human rights protection, but also for the prevention of violations, especially when the source of human rights violations is a law or other general act, which, as practice shows, often affects a greater number of citizens (Džumhur, 2016 p. 237).

The Law on Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter: Law on Ombudsman)[21] stipulated that: „*An Ombudsman may refer cases of alleged human rights violations to the highest judicial authorities of Bosnia and Herzegovina competent in human rights matters, pursuant to the rules concerning appeals to these authorities, whenever he or she finds that this is necessary for the effective performance of his or her duties* “.[22]

[19] Decision: U 58/02 of 27 June 2003 and U 7/10 of 26 November 2010
[20] In the Republic of Croatia, it is called Ombudsperson, in the Republic of Serbia Protector of Human Rights, and in Bosnia and Herzegovina it is Human Rights Ombudsman.
[21] Official Gazette of BiH, 19/02; 35/04; 32/06
[22] Article 6

Considering that the Constitutional Court is the highest judicial authority in charge of human rights in Bosnia and Herzegovina, and starting from the provision of Article 6 of the Law on Ombudsman, the question arises as to the importance of the procedure for referring the alleged cases of human rights violations to the Constitutional Court by the Ombudsman of BiH, especially having in mind the conditions that must be met, which relate to the obligation to comply with the rules governing the filing of complaints with these authorities. This leads to the conclusion that the said provision of the Law on Ombudsman gives the Ombudsman the authority only to submit a complaint to the Constitutional Court, provided that all the requirements of the Rules of the procedure of the court have been met, including the requirements regarding the admissibility of the complaint. Since there is no constitutional provision that authorizes the Ombudsman to address the Constitutional Court, especially in the part relating to the assessment of constitutionality and legality, and as the Constitutional Court enacts its Rules on their own, one can conclude that no effective legal basis has been created to allow for consideration of the Ombudsman's acts by the Constitutional Court, especially having in mind that the Constitutional Court did not foresee such a possibility in its Rules. Consequently, the Ombudsman is treated equally by the Constitutional Court as any other entity addressing the Constitutional Court with a complaint, with the Ombudsman being further required to ensure the consent of the party on whose behalf the complaint is being submitted. The foregoing completely restricts the autonomy of the Ombudsman and has a major impact on the independence of the Ombudsman of BiH in performing their mandate.[23]

Ombudsman of BiH and court proceedings

The Law on the Ombudsman of BiH stipulated that the Ombudsman are competent to investigate all complaints made about the poor functioning of the judicial system or the poor administration of an individual case and recommend appropriate individual or general measures without interfering with the court decision-making process. Ombudsmen may initiate court proceedings or intervene in pending proceedings, whenever he or she finds that such action is necessary for the performance of his or her duties.[24][25]

[23] Ibidem, pg. 239.
[24] Article 4 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina
[25] This possibility was also stipulated in the Constitution of the Federation of Bosnia and Herzegovina for the Ombudsman of the Federation of BiH (Article 6.1.): Ombudsman has the right to initiate proceedings before the competent courts and intervene in the pending proceedings.

The aforementioned legal provision, therefore, gives the Ombudsman two types of authority:

- the authority to investigate all complaints made about the poor functioning of the judicial system or the poor administration of an individual case and to recommend appropriate individual or general measures, but without interfering in courts' decision-making process;
- the authority to initiate court proceedings or intervene in pending proceedings, whenever he or she finds that such action is necessary for the performance of his or her duties.

The first authority opens the question of defining the poor functioning of the court system. In this light, the court system, also known as judiciary, judicial system, is the system of courts in one state that interprets and applies the law on behalf of the state and constitutes a mechanism for resolution of disputes. According to the doctrine of separation of powers, the court system interprets the law and applies it to the facts of each case, but it also develops a case law, whereby setting the precedent to be followed by other courts. The judicial system is also in charge of ensuring the equality of citizens.[26]

Starting from the above definition of the judicial system, its poor functioning would imply the ineffective functioning of the courts, when Ombudsmen have the right to act, but without interfering with the decision-making process. Practice has shown that the majority of complaints received by the Ombudsman regarding the judicial system is exactly related to this situation. Citizens complain about the ineffectiveness of the court system manifested in the long proceedings, the adjournment of the hearing without justified reasons, in some cases caused by long-term sickness absences of judges. The complaints further point to non-transparent selection of expert witnesses or defence counsel *ex officio*, vacating judgements several times and remanding the case to the first-instance body for reconsideration, although there is a legal possibility of deciding on the merits by the second instance body, non-enforcement of court decisions, etc. It is precisely through the investigation that the Ombudsmen try to determine the justification of the allegations of the complaint and,

[26] In a wider context, in some countries, the judicial system includes legal professionals from the public sector and institutions such as prosecutors, state attorneys, ombudsmen, notaries, judicial police services and legal aid officers.

accordingly, decide to make a single or general recommendation to the court or other competent authority, especially in the case of a general measure.

The second authority of the Ombudsman concerning the initiation of court proceedings or intervening during the proceedings is a much more complex issue because it requires the Ombudsman to find that such activity is necessary for the performance of his/her duties. This provision provides for two possibilities: initiation of court proceedings or intervening during court proceedings. It is precisely the first possibility that opens the question as to where such activity would be necessary, i.e. on the basis of which criteria and standards will the Ombudsmen assess this necessity, and what is the role of the Ombudsman in this process, whether the Ombudsman will get the status of a party to the proceedings and how it correlates to procedural laws regulating court proceedings.

The necessity of instituting proceedings by the Ombudsman should essentially be related to the inability of exercising judicial protection in cases of human rights violations, since the protection of human rights is the responsibility of the Ombudsman. From citizens' perspective, the question arises as to whether a citizen may be denied the opportunity to exercise the protection of human rights before a court, which could be the reason for involving the Ombudsman. At the same time, this raises the issue of the primary role of the Ombudsman who is to be considered a mediator in the exercising of human rights[27] and who serves as the communication channel between citizens and offenders and hence the Ombudsman is expected to execute his/her duty primarily through the use of mediation instruments rather than initiation of court proceedings.

The role of the Ombudsman in civil proceedings

Regarding the possibility of intervention during the court proceeding laid down in the Law on the Ombudsman, we will reflect on the legal solutions regarding this possibility as stipulated in the civil procedure codes.

By 2003, only one Civil Procedure Code was in force in the Federation of Bosnia and Herzegovina [28] stipulating that the Ombudsman of the Federation of BiH has the right to

[27] In France the Ombudsman is called Mediator of the Republic.
[28] Official Gazette of FBiH, 42/98 and 3/99.

interfere in a litigation that is in progress when he/she in the course of performing his/her duties finds that there is a basis for that, aiming at protection of human dignity, that is, exercising the rights and freedoms of citizens enshrined in the Constitution and instruments set forth in the Annex to the Constitution of the Federation of BiH.[29]

The new Civil Procedure Code of the Federation of Bosnia and Herzegovina[30,] which came into force on 5 November 2003 repealed the previous Civil Procedure Code[31], and the text of the applicable law does not include an explicit provision that allows the Ombudsman of BiH to participate in the claim as an intervenient, which existed in the 1998 Civil Procedure Code of the Federation of BiH. The issue of the participation of third parties is regulated in the applicable Civil Procedure Code of the Federation of BiH in such a way that a person, having a legal interest in the success of one party in the ongoing litigation between other individuals may join that party until the ruling on a claim becomes final and binding, as well as during the extraordinary legal remedy proceedings.[32] Intervenients are persons who participate in somebody else's litigation, and the nature of the relationship that links them with the parties and the nature of the interests that are being protected in the litigation generates their legal situation which is by no means unique.[33] Each party may contest the right of an intervenient to participate in the proceedings and propose that the participation of the intervenient be denied, while an intervenient, when joining the litigation, must accept litigation in the existing form; litigation actions of an intervenient have legal effect on the party s/he has joined if they do not contravene actions of the party.[34] Consequently, in this

[29] Article 189 of the Law on Civil Procedure of FBiH:
„Ombudsman of the Federation has the right to interfere in an ongoing litigation when in the course of his/her duties s/he finds a basis to do so, aiming at the protection of human dignity, realization of rights and freedoms of citizens enshrined in the Constitution and instruments appended thereto.
In the case when Ombudsman interferes in an ongoing litigation, s/he has the right to suggest, within the limits of the claim, that the facts the parties did not disclose be established or evidence the parties did not suggest be presented.
The Ombudsman shall report his/her participation in an ongoing litigation between the parties in a submission to the Court before which litigation between parties is pending.
The Court shall enable the Ombudsman to take part in the litigation and summon him/her to all hearings and deliver all decisions where legal remedy is admissible ".

[30] Official Gazette of FBiH 53/03, subsequently amended through the Law on Amendments to the Civil Procedure Code, Official Gazette of FBiH, 42/98 and 3/99)

[31] Article 459 of the Civil Procedure Code provided that with the entry into force of this law the Civil Procedure Code (Official Gazette of FBiH, 42/98 and 3/99) shall cease to apply.

[32] Identical solution contained in the Law on Civil Procedure before the Court of BiH, (Article 306 – 309), Official Gazette of BiH, 36/04, 84/07, 58/13 and 94/16 and the Civil Procedure Code in Republika Srpska (Article 369 – 372), Official Gazette of Republika Srpska, 58/03, 85/03, 74/05, 63/07.
Ivan Turčić, LLM, Position and role of ordinary intervenient in litigation, https://hrcak.srce.hr/file/14439

[34] Article 369 of the Civil Procedure Code of the Federation of BiH, consolidated text contains: text of the Civil Procedure Code (Official Gazette of the Federation of BiH, 53/03), which entered into force on 5 November

case, it is an ordinary intervenient whose position in the proceedings is directly dependent on the position of the parties in the litigation because of the complex legal relationships that involve a larger number of parties, there is often the legal interest of third parties to engage as intervenients in a litigation in order to influence their legal outcome with their procedural activities within the limits permitted by the law. [35]

Unlike the ordinary intervenient, the *sui generis* intervenient deals with specific cases in which certain bodies in the proceedings have some special powers that distinguish them from the ordinary intervenient on the one hand and the intervenient with the capacity of the co-litigant on the other. The legal solution in the Civil Procedure Code of FBIH that was in force until 2003 foreseen the possibility for the Ombudsman to act as sui generis intervenient. Such solutions have also been abandoned in some other legal systems. Thus, until 2003 in the Republic of Croatia, the Civil Procedure Code foreseen the participation of the state attorney in the capacity of the *sui generis* intervenient, but this provision was abandoned because it was allegedly not proven in practice.

Nevertheless, the legislator in Bosnia and Herzegovina recognized the importance of the Ombudsman in the court proceedings, especially in cases of discrimination, which resulted in amendments to the Law on Prohibition of Discrimination [36] which ensured that the court must, in accordance with the rules of procedure, consider the Ombudsman's recommendations in instances where the court considers the case on which the Ombudsman institution had already made a recommendation, which a party to the proceedings uses as evidence.[37] This is exactly the way that the involvement of the Ombudsman in court proceedings should be ensured because it is in the spirit of the Paris Principles and other international standards.

The role of the Ombudsman in the administrative dispute

2003, the Law on Amendments to the Civil Procedure Code (Official Gazette of FBiH, 73/05, 19/06) and the Law on Amendments to the Civil Procedure Code (Official Gazette of the Federation of Bosnia and Herzegovina, 98/15 of 23 December 2015).

[35] Ibidem

[36] Law on Prohibition of Discrimination, Official Gazette of BiH, 59/09, 66/16.

[37] Article 15 paragraph 9.

Legislation regulating administrative disputes in Bosnia and Herzegovina provides for the possibility for the Ombudsman to initiate and intervene in administrative disputes, with the exception of the Republika Srpska Law on Administrative Disputes (LAD RS)[38]. Thus, the Law on Administrative Disputes of BiH (LAD BiH), the Law on Administrative Disputes of the Federation of BiH (LAD FBiH) and the Law on Administrative Disputes of the Brčko District of BiH (LAD BDBiH) provided that Ombudsman may initiate an administrative dispute, as well as intervene in the proceeding, when in the course of performing duties under his/her competence, he/she finds that the final administrative act resulted in violation of human dignity, rights and freedoms of citizens enshrined the Constitution and the instruments listed in Annex I to the Constitution of Bosnia and Herzegovina "[39].

The issue of the use of legal remedies in administrative disputes by the Ombudsman has not been solved uniquely in Bosnia and Herzegovina. Thus, the LAD BiH provides the possibility that the Ombudsman for BiH may submit an application for reconsideration of courts' decision only if he/she participated in the administrative dispute proceedings or if, s/he finds in the course of performance of his/her duties that a court decision violated human dignity, rights and freedoms enshrined in the Constitution and instruments of the Annex to the Constitution of Bosnia and Herzegovina.[40] The restriction in the use of legal remedies in administrative disputes concerning the previous participation of the Ombudsman in the administrative dispute proceedings is not provided for in the LAD FBiH. The possibility of using legal remedies in administrative disputes by the Ombudsman is not foreseen in the LAD BD BiH[41].

The LAD FBiH only contains the possibility of initiating court proceedings in order to protect human rights and freedoms that are violated by the final administrative act or by the illegal actions of certain entities. [42]

[38] Law on Administrative Disputes of Bosnia and Herzegovina, Official Gazette BiH, br. 19/02, 88/07, 83/08 and 74/10; Law on Administrative Disputes of the Federation of BiH, Official Gazette of the Federation of BiH, 9/05; Law on Administrative Disputes of Republika Srpska, Official Gazette of RS, 109/05 and 63/11 and Law on Administrative Disputes of Brčko District of Bosnia and Herzegovina, Official Gazette of Brčko District BiH, 04/00 and 01/01.

[39] Article 2 paragraph 7 of the Law on Administrative Disputes in Bosnia and Herzegovina, Article 2 paragraph 5 of the Law on Administrative Disputes in the Federation of BiH, and Article 2 paragraph 3 of the Law on Administrative Disputes in Brčko District BiH,

[40] Article 60

[41] Article 65, in conjunction with Articles 60, 63 and 56 of the LAD FBiH

[42] 24 Article 65 of the LAD FBiH (bilj. 2).

Conclusion

The rule of law, which includes respect for human rights, rests on the principle of amicable settlement of disputes, using dialogue and the power of arguments, while court proceedings should be an exception used only when all other democratic instruments have been exhausted. Therefore, the intention of each society is to reduce the number of court proceedings and to strengthen mechanisms for amicable settlement of disputes. This is particularly important for post-conflict and post-transitional societies, as the circumstances of conflict and/or transition often cause a large number of disputes between different entities. In this light, interventions have been made in the legislation of Bosnia and Herzegovina. Thus, Article 20a of the Civil Procedure Code before the Court of Bosnia and Herzegovina[43] provides that a person who intends to file a complaint against Bosnia and Herzegovina with the Court of BiH may, before filing the complaint, submit a request for amicable settlement of the dispute with the BiH Ombudsman. This request must contain everything that is contained in the complaint.

However, there are situations where certain institutions are vested general powers for certain actions aimed at protection of an unlimited number of citizens, or a certain social value, that is, when we talk about the protection of de-personalized general interest, which does not have a specific titular, rather it concerns the benefit of the whole society.[44] One may conclude therefrom that it is good that the Law on Ombudsman gave the Ombudsmen of BiH the widest possible mandate, including the initiation of court proceedings, and that in each case the Ombudsmen should assess the necessity of using this possibility in the process of exercising their competence, especially if the exercise of rights can be achieved amicably. Unfortunately, insufficient coordination in the creation of a legislative framework in Bosnia and Herzegovina has created different legal solutions, consequently resulting in an unequal level of protection of citizens in Bosnia and Herzegovina before the law, but also in court proceedings.

Nevertheless, in the exercise of the Ombudsman's powers in court proceedings, the Paris Principles governing the functioning of national human rights institutions must always be taken into account. This implies that the role of the Ombudsperson should, above all, be

[43] Law on Civil Procedure before the Court of Bosnia and Herzegovina (Official Gazette of BiH, 36/04, 84/07, 58/13 and 94/16)

[44] E.g. the role of Social Work Centers in initiation of proceedings for termination of marriage or proceedings to find whether marriage exists or not.

directed at strengthening the efficiency of the judicial system, without interfering with the decision-making process. In this process Ombudsmen should ensure maximum institutional neutrality. This is exactly what can be accomplished through amicus curiae instruments or recommendations. Through these interventions, the Ombudsman have the opportunity to provide expert observations to the parties and the decision-making body in a specific case, based on international human rights standards and case law.

The use of amicus curiae is also a way for the Ombudsman to execute the other part of their mandate, which relates to promotion, especially when it comes to the direct application of international standards in judicial proceedings, where there is a pronounced problem.

Therefore, the participation of the Ombudsman in court proceedings that they initiate or joining one of the parties and the use of remedies should be an exception, given the mechanisms through which Ombudsmen can express their views and which can be used in court proceedings such as amicus curiae observations, recommendations, special reports, etc. Exceptionally, this direct participation in court proceedings may be justified by the need to create a new case law, and in accordance with the obligation to ensure the application of international standards, if domestic legislation does not comply with those standards or if the subject matter of the judicial proceedings affects a large number of citizens, especially if they are vulnerable categories. Naturally, for every large-scale involvement of the Ombudsman in court proceedings, it is necessary to provide additional capacities for this institution.

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OMBUDSMAN'S ROLE IN COURT PROCEEDINGS IN THE LIGHT OF INTERNATIONAL PRACTICE

Introduction

The competence of human rights institutions to intervene in court proceedings derives from the obligation to provide assistance to victims of human rights violations, but also from the obligation to implement laws and constitutional principles protecting the fundamental freedoms and rights of citizens. It is widely believed that the modern concept of intervention in court proceedings originates from the 'friend of the court' (*Amicus Curiae*) legal principle, which existed even in Roman law, and which is often used in common law countries. In civil law countries, another related ancient legal principle – that of a class action (*Actio Popularis*) has taken root, whose classical understanding refers to the individual's ability to bring a lawsuit in the interest of the public as a whole.

Today, these legal principles are used in various legal systems worldwide as well as before international courts, but there is no unique model that would be equally applicable in every context. Likewise, the ability of human rights bodies to intervene in court proceedings is not equally compatible with different legal cultures and traditions. It is a fact that all the listed legal principles do not exist in all legal systems, that the degree of their use and efficiency is certainly contributed by terminological dilemmas, and that the decision whether a body can intervene in the interests of the victim sometimes depends on the court, not only the human rights bodies. It is undisputed that parties are often unable to initiate court proceedings themselves so as to protect their rights, which makes human rights bodies irreplaceable. However, the questions raised are that of what does this role imply exactly, to what extent the state institution assumes the role of the party's representative, what kind of capacities it should have, how it chooses cases for intervention, whether intervention in court proceedings is equally expedient in all areas of exercising rights, and finally, which of the existing models gives the best effects.

The complexity and nature of the subject-matter of the research, content of hypotheses and the objective set decided which combination of methods would be used in research for this text, such as the legal (dogmatic, normative) method, scientific and professional literature content analysis method, case study method, comparative method, as well as, in terms of deriving conclusions, general logic methods of synthesis, induction, abstraction and generalization.

The subject-matter of the research includes analysis of systems of interventions in court proceedings in countries with complex, federal organisation, often involving a number of human rights institutions, which also include special institutions protecting equality. Furthermore, the very essence of this authority is placed under a magnifier, because there are different levels of involvement, which sometimes include only the possibility of delivering

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expert opinions without obtaining the status of a party, and sometimes also initiating and participating in court proceedings, including legal remedy proceedings, as well as the possibility to represent parties before court or another authorized tribunal. Finally, it has been pointed out to the legal, HR and material framework that has to be established so that the competence to intervene in court proceedings would achieve the desired effect and produce real changes. In this process, it is necessary to respect the existing legal tradition and autochthonous legal principles that have demonstrated their practical applicability over a number of years, and any attempt to use legal transplants through which national laws are being rapidly unified and raised above the borders of national jurisdictions can only produce confusion and counter-effects. Therefore, in spite of numerous differences, this analysis aims at presenting considerations, analyses and recommendations that will benefit not only the courts, legislators and governments, but also human rights bodies which aim at setting up or using the possibility of intervention in court proceedings.

United States of America

Intervention in court proceedings for protection against discrimination in the United States is exercised through administrative disputes, most frequently as concerns the exercise of voting rights, by initiating lawsuits regarding discrimination on any ground. Such a lawsuit most commonly derives from a law, by-law or practice of a state body, and through friend of the court (*amicus curiae*) briefs in all branches of law, including criminal and criminal procedure law, enforcement procedure in civil matters, manner and conditions of criminal sanctions enforcement and sentence fixing and severity. A number of state bodies are involved in the interventions, which makes the US system one of the most diverse and complex, but probably also one of the most efficient in terms of using this legal possibility.

The role of the equality body at the federal level is performed by the Washington-based U.S. Commission on Civil Rights (USCCR) and six regional offices. [46] It was created by the Civil Rights Act of 1957 and it is answerable to Congress for its work. The Commission was created as an independent and politically neutral federal agency with the power to conduct investigations, implement and enforce federal laws and enhance human rights policies, conduct research and analyses on matters essential to the work of the federal government, and to inform the public and legislative bodies thereon. The Commission examines allegations of violations of electoral rights, allegations of discrimination based on race, colour, religion, sex, age, disability, national origin, as well as violations of the rights of citizens by law enforcement agencies[47]. In order to accomplish its mission, the Commission is authorized to request documentation and access to databases, examine witnesses, organize public debates, issue public service announcements, forward citizens' complaints to competent human rights bodies at the state and local level, monitor and ensure the implementation of laws that guarantee equality of citizens, and to publish studies and reports on the subject of human rights protection, which usually contain findings, recommendations and advice to legislative bodies.

The Commission intervenes in administrative and court proceedings via the Office of the General Counsel, inter alia, through participation in lawsuits by submitting expert opinions in

[46] *Washington DC, Atlanta, Chicago, Kansas City, Denver, Los Angeles*

[47] Including the actions of police agencies and other security services, administrative, judicial and other governmental bodies, and the treatment of persons deprived of their liberty.

the capacity of an interested third party. In order to get informed about the cases that require intervention, but also in view of conducting investigation and information gathering procedures, the Commission has established State Advisory Committees in each of the 50 federal states and the District of Columbia. The committees are made up of citizens of the federal state who do not receive remuneration for their work and are tasked with reporting to the Commission in writing on allegations or findings of denials of electoral rights or discrimination on afore-mentioned grounds, submitting an opinion in cases falling within the competence of the Commission which concern the human rights situation in a given federal state when reporting to the President and the Congress, receiving complaints from citizens, civil servants and representatives of public and private organizations, forwarding their findings and opinions when requested to do so by the Commission, as well as attending public hearings or meetings important to the work of the Commission. Based on such investigation mechanisms, the Commission has most often intervened in court proceedings concerning general matters of importance to the whole country, such as gender equality[48], requirements for registration of national minorities in order to exercise voting rights[49], exercising the rights of families whose members have different nationalities[50], as well as positive discrimination measures in the field of education.[51] Having in mind the complex administrative system as well as the need to specialize (expert and geographical) in specific fields where equality of citizens is breached, the Commission predominantly plays the role of a coordinator between institutions at different levels of government, and it reports on the human rights situation and the results of all undertaken activities at least once annually to the central government and proposes amendments to laws.

One of the federal institutions that mostly uses the possibility of taking part in lawsuits and initiating proceedings for protection against discrimination is the U.S. Department of Justice (DOJ), which includes special offices - Civil Rights Sections, which operate in fields of: equal opportunities in education, labour rights, housing, rights of immigrants, rights of persons with disabilities, prisoners, detainees and juveniles deprived of their liberty, as well as citizens' voting rights.[52] The Department had the most interventions in court proceedings in the field of education, in terms of school desegregation; the annual budget for these purposes ranges from two to six million dollars [53] and the number of permanent staff is 30 on average[54]. Additionally, the Department has had interventions in court proceedings in the field of housing, with an average of 20 to 40 cases opened annually, of which ½ is usually finalised by initiating court proceedings or by an out-of-court settlement,[55] as well as in the field of equal opportunities in employment, with a total of 229 court proceedings launched from 1998 to 2017 (ending with August.[56]

[48] *G.G. v. Gloucester County School Board*, before the Supreme Court of the United States.
[49] *Shelby County v. Holder* before the Supreme Court of the United States and *North Carolina State Conference of the NAACP, et al., v. McCrory*, before the United States Court of Appeals for the Fourth Circuit.
[50] *United States v. Texas*, before the Supreme Court of the United States.
[51] *Fisher v. University of Texas at Austin*, before the Supreme Court of the United States.
[52] See https://www.justice.gov/crt/voting-section-litigation, visited on 11/01/2018.
[53] See http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf, p. 18, visited on 11/01/2018.
[54] See http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf, p. 19, visited on 11/01/2018.
[55] For the sake of illustration, there were 18 cases opened during 2016 related to unequal possibilities for obtaining housing loans for members of minority groups, of which legal proceedings have been initiated in 7 cases and a total of nearly 37 million dollars have been settled. See https://www.justice.gov/crt/page/file/996791/download, p. 3, visited on 11/01/2018.
[56] See https://www.justice.gov/crt/employment-litigation-section-cases, visited on 11/01/2018.

It is interesting that the sections also get involved into the work of courts by organising expert level panel discussions and training sessions for judges, at which they discuss issues related to the exercise of fundamental human rights, such as conversion of fines into prison sentences for indigent persons.

It is also indicative that the term "enforcement" of a law, statute or other act is used to refer to the authority to intervene in court proceedings,[57] which indicates that intervention in court proceedings is a daily, regular and implied activity and therefore at the very core of the activities of state human rights agencies.

A complex federal system, with a virtually inexhaustible number and types of practical needs for intervention in court proceedings in the field of protection of equality of citizens, in a country where the power of a court judgment enjoys the status of not only a source of law but also keeps a check on the legislative branch, requires not only a complex but also flexible and decentralized state mechanism, which is simultaneously adequately equipped and financed, and whose reactions are timely. Regardless of its particularities, in the context of globalization and close international cooperation, this system has also exerted a decisive influence on the shaping of legal cultures beyond its borders, together with other typical representatives of the case law tradition, from which many of the said legal principles are originally derived.

Great Britain

Although protection of equality in the Great Britain was entrusted to the work of several highly specialized bodies for a number of years, the Equality Act of 2006 established the Equality and Human Rights Commission (EHRC)[58], a single and independent public institution with the authority to promote and enforce equality and non-discrimination laws in the territories of England, Scotland and Wales. The Commission took over the responsibilities of the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. It also has responsibility for other aspects of equality law: age, sexual orientation and religion or belief. The Commission's main office is in London, with regional offices in Manchester, Glasgow and Cardiff; it is funded from the state budget, via the Department for Education (DfE).

As for the courts, the Commission has competence to provide legal assistance to victims of discrimination, to intervene in existing court proceedings or to initiate new ones, including procedures under legal remedies and procedures for reviewing the constitutionality of acts, and to require the court to issue provisional measures.[59]

These opportunities are most commonly used by the Commission in cases of equal employment opportunity, in ensuring access to assets, institutions and services, and in the area of housing and education.[60] The average annual budget of the Commission in the period

[57] Originally: *Enforcement (of Law, Statute, Civil Rights Act, etc.)*.
[58] *The Equality and Human Rights Commission*, https://www.equalityhumanrights.com/en, visited on 12/01/2018.
[59] Equality Act 2006, Section 30, https://www.legislation.gov.uk/ukpga/2006/3/contents, visited on 12/01/2018.
[60] See https://www.equalityhumanrights.com/en/gwaith-achos-cyfreithiol/our-legal-work-action, visited on 12/01/2018.

from 2007 to 2017 ranged from EUR 20 to 60 million,[61] and between 200 and 400 employees work on equality issues.[62] It intervenes in a number of selected cases of general importance each year[63], in accordance with the Strategic Litigation Policy[64], with a success rate between 60% and 80%.[65]

Out of the numerous cases examined by the Commission, authorities to intervene in court proceedings are used when a positive change of practice is needed, by clarifying the statutory provisions, placing essential issues among the priorities that need to be resolved, as well as by challenging policies or practices causing significant inequalities within an entire branch of economy or part of social life. The Commission drew the attention of the international public owing to its work on the case in which the British National Party (BNP) was the responsible party, as its constitution stated that party membership was open to persons who are "indigenous Caucasian and defined ethnic groups emanating from that Race." The Commission requested an amendment to the party constitution, after which the responsible party expressed its readiness to "clarify" the term "white" on its website. Believing that despite the clarification, the BNP constitution will continue to discriminate against potential members on racial grounds, the Commission issued proceedings before the Central London County Court against the BNP on discrimination grounds against party leader and two other officials, with a favourable outcome.[66]

European civil law countries

Although state equality bodies operate within the same European Union legal framework, their work is organized in different ways, they have different mandates and carry out their mission within different legal systems.

European Union directives[67] require Member States to establish a body or bodies for the protection and promotion of the principle of equality, that such bodies have competence to provide support to victims of discrimination, have authority to conduct independent investigations, make their recommendations and publish reports on instances of discrimination. However, the nature and extent of support that needs to be provided to victims of discrimination are not specified. The recommendations of the European Commission against Racism and Intolerance (ECRI), although not binding, are an attempt to codify the best practices of equality bodies and to interpret the afore-mentioned Directives. ECRI General Policy Recommendation (GPR) on specialised bodies to combat racism,

[61] See https://www.equalityhumanrights.com/en/adrodd-corfforaethol/annual-reports, visited on 12/01/2018.
[62] See http://www.equineteurope.org/Equality-and-Human-Rights, visited on 12/01/2018.
[63] See https://www.equalityhumanrights.com/en/legal-casework/legal-cases, and https://www.equalityhumanrights.com/en/legal-casework/human-rights-legal-cases, visited on 12/01/2018.
[64] See https://www.equalityhumanrights.com/sites/default/files/strategic_litigation_policy_100315.pdf, visited on 12/01/2018.
[65] See https://www.equalityhumanrights.com/en/adrodd-corfforaethol/annual-reports, visited on 12/01/2018.
[66] The court accepted the allegations and ordered amendment of the party's constitution in accordance with Clause 4 of the Equality Act, which was done. See https://www.theguardian.com/politics/2009/oct/15/bnp-non-white-members, visited on 12/01/2018.
[67] Council Directive 2000/43/EC of 29 June 2000implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

xenophobia, antisemitism and intolerance at national level requires that states, in accordance with their domestic legal framework "provide equality bodies with the right to intervene in court or other adjudicatory bodies' proceedings, in appropriate circumstances, and where necessary."[68]

Interpreting EU Directives in the *Rewe-Zentralfinanz case*, the European Court of Justice has found:

> "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law." [69]

Opportunities for intervention in court proceedings or for submitting friend of the court briefs are not widely used, due to a number of reasons. First of all, some of the legal systems do not provide for this possibility in any form. Some equality bodies have been set up relatively recently, and the parameters of their powers, as well as the statutory provisions they are governed by, have not been tested in practice. In general, it seems that this concept is stronger in member states related to the case law tradition, although it is not exclusively related to these countries.

At European Union level, equality bodies can forward cases to decision-making to specialized tribunals[70]and/or initiate court proceedings in cases of discrimination.[71] The Austrian Ombud for Equal Treatment may request the court to pass a declaratory judgment in labour disputes or civil proceedings when it does not agree with the Equal Treatment Commission's decision or when the responsible party does not adhere to the findings of the Commission. The Danish Institute for Human Rights as well as the Estonian Chancellor of Justice[72] provide support to victims of discrimination in the process of obtaining free legal aid, when they find it to be justified. In civil and administrative disputes in France, the parties or the court may require the Equal Opportunities and Anti-Discrimination Commission to intervene by submitting a file including the results of the investigation and to submit its opinion on the subject of the complaint or, if the case has not been examined by the Commission, to submit to the Court its opinions regarding the factual basis and the application of the law. In criminal cases, the French Commission may also intervene on its own initiative. Other equality bodies make legally binding decisions[73], impose fines which may be challenged before a court[74] or have an explicitly prescribed advisory role as a friend

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[68] *ECRI General Policy Recommendation N°2 on Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level* CRI(97)36, of 13 June 1997.

[69] Case *33/76 Rewe-Zentralfinanz EG v. Landwirtschafts-Kammer für das Saarland* [1976] ECR 1989, para.13.

[70] The Austrian Ombudsman for Equal Treatment, the Ombudsperson for Equality and the Ombudsman for Minorities of Finland, the Center for Gender Equality of Iceland and the Equality Authority of Ireland.

[71] Belgium, Finland, France, Ireland, Malta, Slovakia, Sweden and the United Kingdom.

[72] Since 1999, the Public Defender has also been performing the role of the Ombudsman. See http://www.oiguskantsler.ee/en, visited on 16/01/2018.

[73] Bulgaria (Commission for Protection against Discrimination); Cyprus (Ombudsman's Office); Estonia (Public Defender and Gender Equality and Equal Treatment Commissioner); Finland (Discrimination Tribunal of Finland); Hungary (Equal Treatment Authority); Iceland (Gender Equality Complaints Committee); Ireland (Equality Tribunal); Norway (Equality and Anti-discrimination Tribunal) and Romania (National Council for Combating Discrimination).

[74] Latvia, Romania, Slovenia, Bulgaria, Estonia, Ireland, Norway.

of the court.[75] Some equality bodies that have competence to initiate court proceedings may also represent victims of discrimination in court.[76] When the equality body institutes court proceedings on behalf of the injured party, that turns it from a neutral institution to an institution that unambiguously represents the interests of only one party, i.e. the alleged victim of discrimination. Formally, this change is most frequently followed by a case re-assignment to another employee or another department within the equality body.

Although many equality bodies have competence to initiate court proceedings in cases of discrimination, only some[77] have set up detailed criteria when deciding which cases justify intervention in court proceedings. The following are some of the most commonly used criteria: interpretation of valid statutory provisions, enforced implementation of laws and achieving equality in practice, potential benefit for future victims of discrimination, interests of the victim or injured party and potentially remedial influence on his/her situation, striking an adequate balance between the different discrimination forms and resources available to the equality body for these purposes, as well as cooperation with other organizations representing victims of discrimination in courts. The afore-mentioned criteria are applied, of the one part, to assess individual benefit for the victim, such as awarded compensation of damages, and of the other part, the general interest in improving legal certainty and preventing discrimination in areas that are particularly susceptible to it. Such cases play a key role in the law enforcement process, contributing to positive changes as regards the presence of discriminatory practices and raising awareness of the gravity, harmfulness and punishability of such actions. The bodies that have established guidelines for selecting cases for intervention in court proceedings are precisely the ones most often involved in litigation.

It seems, however, that there is a substantial overlap or even confusion between the concepts of interveners, concerned parties and friends of the court, depending on legal culture, tradition and established legal terminology.[78] Due to various interpretations and ambiguities in the interpretation of these terms, as well as insufficiently defined role of national human rights bodies, it is useful to analyse the case law of European courts precisely in protection against discrimination procedures, involving such bodies.

Ombudsperson's interventions before the European Court of Justice

The Court of Justice of the European Union (CJEU) is the highest instance judicial authority with jurisdiction to interpret EU agreements as well as to review the legality of acts of the Union institutions. The Court plays a key role in the legal integration of the European Union, through discussion and decision-making on the boundaries of Union's powers and by shaping and implementing its primary principles. Consequently, the Court often dealt with the interpretation of directives addressing citizen equality issues, and in principle with the role and limits of powers of equality bodies in court proceedings. In *Webb v. Emo Air Cargo*, the

[75] Bulgaria, Finland, France, Ireland, Latvia, Lithuania, Norway, Romania, Slovakia, Slovenia and the United Kingdom.
[76] Ireland (Equality Authority), Portugal (High Commission for Immigration and Intercultural Dialogue), Slovakia, Sweden and the United Kingdom.
[77] Belgium, Ireland (Equality Authority), Sweden and the United Kingdom.
[78] For example, the Slovak National Centre for Human Rights may send to the court to an "expert position" on protection of equality related matters. According to the contents of prescribed authorities, this is a counterpart to the amicus curiae concept from case law.

Court examined the obligations of national authorities and found that the Gender Equality Directive should be interpreted with the aim of achieving substantive, not just formal equality,[79] while in *Kalanke v. Freie Hansestadt Bremen*, the Court found that the system of positive measures by state bodies is a necessary step in the implementation of the equal opportunity principle prescribed by the Gender Equality Directive.[80] The Court therefore requires states to take positive measures in the implementation of directives, which undoubtedly includes the possibility to intervene before national courts. This, however, does not apply to the right of equality bodies to institute proceedings before the Court of Justice of the European Union.

Article 267 of the Treaty on the Functioning of the European Union prescribes the right of national courts or tribunals to request the European Court of Justice to interpret the treaties or acts of the institutions, bodies, offices or agencies of the Union if they consider that a decision on the question is necessary to enable them to give judgment. It is therefore clear that the rules governing the work of the Court do not allow this possibility to national equality bodies, even when it comes to questions of interpretation or application of equality directives. This view is confirmed by the case law of the European Court in the case *Valeri Hariev Belov v. CHEZ Elektro Balgaria AD and Others*[81] in which the request of the Commission for Protection against Discrimination of Bulgaria for a preliminary ruling was dismissed by the Court as inadmissible. The reasoning states, inter alia, that one of the key principles governing the Court in deciding on admissibility is that the right of a body to refer questions for a preliminary ruling to the European Court of Justice is a question governed by EU law alone rather than the domestic law. In this context, the Court examines whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Furthermore, it has to be a pending case and the request needs to relate to a decision of a judicial nature.[82]

The situation is somewhat more favourable as regards the right to submit briefs in the capacity of a concerned qualified party, without participating in the procedure itself. Although the existing rules of the Court do not explicitly allow this possibility to equality bodies, or to any third party, the right to submit written observations in on-going proceedings is provided to Member States and the European Commission. Intervention in proceedings before the European Court can therefore happen indirectly, in proceedings in which the equality authority has previously participated at national level. This possibility was used by

[79] C-450/93 [1995] ECR I-305.
[80] C-32/93 [1993] ECR I-3567.
[81] C-394/11 Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others, CJEU, 31 January 2013.
[82] *Ibid*, para 38.

several European equality bodies,[83] and some such cases exerted a decisive influence on the development of European anti-discrimination law.[84]

Ombudsman's interventions before the European Court of Human Rights in Strasbourg

Unlike the Court of Justice of the European Union, the European Court of Human Rights in Strasbourg not only allows the participation of human rights bodies in the capacity of a concerned third party, but also calls for such an intervention when it can be helpful in decision-making.

First of all, it should be borne in mind that national human rights institutions can not initiate proceedings before the European Court of Human Rights on behalf of the injured party, as they are prevented from doing so by the requirement provided for in Article 34 of the European Convention on Human Rights. Although some authors advocate such a possibility,[85] recent meetings of Council of Europe member states representatives at the highest level indicate that there is no support for such changes to the protection system under the Convention.[86] Moreover, national human rights institutions, although established by the state and independent of other branches of government, can not address the Court on their own behalf on account of alleged violations of the rights enshrined in the Convention, caused to them by the state. Finally, the Court's case law is unambiguous also with regard to the inadmissibility of class actions (*Actio Popularis*) where the applicant is an organization or association whose interests are threatened, but which are not directly harmed by a state act. In *Aksu v. Turkey*, the Court underlined: "Consequently, the existence of a victim who was personally affected by an alleged violation of a Convention right is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid and inflexible way."[87]

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[83] Centre for Equal Opportunities and Opposition to Racism of Belgium (case C-54/07 *Centrum Voor Gelijkheid Van Kansen En Voor Racismebestrijding v. Firma Feryn NV); Equality and Human Rights Commission of Great Britain (cases C-303/06 Coleman v. Attridge Law* and C-388/07 *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (aka the *Heyday* case). Equality Commission for Northern Ireland (cases C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* and C-342/93 *Gillespie v. Northern Health and Social Services Board*); Equality Ombudsman of Sweden (case C-236/98 *Jämställdhetsombudsmannen v. Örebro läns landsting*).

[84] In case C-222/84 (*Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*), the European Court of Justice found that 'depriving the applicant of his/her possibility to bring forward that s/he is a victim of discrimination due to unequal treatment by a court constitutes a violation of European Union law'; in case no. C-303/06 *(Coleman v. Attridge Law*), the Court found that the prohibition of discrimination also includes discrimination by virtue of an implied relationship with the group; and in case no. C-54/07 *(Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*), the Court found that the act of discrimination without witnesses could still constitute discrimination against the principles governing the proving of discrimination.

[85] Gauthier de Beco, *Non-judicial Mechanisms for the Implementation of Human Rights in the European States* (Brussels: Bruylant, 2009).

[86] *Antoine Buyse, The Court's Ears and Arms: National Human Rights Institutions and the European Court of Human Rights*, in: Katrien Meuwissen and Jan Wouters (ed.), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives* (Antwerp: Intersentia, 2012), p. 3.

[87] *Aksu v Turkey*, Application nos. 4149/04 and 41029/04, judgment of 15 March 2012.

Contrary to the afore-mentioned, Article 36 of the European Convention on Human Rights allows the participation of third parties in several ways:

1. "In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant may submit written comments and take part in hearings in cases before a Chamber or the Grand Chamber.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
3. 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."

The cited provision therefore provides for Ombudsperson's interventions at the request of the Court or by submitting an application to the Council of Europe Commissioner for Human Rights. The advantage of the second option is reflected in the fact that the Commissioner has the right to intervene in any case, and certainly finds the involvement of the Ombudsperson useful in better understanding the situation in the country which is the responsible party. For this reason, the Commissioner established a liaison office with national human rights institutions, with the explicit aim of strengthening cooperation and coordinating the exchange of information.[88] The first option whereby the national institutions seek the approval of the Court for intervention entails the risk of such a request being rejected, since the Court receives more requests for intervention than it can approve, and makes a selection on the basis of relevance for deciding on the case. In reality, however, the Court generally approves the request for intervention of the national human rights institutions, not only because it is in principle open to intervention, but also because of the fact that national institutions are deeply rooted in the domestic human rights system, whose functioning is reviewed by the Court.[89] Moreover, it can be argued that the legitimacy of their interventions is greater due to their independence from non-governmental organisations, which are usually governed by specific interests.

Interventions of national human rights institutions before the European Court of Justice in Strasbourg have not been numerous in the past decades, but their number has been growing year by year and they certainly positively influence the development of case law on the application of the Convention. These interventions helped the Court to render important decisions, such as the following judgments: judgment on the rights of Iraqi nationals transferred by one of the signatory countries to Iraqi custody, where they could be imposed death sentences;[90] judgment on the right to manifest religious belief in the context of wearing the standard flight attendants uniform of a private British airline;[91] judgment establishing that a child's sexual abuse at school constitutes torture, inhuman or degrading treatment or

[88] De Beco (2009) p. 177-178.

[89] David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009, 2nd ed.), p. 855-856.

[90] Case of AL-SAADOON AND MUFDHI v. THE UNITED KINGDOM *(Application no. 61498/08*), judgment of 04/10/2010, in which the Equality and Human Rights Commission of England and Wales intervened.

[91] Case EWEIDA AND OTHERS v. THE UNITED KINGDOM *(Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)*, judgment of 15/01/2013, in which the Equality and Human Rights Commission of England and Wales intervened.

punishment, prohibited by Article 3 of the Convention;[92] judgment on the issue of forced sterilization[93] or the judgement on involuntary commitment to a mental health facility and unfair guardian appointment procedure.[94]

This practice follows the Paris Principles that require that national human rights institutions cooperate with regional mechanisms to protect human rights. By supporting the work of the Court from the level of domestic jurisdiction, national institutions contribute to the efficiency of the European system of human rights protection and legitimacy of judicial decisions, while the expert assistance provided contributes to reducing backlog at the same time. From the Court perspective, national human rights institutions act as useful sources of information and evidence, and from the perspective of the States Parties to the Convention, activities of these institutions contribute to raising awareness of the mandatory and effective mechanisms for the protection of human rights in general.

Conclusion

Court proceedings are generally one of the most important and efficient ways of promoting and ensuring the application of statutory norms, because judgments in individual cases may have far-reaching legal and social consequences. Given the fact that human rights bodies have competence to promote and apply human rights standards, it is undeniable that they need to take measures with the aim of actually putting these norms into practice, which includes the possibility of intervening in court proceedings. There is also an internationally recognized obligation of domestic courts to interpret domestic law in the light of international standards embodied in conventions, directives and case law. Of the other part, it would be incomprehensible for an institution promoting the protection of citizens' rights not to have the authority to seek the application of the basic principles of human rights protection through participation in court proceedings. The intent of High Contracting Parties, presented comparative practice of human rights bodies, as well as interpretation of international conventions and European directives by regional courts, unequivocally suggest to such a conclusion.

In order for the human rights bodies to be able to perform this function at all, it is necessary that the state not only refrain from imposing prohibitions or requirements limiting this competence, primarily through legislative activity, but also to take a proactive role by ensuring adequate capacities for this purpose. This primarily relates to material and personnel capacities, which should be provided taking into account a number of factors such as the number of cases, level of enforcement and exercise of citizens' rights without the intervention of competent authorities, state of human rights in certain fields that are particularly susceptible to discrimination or position of particularly vulnerable groups in a given society and specific time context, ability of courts to bring about positive changes in the society by

[92] Case *O'KEEFFE v. IRELAND* (Application no. 35810/09), judgment of 28/01/2014, in which the Irish Human Rights and Equality Commission intervened.
[93] Case Gauer and others v. France (Application number 61521/08), judgment of 23/01/2012, in which the European Group of National Human Rights Institutions intervened.
[94] Case D.D. v. LITHUANIA, (Application number 13469/06, judgment of 09/07/2012, in which the European Group of National Human Rights Institutions intervened.

their decisions on selected matters, as well as neutral parameters such as the number of inhabitants, budget and existing capacities within the human rights body. Furthermore, the internal structure of the human rights body must be adapted to the performance of its mandate to intervene in court proceedings. The models analysed point to the conclusion that it is most commonly necessary to establish a separate division whose work is separated from the work of the divisions acting on citizens' complaints, primarily focused on monitoring the situation in individual fields, litigation, legal remedies lodging, and cooperation with other relevant institutions, primarily with the judicial and non-governmental sector organisations. This division and specialization of functions is particularly important because the human rights body acts in a neutral way in cases opened on citizens' complaints, while paying due attention to the arguments of both parties, and making a final decision in accordance with regulations in force, while intervention in court proceedings implies a completely different mode of work, representation of interests and arguments of one party only with the aim of achieving a favourable outcome of court proceedings. Equally, intervention in court proceedings of bodies that do not have adequate capacities can have a counter-effect, not only because of increased opportunities for adverse outcomes of court proceedings, but also on account of creating a general culture of impunity, inability to sanction the responsible party and deterring victims of human rights violations from seeking material and moral satisfaction.

Finally, effective involvement of human rights bodies in court proceedings needs openness and readiness of courts to respect this type of competence and to trust these interventions to the extent that they represent the position of a qualified party on matters within their primary competence. The reasoning by which all competent branches of government should be led is the fact that citizens rarely decide to initiate court proceedings that are time-consuming, exhaustive and financially demanding, and that strategic focusing of resources on individual court cases can produce essential changes of general public interest.

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ROLE OF THE HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND HERZEGOVINA IN CIVIL ACTIONS BROUGHT IN COURTS

Introduction

The institution of Ombudsman was created more than two centuries ago. The year 1809, when the Swedish Office of the Parliamentary Ombudsman was set up, is usually understood to be the time when this institution was created. However, this institution did not spread beyond the Swedish borders immediately after its creation. To explain, it took more than one century for the Ombudsman to appear in other Scandinavian countries (Finland in 1919, Denmark in 1955, and Norway in 1962 respectively).

The basic model of the Ombudsman's Office as a human rights institution in Bosnia and Herzegovina was set up in 1996 by the Dayton Peace Agreement, Annex VI thereto. Initially, three Ombudsman's Offices were active in B&H, entity-level Ombudsman's Offices and the B&H Ombudsman. The Human Rights Ombudsman of Bosnia and Herzegovina was set up by amendments to the Law on B&H Human Rights Ombudsman, as an independent institution tasked with promoting good governance and rule of law, protecting the rights and freedoms of natural and legal persons, as enshrined in the B&H Constitution and international agreements from the appendix to the Constitution, to monitor the institutions of Bosnia and Herzegovina, its entities and Brčko District in accordance with the provisions of law. The statutory powers and competences of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina are based on the Paris Principles adopted by the United Nations General Assembly Resolution of 20 December 1923, which are international standards for the functioning of national human rights institutions and are used as a basis for their international accreditation.

The institution of Ombudsman has a range of competences and functions; the one concerning its relations with courts is particularly important and interesting. The position of the Ombudsman institution, specifically in civil actions brought in courts, is set forth by a provision of Article 4 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina, whose paragraph (1) stipulates that the competence of the institution will also include the authorities to conduct investigations of all complaints related to poor functioning of the court system or improper processing of individual cases and to recommend appropriate individual or general measures. The Ombudsman will not interfere in the court decision-making process, but it may initiate court proceedings or intervene during on-going proceedings when it finds, during the performance of its duties, that such activity is necessary. The Ombudsman may also make recommendations to a government authority which is a party to proceedings or be consulted by the parties to proceedings (para. 2). Thereat, it must be kept in mind that the judiciary is a mechanism for controlling the legality of actions of all entities in the society. Courts are autonomous and independent from the legislative and executive branch of government and no one should influence the independence and impartiality of a judge when deciding in cases assigned to him/her (Art. 3

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of the Law on Courts in the Federation of Bosnia and Herzegovina). Independence is the way in which the judiciary exist and a substantial characteristic of the court as a state body.

Ombudsman's authority in civil actions brought in courts

The right to a fair trial before an independent and impartial tribunal within a reasonable time, i.e., efficient provision of legal safeguards, is one of the fundamental rights; citizens also address the Ombudsman institution asking for its protection. The 2016 annual Ombudsman report pointed to unenforced court decisions regarding human rights and the burden on the judicial system through numerous pending cases and the inefficiency of the judiciary.[96]

As for Ombudsman's intervention regarding complaints to the poor functioning of the court system, the court files show that in the majority of cases after the Ombudsman is addressed, first instance courts undertake legally prescribed procedural actions, which is not possible in the second instance procedure and appeal procedure, as the cases are resolved following the age of the initial act, according to the instructions of the B&H High Judicial and Prosecutorial Council (so-called planning cases), followed by regular cases that are urgent under law (labour cases, housing cases and bankruptcy cases).

Although in most cases the Ombudsman carries out investigations related to the duration of court proceedings, it does not ensue from the competences prescribed by the Law on the Ombudsman that the Ombudsman is authorized to represent the citizen in the procedure or to join the procedure instead of a citizen.

Under the Law on Prohibition of Discrimination, the Human Rights Ombudsman has been assigned the role of a central institution for protection against discrimination. Discrimination is inadmissible differentiation of people, unequal treatment of individuals or groups based on a personal capacity, without reasonable justification.

The basic moral and legal principle that: "All human beings are born free and equal in dignity and rights" is an axiom on which ideas, theories and the practice of human rights rest. All forms of discrimination are prohibited, which is a negation of the principle of equality. Everyone has the right not to be discriminated. As an exceptionally negative social phenomenon, discrimination is prohibited by all domestic and international legal documents that are in force in B&H. Discrimination is prohibited by the B&H Constitution (entity-level constitutions, Statute of the Brčko District, cantonal-level constitutions), as well as by all laws regulating individual areas of life and work of a citizen (in the fields of labour, health, education, social welfare, and the like).

The Law on Prohibition of Discrimination of Bosnia and Herzegovina governs all forms of discrimination, institutions responsible for protection against discrimination, as well as the procedures for protection against discrimination before the B&H human rights institution, court proceedings and administrative procedures.

[96] Institution of Human Rights Ombudsman of Bosnia and Herzegovina, *The 2016 Annual Report on the Results of Activities of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina*, pp. 17-21, available at: https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2017032310003163bos.pdf.

As the central institution for protection against discrimination, the Ombudsman has several competences, in accordance with the provisions of the Law on Prohibition of Discrimination. The Ombudsman works on the promotion of that law, informs the public, raises awareness, conducts campaigns and in other ways actively promotes fight against discrimination with the objective of its suppression. Ombudsmen conduct investigations in the field of discrimination either based on an individual or group complaint of natural or legal persons in relation to discrimination or on their own initiative. When the Ombudsman finds during investigation that the rights and freedoms of the claimant were violated, he makes recommendations to the government authorities. The recommendation may be declaratory, finding if discrimination has occurred at all (reasoned in accordance with the highest international human rights and fundamental freedoms standards), which is a prerequisite for the making of any other recommendation; constituent or transformative recommendation recommending to the responsible party how to eliminate the discrimination found; non-repeating guarantee recommendation - the responsible party is given a recommendation how to establish an effective way to prevent future repetition, recommendation for compensation of damages – recommending to the responsible party to consider the claimant's claim for damages with the aim to prevent court proceedings. The law prescribes a fine for misdemeanours committed by failing to act upon a recommendation of the B&H Ombudsman, as well as in cases when the legal person fails to cooperate with the B&H Ombudsman, or fails to provide written answers or notifications. The Law on Prohibition of Discrimination provides for the institution's obligation to submit annual reports on instances of discrimination to the relevant parliaments in B&H, since that would contribute primarily to determining the level of discrimination in B&H society, but also to publicly discussing it before various parliaments.

Chapter V of the Law on Prohibition of Discrimination refers to existing procedures for protection against discrimination, judicial and administrative proceedings. In cases where a violation of the right to equal treatment arises from an administrative act, an appeal in administrative procedure and possible initiation of an administrative dispute based on protection against discrimination requiring the annulment of such an administrative act will not prevent the persons referred to in paragraph (1) of Article 11 from initiating court discrimination proceedings.

Article 12 Article 12 of the Law on Prohibition of Discrimination prescribes special discrimination lawsuits. The Ombudsman may join proceedings initiated by filing discrimination lawsuits, in accordance with the rules of civil proceedings, as an intervener on the part of a person or group of persons who claim to be victims of discrimination. The court will allow the Ombudsman to participate as an intervener only with the plaintiff’s assent. The Ombudsman can also file a lawsuit against a person who has violated the right to equal treatment of a large number of persons, who predominantly belong to the group whose rights are protected by the plaintiff. In cases when the court examines a case on which the Ombudsman has already made a recommendation, used by the party as evidence, the court is obliged, in accordance with the rules, to give consideration to Ombudsman's recommendations.

Ombudsman's participation in administrative procedures and administrative disputes is prescribed by the Law on Administrative Procedure of B&H according to which the B&H Ombudsman may be a party when it finds, while performing the duties within its competence, the basis for initiating administrative procedure for exercising the rights and freedoms of citizens enshrined in the B&H Constitution, Convention for the Protection of Human Rights and Fundamental Freedoms and instruments listed in Annex VI to the General Framework

Agreement for Peace in B&H. In administrative procedures the Ombudsman has the status of a party that is determined by its competence in the exercise of citizen rights and freedoms. The Ombudsman has the status of a party only in the procedural or formal sense, because it was not a participant in the substantive law relationship that is the subject of administrative proceedings. The Ombudsman has the right to initiate an administrative dispute against a final administrative act, as well as to use legal remedies in favour of the party.

Therefore, in proceedings of judicial protection against discrimination, the Ombudsman has the authority to participate in proceedings as an intervener with the plaintiff's consent and the right to file a lawsuit in favour of a large number of persons predominantly belonging to the group whose rights are protected by the plaintiff. The prolonged time-limit for filing a lawsuit, pursuant to Article 12 of the Law on Prohibition of Discrimination, is three years from the day of finding out about the violation of the right, and five years at the most from the date of the violation (in cases of continuing discrimination, the time-limit is calculated from the last committed act, while time-limit is not calculated in cases of systemic discrimination). Such a time-limit enables protection against discrimination in court proceedings, after the Ombudsman has conducted its proceedings, that is, it avoids the conduct of both proceedings in parallel. Before initiation and during the procedure on the request under Art. 12, para. (1) of the Law on Prohibition of Discrimination, the court may, under a motion of the applicant, impose the court measure of securing of claims, i.e., a provisional measure to preserve assets, in accordance with the rules of the Code of Civil Procedure applied in B&H.

Article 17 of the Law on Prohibition of Discrimination stipulates that associations, bodies, institutions or other organisations that are registered in accordance with the regulations governing the association of citizens in B&H, which have a justified interest in protecting the interests of a particular group or, which engage, within the limits of their activities, in discrimination protection of a particular group of persons, can file a lawsuit against the person who has violated the right to equal treatment, if they make it plausible that the respondent’s actions have violated the right to equal treatment of a large number of persons who mainly belong to the group whose rights are protected by the plaintiff. It can be concluded from the contents of the said statutory provision that the Ombudsman has the right of action for filing a class action against a natural or legal person that discriminated a large number of persons, meaning that this type of protection can not be used if the victim is an individual.

The particularity of this class action is manifested in the possibility to have court proceedings initiated, in the capacity of a plaintiff, by persons and organisations that are themselves not injured by the violation of the right, but rather conduct the procedure for the purposes of protecting the rights of a group - persons who are not identified by their names. In a certain sense, that can be considered as a public interest. Hence, class actions can also be deemed as a type of procedure in the public interest. Since associations, bodies, institutions or other organisations independently initiate the procedure and have the status of a party, they do not depend on the will of potential victims of discrimination, so that they do not need their assent to file this action. However, in order for the action to be allowed, the claimant must make it plausible that the disputed actions of the respondent could have discriminated most of the persons who predominantly belong to a particular group, which in the nature of things may be connected to some of the grounds of discrimination referred to in Art. 2, para. 1 of the Law on Prohibition of Discrimination (e.g. sex, religion, ethnicity, etc.). Likewise, the claimant would have to prove that he has a legitimate interest in protecting the rights of that group, i.e.

to demonstrate that its objectives include either protection of the rights and interests of that group or that otherwise, within the limits of its activities, it generally deals with the suppression of discrimination, which is also an authority of the Ombudsman.

Since a class action represents a form of group legal protection, the question raised is that of subjective boundaries of the judgment rendered on it. It should be concluded that a valid favourable judgment on a class action affects not only the parties to proceedings but also all members of the group which was subjected to discrimination, as confirmed by the judgment. Therefore, a judgment establishing discrimination (but not a judgment rejecting the action) would have a prejudicial effect in all civil proceedings that could be conducted between victims of discrimination and discriminators. The afore-mentioned extended subjective action of the judgment of conviction passed on a class action allows all, even future members of the group, to invoke that judgment. For these reasons, enforcement based on a judgment of conviction in proceedings of collective protection against discrimination could be requested, in addition to the plaintiff, by any member of the group in question. By contrast, litispendence based on a class action is not an obstacle to the parallel conduct of individual anti-discrimination procedures.

The importance of a class discrimination action is reflected in the fact that this lawsuit allows for the development of the strategic litigation concept, which aims to encourage changes in the exercise of the disputed right by achieving success in one case. Strategic cases are cases that have the potential to encourage change or consistent application of law, that is to say, to lead to a change in society. Strategic cases are therefore significant to the broader community, as they expand the legal education and public awareness of a particular social problem.[97]

In court proceedings in which the Ombudsman participates as an intervener on the side of the plaintiff or as the party filing a class discrimination action, the provision of Art. 15 of the Law on Prohibition of Discrimination, which prescribes the so-called shifting the burden of proof, is also significant as a procedural instrument that should increase the effectiveness of anti-discrimination judicial protection. The plaintiff presents and proves facts on which the existence of discrimination can be presumed; it does not suffice just to claim that it has been discriminated against, and in that case there is a rebuttable presumption that it is probably a case of discrimination. The burden of proof then shifts to the respondent who needs to prove that he did not violate the principle of equality by his actions (commission, omission), that is, that he did not commit discrimination.

The term "make plausible" should be interpreted within the meaning of *prima faciae* evidence. Adjudication is based on one or more evidence and on the basis of a series of causal events, which make it more plausible that discrimination has occurred than that discrimination has not occurred. This type of evidence differs from circumstantial evidence in that judges primarily apply their life experience in cases of circumstantial evidence, and in cases of prima faciae evidence they also apply rules of experience of the legal community. The respondent can free itself from the burden of proof by challenging the plausibility of what the plaintiff was supposed to prove (counterevidence) and by proving that exactly the opposite is "more plausible" (evidence to the contrary). The respondent does not prove absence of a causal link between the unequal treatment and the plaintiff's personal capacity,

[97] For example, see the case known as "two schools under one roof" - Ruling no. 58 0 Ps 085653 13 Rev of the Supreme Court of the Federation, of 29 August 2014; decision of the Constitutional Court of B&H AP-4348/14 of 15 June 2017.

the so-called negative facts, but should rather present facts and offer evidence that will convince the court that its conduct was based on other objective reasons, which are not in any way related to the personal capacity of the person who claims to have suffered discrimination. Motives are irrelevant, for example, that the respondent's actions were motivated by racial prejudice, just as the intent is irrelevant, as discrimination can be committed even when the discriminator acted with good intent.

In cases where a person considers that s/he has suffered the consequences of discrimination, statistical data or databases may be used as evidence for the exercise of the rights referred to in paragraph (1) of Article 15 of the Law on Prohibition of Discrimination. According to Article 15, paras. (4), (5) and (6) of the Law on Prohibition of Discrimination, a person who has consciously exposed him/herself to discriminatory treatment with the intention to personally check if rules prohibiting discrimination are applied or not may also be a witness in discrimination proceedings. This person has to inform the Human Rights Ombudsman of Bosnia and Herzegovina about the intended action, unless where circumstances do not allow doing so, as well as to inform the Ombudsman in writing about the action taken. The Court may hear that person as a witness.

Court ruling in discrimination proceedings, which is different from the recommendation of the Ombudsman in cases when the procedure was conducted before the Ombudsman, does not affect the legal certainty of citizens, because these procedures can not be compared, as they are rather complementary. In this regard, it should be borne in mind that, for example, the Supreme Court of the B&H Federation resolved seven discrimination cases in appellate proceedings during 2016, while 15 such cases were received in 2017, of which 13 were completed, and 2 are pending.

Conclusion

The Ombudsman implies free, informal, highly accessible and flexible means of control and protection of human rights, which should be an indispensable element in a democratic society. Its inability to make legally binding decisions and recommendations does not diminish the importance of the Ombudsman. I am not of opinion that the binding nature of Ombudsman's recommendations would increase its reputation and credibility. Non-binding nature of recommendations does not constitute an obstacle; it is rather the essence of this institution. Otherwise, Ombudsman's function would not be much different from that of courts, so the question of purpose of its further existence could be raised. The great advantage of the Ombudsman as compared to other bodies is the fact that it exercises control relying on conviction and personal authority. Besides all the powers set forth by the Law on B&H Human Rights Ombudsman, laws on administrative procedure and laws on administrative dispute which are applied in B&H, the Ombudsman is not a universal instrument for all problems faced by the modern administration, nor a substitute for the existing means of control, but their necessary supplement.

Efficient and proper application of the Law on Prohibition of Discrimination of Bosnia and Herzegovina, especially through institutional strengthening of the Human Rights Ombudsman of Bosnia and Herzegovina, as the central institution responsible for protection against discrimination, is a prerequisite for a faster and more efficient protection of the right to prohibition of discrimination. The role of the Human Rights Ombudsman of Bosnia and

Herzegovina in civil actions brought in courts as an intervener on the side of the plaintiff or as a party filing a class action is also significant. By joint action, in the manner and under the presumptions laid down by law, significant results can be achieved in terms of the suppression and elimination of all forms of discrimination.

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ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN CIVIL PROCEEDINGS AND ADMINISTRATIVE DISPUTES BEFORE THE COURTS OF BOSNIA AND HERZEGOVINA

Introduction

In an effort to join the developed European countries through reforms, Bosnia and Herzegovina introduced, among other things, the Institution of the Human Rights Ombudsman (hereinafter referred to as the "Ombudsman"). Originally, this institution originates from the Swedish democratic and legal culture. The term means "a person who has an ear to the people." Hence, in our country and in other countries, it is designated as the "protector of citizens", "agent for justice", "the human rights ombudsman", and the like. In principle, its role is to protect human rights of citizens against violations, unfair decisions, negligence and mistakes of the administration, with the ultimate goal of making the executive branch, government and state services more accountable to the public and citizens, whom they need to serve, not rule. Therefore, the following question is raised: What is Ombudsman's role in court proceedings?[99]

As regards the protection of human rights, the role of the Constitutional Court of Bosnia and Herzegovina is indisputably significant, as it is open to the citizens via a procedure initiated by citizens filing complaints due to human rights violations by state authorities, including the courts.

Last but not least, non-governmental organisations, free legal aid services, and the like have a notable role in helping citizens in cases of human rights violations by public authorities.

Reformed civil proceedings and the role of parties

Regularity and legality of the court ruling is the guiding idea of the entire process, its objective and purpose.[100] Having converged this basic objective of civil proceedings with the principle of cost-effectiveness of proceedings, it is easy to conclude that the principle of procedural economy has a predominantly technical, not essential significance, because it serves to facilitate unimpeded work of the judge in rendering a regular and legal court ruling, and ultimately, to reach a solution to the dispute on its merits. Despite this, civil procedure

[98] Judge, Court of Bosnia and Herzegovina.

[99] In the meantime, an expert level discussion was held on 20 September 2017, on the theme of: *Do we need ombudsmen in the B&H legal system* ? Papers from this meeting were published in the collection: *Human Rights Ombudsmen - Balance of a Failure*, edited by Edin Šarčević, Center for Public Law Foundation (CJP), Sarajevo (2017). A negative reaction of the B&H Institution of Human Rights Ombudsman followed, with a press release announcing that they refuse to participate in a conference that advocates a one-sided approach.

[100] Milivoje Č. Marković, *Basic Principles of Civil Procedure* (Novi Sad: Faculty of Law, University of Novi Sad, 1977), p. 125.

reformers relied on the public perception of judicial slowness and the widespread criticism to that effect, for which they received political support of both domestic and foreign political entities.

Some problematic phenomena have been noted in the implementation of the reformed Code of Civil Procedure (CCP), primarily related to restricted possibilities of abolishing lower instance court judgments and remanding irregular and illegal decisions to first instance courts. Thus, first instance courts are exempt from responsibility for mistakes committed in adjudication. If they were to correct them following instructions of a higher court instance, that would lead to better case law. In our opinion, the one who made a mistake in the trial should be the one to correct it, rather than having the higher instance doing it on its behalf. By correcting its mistake, this party should learn not to repeat it, and the higher instance would act upon legal remedies, which is what it has jurisdiction for. Apparently, authors of the new CCP provisions considered that non-abolishing wrong decisions and remanding them to lower instance courts leads to faster procedure and to trial efficiency. They did not take into account the other side of the medal: that the procedural rights of parties are substantially violated and that the work of courts is disrupted. With such a new approach, the difference in the trial between the first instance and the second instance (appellate) court, is annulled. However, that difference is necessary. The adjudicating court to which the factual substance of the dispute is presented, and which directly examines the factual material collected and presented, should pass a regular and legal judgment. The first instance court is tasked with the correct and complete determination of facts of the case, but also, with the correct application of substantive law. The second-instance, appellate court should act on the appeal by which a party warns of the possible shortcomings in the first instance procedure related to improperly and incompletely determined facts of the case, violations of the procedural law provisions and improper application of substantive law.

If we examine the procedural construct under the new CCP, the question of justification of existence of such first-instance court instances is raised, because they become, figuratively speaking, a kind of a "stopover" visited by the "fast train of trial" which never returns. In legal remedy procedure, the Appellate Court should assume their role and re-adjudicate the same matter. With such a role entrusted to first-instance courts, they feel no accountability in cases of their low quality work because they do not expect the case file to be remanded for a retrial. It also ensues that they do not have to pay attention to the quality of their work, but only to the quantity, because all mistakes will be corrected by the appellate instance. A poorly implemented procedure, irregular and illegal decision and other omissions in work do not result, under the new CCP, in accountability of the first instance court. In our opinion, which deviates from the traditional practice, work of the first-instance judge should be of high quality and valued and remunerated as such. S/he bears all the burden of a regular and legal trial. Citizens and other parties in court expect to be provided justice by him/her. His/her regular and legal, independent and professional actions directly achieves protection of subjective civic and human rights in civil litigation. The first-instance judge should be a judge "in the best shape". His/her income should not be any different than the income of higher instance courts judges. Unfortunately, experience shows that it does not happen that way within the judicial organisation. In our opinion, in addition to the best possible procedural rules, the personality of the judge has a decisive influence on the regularity and legality of the trial and adjudication. A proper choice of judicial office holders who have all the necessary characteristics, with a view to preserve the reputation of the profession and a positive perception of the public, is of crucial importance. It is a complex and demanding task that can not be avoided by an independent regulatory body, and there is no justification

for omissions and mistakes made by today's independent and regulatory body in its most important task of the judicial personnel commission. Examination of candidate profiles should not be left to modern personnel metric methods; candidates should rather be approached as close as possible through long-term monitoring and evaluation of their work.

In civil procedural law theory, distinguished theorists have never considered urgent dispute resolution as a procedural virtue - a value to be cared for and to be pursued. Haste during a trial is not the objective; the basic procedural objective is to render a regular and legal decision. Only a regular and legal decision is justified, certainly not a decision rendered hastily and rashly. As eminent theoreticians of civil procedural law point out in their papers, the very word "process", according to its substance and meaning, refers to "a measured, deliberate, dignified movement forwards".[101] Legal theorists indicate to the history of procedural law in which the principles of procedural law are conditioned and dependent on the nation in which they were created or the "legal milieu" to which the law of that nation belongs. Similar living conditions require similar solutions, and different ones require different solutions.[102] Thus, one can also come to an understanding of the justice that exists in a particular living environment or community.

An understanding that civil litigation is a legal concept in the public interest has been developing and establishing itself starting from the 19th century. Hence, an appropriate balance is sought between the adversarial and the inquisitorial principle.[103] To that effect, one can recognize the impact of the adversarial principle on the introduction of mandatory representation of parties by qualified legal representatives - proxies, in contrast to the possibility to introduce the principle of legal instruction of parties unversed in law instead of compulsory representation by an attorney.[104] Consistently implemented principle of party disposition rests on the legal nature of subjective civil rights. However, the direct subject-matter of litigation is not solely a subjective substantive right which makes the party the only *dominus litis* ("the master of the suit"). The direct subject-matter of litigation is a legal redress request for protection of a subjective civil right. The "right of action" addressed to the state judicial authority stems from a subjective civil right. Therefore, by its legal nature, the "right of action" is a legal principle governed by public law. A judicial decision, bringing us back to the subject-matter of this discussion, can not depend only on the will of the parties, because the objective goal of the procedure is to achieve a substantive law order by having subjective civil rights recognized by government authorities to an entity to/from whom they have been unlawfully denied, thwarted or deprived.[105]

A question may be raised as to whether the judicial function should depend on the will of the litigants and what is the extent to which the judge should be acting ex officio.[106] Hypothetically, if the entire civil proceedings were left to party disposition, there would be no guarantees that the court would render a regular and legal decision. The court would ultimately be able to render a decision, but most likely only in the interests and in favour of the richer, better represented and defended party, to the detriment of both the truth and the poorer, procedurally less organized and worse defended party. This is a defeat of the judiciary as a public law social function.

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[101] *Ibid.*, p. 124.
[102] *Ibid.*, p. 3.
[103] *Ibid.*, p. 4.
[104] *Ibid.*, p. 5.
[105] *Ibid.*, p. 24.
[106] *Ibid.*, p. 25.

Nevertheless, the legislator resolves or complicates these dilemmas depending on its own views of the lawsuit. From a legislative point of view, a lawsuit can be organized as a battle of the parties' private interests before the court, which acts as a passive observer of that fight and presents its opinion only after its end, to "declare the winner". Of the other part, it is possible that the legislator would place the court in a decision-making position in a civil right dispute when the lawsuit has a public law function and the independent court represents a state body from the third branch of government. There is no doubt that the second approach prevails in the domestic, civil law tradition of civil justice, which relies on the German model. Then CCP principles will have to include the principle of court administered lawsuit, which is why the impact of the inquisitorial axiom on the course of proceedings would have to be retained.[107] In our opinion, a reformed civil justice should not become a "party matter" or party means of resolving a dispute under someone's stronger will. The civil litigation procedure must ensure that the court, as a state body, conducts civil proceedings ex officio after exhaustion of party disposition by initiating a dispute through an action (and subsequent filing of prescribed legal remedies).[108] Undoubtedly, it is true that the position of a judge in litigation is important in order to enable, from a public interest aspect, adequate promotion of the private interests of litigants, enabling them equal position in their dispute and a just judgment.[109]

Participation of third parties in court proceedings

The general rule on the participation of third parties in civil proceedings is found primarily in the provisions of the B&H Code of Civil Procedure.[110]

The participation of third parties (interveners) in civil proceedings for protection against discrimination is regulated by a provision of Article 16 of the Law on Prohibition of Discrimination:

> "*(Participation of Third Parties)*
>
> *(1) Pursuant to the rules of civil proceedings, in procedures initiated in accordance with Article 12 of this Law, a body, organisation, institution, association or another person whose scope of activities includes protection against discrimination of persons or group of persons whose rights are being decided in the procedure can join proceedings on the side of the person or group of persons claiming to be victims of discrimination, in the capacity of an intervener.*

[107] *Ibid.*, p. 36.
[108] *Ibid.*, p. 37.
[109] *Ibid.*, p. 38.
[110] A provision of Article 369 of the Code of Civil Procedure regulates the participation of interveners as follows: "*(1) A person having a legal interest in the success of one party in the on-going litigation between other individuals may join that party. (2) An intervener may join an on-going litigation until the decision on the claim becomes final, as well as during the extraordinary legal remedy proceedings. (3) The intervener may give a statement on joining the litigation at the hearing or by means of a written pleading. (4) The intervener's pleading shall be submitted to both litigants, and where the intervener's statement was given at the hearing, transcript of that part of the record shall be delivered only to the party who failed to appear at the hearing*." (Official Gazette of B&H, Nos. 36/04, 84/07 and 58/13).

(2) The court shall permit the participation of an intervener only with the plaintiff's assent.

(3) The intervener shall take part and take actions in proceedings until explicit revocation of prosecutor's assent.

(4) Regardless of the outcome of civil proceedings, the intervener shall bear its own expenses of participating in the civil proceedings."

The Constitutional Court of Bosnia and Herzegovina found in the case on an appeal AP-4179/12 that in the event of conflict of the Law on Protection against Discrimination and the Code of Civil Procedure, the Law on Protection against Discrimination has the lex specialis status.

Role of the B&H Ombudsman in court proceedings[111]

The primary function of the Ombudsman is to act as an important mechanism in the protection of human rights by making recommendations for the protection of persons against discrimination. However, within the limits of its competences the B&H Ombudsman institution may initiate misdemeanour and criminal procedures in cases of discrimination of individuals, that is, intervene in the course of on-going procedures, whenever it finds in the performance of its duties that such activity is necessary.[112]

Additionally, under the current legal framework, the Ombudsman can initiate court proceedings, either for the benefit of an individual or on its own behalf. The latter option is particularly important in the field of discrimination, since it allows action filing in cases where there are no specific victims (e.g. a job competition containing discriminatory elements) or in situations where potential victims are afraid that they would be subjected to negative consequences if they file an action themselves. An additional way in which the Ombudsman is given the opportunity to participate in court proceedings is intervention as a third party. According to Article 16 of the LPD, the Ombudsman can intervene in court proceedings by acting on the side of the discrimination victim (plaintiff), and thus making their position in proceedings stronger. A potentially significant role of the Ombudsman as a friend of the court clarifying certain discrimination-related legal or factual issues in court proceedings is unfortunately **not envisaged by the current statutory provisions**.

However, in spite of the aforementioned wide-ranging powers, the Ombudsman is still reluctant to engage in court proceedings, primarily because of the omnipresent lack of resources, but also because of the restrictive interpretation of its own role in the field of protection against discrimination, which is seen by the representatives of this institution as strictly and completely separated from the role of courts.

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[111] As quoted by: Hanušić Adrijana, summary based on the findings of the author of the report *Ombudsman in the B&H system of protection against discrimination*: *Situation Analysis and Typical Problems* (Sarajevo: Analitika – Center for Social Research, 2012), available at http://www.analitika.ba/sites/default/files/publikacije/analitika_-_izvjestaj_-_ombudsman_10maj2013_bhs.pdf.

[112] Law on the Human Rights Ombudsman of Bosnia and Herzegovina, Art. 4, para. 2, *Official Gazette of B&H*, Nos. 19/02 and 32/06.

In discrimination cases, citizens in Bosnia and Herzegovina have the right to submit a complaint to the Ombudsman, to initiate discrimination proceedings in courts or to do both. The time-limits for addressing these institutions vary. In case of addressing the court, individuals have a subjective term of three years and an objective term of five years to initiate the procedure.[113] On the other hand, the general time-limit for filing complaints to the Ombudsman is one year of the occurrence of the event to which the individual is complaining. In practice, Ombudsman's recommendation in court proceedings in the same discrimination case is most often used as evidence that a violation of a right had occurred, so courts generally decide the same as the Ombudsman. After that, the court will only have to determine the extent of violation of the right and the type of sanction prescribed by law, but in this case the court is not obliged to accept Ombudsman institution's recommendation.

Provisions of the Law on Prohibition of Discrimination lay down the role of the Ombudsman as a central institution for protection against discrimination.[114] Ombudsman's significant role

[113] Law on Prohibition of Discrimination, Article 13, para. 4, *Official Gazette of B&H* Nos. 59/09 and 66/16.

[114] Article 7 (Central Institution for Protection against Discrimination)
(1) The central institution responsible for protection against discrimination is the Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter referred to as the "B&H Ombudsman").
(2) The B&H Ombudsman shall act in accordance with this Law and the Law on the Human Rights Ombudsman of Bosnia and Herzegovina, by doing the following within the limits of its competences:
a) receive individual and group complaints related to discrimination;
b) provide the necessary notifications to natural and legal persons who filed a discrimination complaint about their rights and obligations, and possibilities of judicial and other forms of protection;
c) in relation to a complaint, the B&H Ombudsman may decide not to accept the complaint or to initiate investigative proceedings in accordance with separate regulations;
d) propose the initiation of a mediation procedure in accordance with the provisions of the Law on Mediation;
e) collect and analyse statistical data on discrimination cases;
f) submit annual and, if necessary, extraordinary reports on occurrences of discrimination to the Parliamentary Assembly of Bosnia and Herzegovina, Parliament of the Federation of Bosnia and Herzegovina, National Assembly of Republika Srpska and the B&H Brčko District Assembly;
g) inform the public on occurrences of discrimination;
h) conduct surveys in the field of discrimination on its own initiative;
i) give opinions and recommendations aimed at preventing and suppressing discrimination, and propose appropriate legal and other solutions to the competent institutions of Bosnia and Herzegovina;
j) has the right to initiate and participate in a discrimination procedure for misdemeanour prescribed by this Law;
k) monitor legislation and provide advice to legislative and executive bodies;
l) work on the promotion of this law, inform the public, raise awareness, conduct campaigns and in other ways actively promotes fight against discrimination for the purpose of its prevention;
m) improve policies and practices aiming to ensure equal treatment.
(3) When developing regular reports, opinions and recommendations on occurrences of discrimination, the Ombudsman of Bosnia and Herzegovina shall cooperate with civil society organizations dealing with protection and promotion of human rights and organizations dealing with protection of rights of groups exposed to a high risk of discrimination.
(4) The Ombudsman of Bosnia and Herzegovina shall provide assistance to persons or groups of persons addressing international bodies for protection against discrimination, providing them with guidelines, advice, consultations during a procedure, proposals and recommendations.
(5) In order to exercise its competences, the Human Rights Ombudsman of Bosnia and Herzegovina shall establish a special department to exclusively consider cases of alleged discrimination related to actions of public bodies at the level of state, entities, cantons and the B&H Brčko District, municipal institutions and bodies, and legal persons having public authorities, as well as actions of all legal and natural persons, in all areas of life.
The budget of the Human Rights Ombudsman of Bosnia and Herzegovina shall have a special budget item necessary for the functioning of the special department(s) for combating discrimination.
(6) All state, entity and cantonal institutions, and B&H Brčko District bodies, municipal institutions, institutions and legal persons having public authorities, and other legal and natural persons shall deliver, upon a request

is also set forth by the Law on Administrative Disputes of Bosnia and Herzegovina (B&H LAD).[115] Pursuant to Art. 2, para. 2 of the aforementioned law, *the Human Rights Ombudsman of B&H may also initiate an administrative dispute and intervene in an on-going procedure when it finds, in the performance of duties within its competence, that a final administrative act violates human dignity, rights and freedoms of citizens enshrined in the Constitution of Bosnia and Herzegovina and instruments listed in Annex 1 of the Constitution of Bosnia and Herzegovina.*

Article 60 of the B&H LAD gives significant powers to the Ombudsman institution, because *reopening of proceedings requests and judicial decision review requests may also be filed by the B&H Ombudsman where it has participated in the administrative dispute or where it finds during the performance of duties within its competence that a judicial decision has infringed human dignity or the rights and freedoms set out in the Constitution and the instruments of Annex to the B&H Constitution*. In our opinion, in order to better position the Ombudsman in court proceedings, its role in the filing of legal remedies in administrative dispute should be focused on the right to file an application for judicial review. As jurists know well, submission of applications for judicial review was traditionally entrusted to public prosecutors in our procedural law. A public prosecutor is a person who did not participate in any civil proceedings or administrative disputes. According to the current statutory provision, which we do not consider to be the most appropriate, *the Public Defender of Bosnia and Herzegovina may file an application for judicial review against a final decision of the Administrative Department of a B&H court and against the final decision of the highest court of the B&H Brčko District passed in an administrative dispute.*[116] In our opinion, should this provision remain in force in the present form, it should be added the following formulation: "*if it did not participate in an administrative dispute*". Finally, and in *de lege ferenda* terms, we propose a "repositioning" and necessary adaptations of provisions of Art. 67-75 of the B&H LAD (VIII-PROCEDURE FOR PROTECTION OF FREEDOMS AND RIGHTS OF CITIZENS ENSHRINED IN THE CONSTITUTION).

In respect of judicial institutions, the Human Rights Ombudsman of Bosnia and Herzegovina acts within the limits of the competences referred to in Article 1 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina.[117]

A provision of Art. 4, para. 1 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina stipulates that the institution has competence to conduct investigations of complaints to poor functioning of the court system or improper processing of individual cases and to recommend appropriate individual or general measures. Paragraph 2 of the same Article prohibits the Ombudsman from interfering with the court decision-making process, but it was given the option to initiate court proceedings or intervene in on-going proceedings,

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from the Ombudsman of Bosnia and Herzegovina, requested data and documents at the latest within 30 days of the date of receiving the request.

(7) The competent institutions in Bosnia and Herzegovina shall cooperate with the Ombudsman of Bosnia and Herzegovina and deliver their responses and notifications in writing, within the time-limit defined by the Ombudsman of Bosnia and Herzegovina, including on the efficiency of recommendations made in order to end discrimination.

[115] Official Gazette of B&H, Nos. 19/02, 88/07, 83/08 and 74/10).

[116] Article 55 of the Law on Administrative Disputes of B&H (Official Gazette of B&H, Nos. 19/02, 88/07, 83/08 and 74/10)

[117] Official Gazette of B&H, Nos. 19/02, 35/04, 32/06)

if necessary in the performance of its duties. It may also appear as an advisory body of a government authority which is a party to proceedings (the plaintiff or the respondent).

In accordance with such a position, the Ombudsman institution competes with the statutory position and role of the Office of the Public Defender, who plays the primary role of the state's representative in courts, i.e, the court of Bosnia and Herzegovina.[118] According to the Law on the Human Rights Ombudsman of Bosnia and Herzegovina,

> "*The Human Rights Ombudsman of Bosnia and Herzegovina is an independent institution set up for the purpose of promoting good governance and rule of law, protecting the rights and freedoms of natural and legal persons, as enshrined in the B&H Constitution and international agreements from the appendix to the Constitution, which will, in this respect, monitor the activities of Bosnia and Herzegovina institutions, its entities and Brčko District, in accordance with the provisions of this law."*

A provision of Article 32, paragraph 1 of the same law prescribes: *The Ombudsman may make recommendations to government bodies in Bosnia and Herzegovina...“* Thus, Recommendation No. P-79/17 of 03/04 /2017, sent to the High Judicial and Prosecutorial Council and the Appellate Court of the B&H Brčko District, ordered: *"1. To take the necessary actions to ensure regular operation of the B&H Brčko District Appellate Court and decision-making on cases that are conditioned by decision-making in a panel of judges; 2. To inform the B&H Human Rights Ombudsmen about the implementation of these recommendations within thirty (30) days from the date of receipt of the recommendation."*

In its Art. 87, para. 1 the Code of Civil Procedure[119] assigned a prominent monitoring role to the Ombudsman before the court of Bosnia and Herzegovina, as the statutory provision explicitly states that *the exclusion of public does not apply to parties, their legal representatives, proxies, interveners and the Ombudsman.* Pursuant to Article 89, which supplements the aforesaid provision of the CCP, before a court of B&H, *provisions on the public nature at the main hearing shall be appropriately applied at the preparatory hearing, at a hearing outside the main hearing before the court and at a hearing before the requested court.* Art. 1, para. 1 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina is compatible with the afore-mentioned provisions, as it states that the *Ombudsman shall oversee the activities of the institutions of Bosnia and Herzegovina, its entities and the Brčko District, in accordance with the provisions of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina*.

Unlike the civil procedural legislation of B&H, the criminal procedural legislation of B&H [120] does not contain such an explicit provision. A provision of Article 234 of the B&H CPC sets forth the general public nature of the main hearing. A provision of Article 235 of the B&H CPC prescribes the requirements for exclusion of public, while a provision of Article 236 of the B&H CPC prescribes to whom the exclusion of public does not relate: the parties, defence counsel, injured party, legal representative and proxy. The court may allow officers,

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[118] Article 13 Law on the Public Defender's Office of Bosnia and Herzegovina (Official Gazette of B&H, Nos. 08/02, 10/02, 44/04,102/09, 47/14).

[119] Official Gazette of B&H, Nos. 36/04, 84/07, 58/13 and 94/16.

[120] Criminal Procedure Code of B&H (Official Gazette of B&H, Nos. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 86/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09. 72/13)

scientists and public employees to be present at the hearing from which the public is excluded, and at the request of the defendant, it may allow the presence of a spouse/common-law partner or close relatives.

Conclusion

The Ombudsman institution was transferred into the Bosnian-Herzegovinian legal system from the Scandinavian legal milieu. Under the Scandinavian litigation regulations, the Ombudsman institution is specific. The "Swedish model" is characterized by an amicable and conflict-free dispute settlement. The focus of the "civil ombudsman" is arbitration mediation so that the parties can resolve their dispute in such a way, while at the same time checking the constitutionality and legality of the work and conduct of state and administrative bodies, and therefore of the court. The force of a decision of the Scandinavian Ombudsman lies in the so-called *deliberation*, which implies postponement of enforceability of the evaluated judicial act, until a final decision of the Supreme Court is rendered.[121]

In comparative law, not all countries accepted the Ombudsman institution, nor gave it a role in litigation. Some criticism of attempts to introduce the Ombudsman was noted in the American case law system by their reputable jurists. American jurists believe that there are sufficient guarantees in US law that ensure the necessary rights of parties in civil proceedings in courts, as well as in administrative and criminal proceedings.

Most contemporary civil proceedings from European civil law countries guarantee the highest degree of protection of the rights of parties in litigation, primarily through a highly professionalized bar practice. It is so in Italian, German and Austrian civil procedural law.[122]

In Bosnia and Herzegovina, which has uncritically copy-pasted, in its turbulent transition period, foreign statutory provisions and institutions, the political aspirations of the legislator to introduce under law the Ombudsman institution as a national, state institution were not accompanied by adequate statutory provisions. Should the Scandinavian model be followed, which served as a role model in Bosnia and Herzegovina, the Ombudsmen would have to be active entities in the mediation procedure according to the rules contained in entity-level litigation regulations. The role of the Ombudsman, thus set, would not contradict the principle of judicial independence. The ethical principles contained in the Code of Judicial Ethics[123], stated: "*An independent judiciary is the right of every citizen in Bosnia and Herzegovina. The judge has the freedom to decide fairly and impartially on the basis of laws and evidence, without any pressure or influence."* Independence of the judiciary is a right of the citizens of Bosnia and Herzegovina, a precondition for the rule of law, a status position of judges in relation to the legislative and executive branch of power, public, media, other institutions of society, parties to proceedings and their peers.[124] The Code of Judicial Ethics

[121] Sanjin Omanović, *Certain Litigation Tools in Comparative Law*, A Collection of Papers - International Scientific Conference: *Application of the Code of Civil Procedure in Bosnia and Herzegovina*, Pale, Faculty of Law, University of East Sarajevo (2007), p. 372.
[122] *Ibid.*, p. 374.
[123] Official Gazette of B&H, No. 13/06.
[124] *Ibid.*, item 1 Independence.

states: "*A judge shall refuse any attempt to influence his/her decisions beyond court proceedings as well*."[125]

Was the Bosnian-Herzegovinian legislator possibly mistaken in cautiously prescribing the role of the Ombudsman in court proceedings? The answer is negative. Why is it so? Because the Ombudsman is a state body whose participation on one side of adversarial court proceedings would lead to procedural imbalance, inequality and violation of the basic principles of adjudication in civil litigation. The Ombudsman remains a prevention and regulation factor which eliminates, via its activities, authority and reputation, the tendencies of human rights violations in the work of state bodies predominantly from the legislative and administrative power, and partly and moderately from the judicial branch of power as well. Like every new institution it needs to prove itself, as evidenced by the numerous revaluations of its previous work and of results of such work.

The Ombudsman has the function of preventively acting in detecting and eliminating the tendencies of human rights violations that occur in the work of state bodies within the legislative, administrative and judicial branches of power. Since the judicial branch of power is under observation and jurisdiction of the Constitutional Court of B&H, but also of the European Court of Human Rights in Strasbourg, the scope of Ombudsman's work remains the legislative and administrative branches. The question whether the tools currently used by the Ombudsman are properly and adequately standardized should be answered in detailed, multidisciplinary discussions of professional and scientific circles.

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[125] *Ibid.*, item 1, sub-item 1.6.

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B&H HUMAN RIGHTS OMBUDSMAN AS A PARTY TO ADMINISTRATIVE PROCEEDINGS

Introduction

In the newly created states - former SFRY republics, the Ombudsman institution is not a mystery. In the Republic of Slovenia ("varuh človekovih pravic") it has been in existence since 1991[127], in the Republic of Croatia[128] ("pučki pravobranitelj"), since 1992[129], in the Republic of Serbia ("zaštitnik građana") since 2005[130], in the Republic of Macedonia[131] ("narodniot pravobranitel") since 2001, and in the Republic of Montenegro[132] ("zaštitnik ljudskih prava i sloboda") since 2011. The Ombudsman institution was introduced into the B&H legal and state system by the Dayton Peace Agreement in December 1995. Introduction of the Ombudsman was an absolute novelty given that in Bosnia and Herzegovina and its constituent components (entities) there is a continuity of the legal system within the meaning of Article 2 of Annex II to the B&H Constitution - as of 01/03/2000 in the B&H Brčko District as well-[133], and therefore, there is a continuity of applying all laws and other general acts existing in B&H at the time of the entry into force of the B&H Constitution. In time, it opened the possibility to the legislator to go off course in search of an adequate statutory provision for regulating the position and competences of the Ombudsman which would satisfy the proclaimed Ombudsman function[134], on the one hand and, on the other, the requirements of the constitutional rule of law principle (including good governance) and ensuring respect for the democratic standards of human rights protection.

The fact that up to the moment when the Law on the Human Rights Ombudsman (LHRO) of Bosnia and Herzegovina was put into use (2004/2005), entity ombudsman institutions existed in parallel to that institution constituted a particular difficulty.

Various factors: the number of Ombudsman institutions in the territory of the state of B&H, with frequent mutual misunderstanding between the B&H Ombudsman and the entity Ombudsmen, especially during the term of the last foreign B&H Ombudsman, Frank Orton, legal position of the B&H Ombudsman institution, broad statutory competences, both in court and in administrative procedure, lack of a true will of the legislator to commit itself to the legal essence of the Ombudsman, led to a statutory provision in the Law on Administrative

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[126] Judge, Constitutional Court of the Republic of Srpska.

[127] Article 159 of the 1991 Constitution of the Republic of Slovenia and the 1993 Law on the Protector of Human Rights.

[128] Article 93 of the Constitution of the Republic of Croatia.

[129] (The first) Law on the Ombudsman, Official Gazette of the Republic of Croatia, No. 60/92.

[130] The 2005 Law on the Protector of Citizens, and Art. 138 of the Constitution of the Republic of Serbia of 2006.

[131] Article 77 of the Constitution of the Republic of Macedonia (Amendment XI to Article 77, 2001), Law on the Ombudsman of 2003.

[132] Article 81 of the 2007 Constitution of the Republic of Montenegro, Law on the Protector of Human Rights and Freedoms of 2011.

[133] Established by the Arbitration Decision of 05/03/1999, which entered into force on 1 March 2000 and which is based on a provision of Article 5 of Annex II to the Dayton Peace Agreement.

[134] Article 1 Article 1 of the Law on B&H Human Rights Ombudsman (Official Gazette of B&H, Nos. 19/02, 35/04 and 32/06, hereinafter referred to as the "LHRO").

Procedure of B&H, which expressly gives the B&H Ombudsman the status of a party to administrative procedure, when it deems that an administrative procedure needs to be initiated in order to exercise the rights and freedoms of citizens enshrined in the B&H Constitution and relevant international documents[135].

This statutory definition opens the question whether it is compliant with the valid legal understanding (theoretical and legal) of the legal nature of a party to administrative procedure, and whether this norm of the B&H LAP gives the B&H Ombudsman a higher level of authority than it should have under the Law on the Human Rights Ombudsman of Bosnia and Herzegovina.

B&H Human Rights Ombudsman - basic competences

In accordance with the LHRO, the institution was established in order to promote good governance and rule of law, protection of the rights and freedoms of natural and legal persons, as enshrined in particular in the Constitution of Bosnia and Herzegovina and international agreements contained in the appendix to the Constitution. In this regard, the B&H Ombudsmen oversee the activities of the institutions of Bosnia and Herzegovina, its entities and the Brčko District, in accordance with the provisions of that law (Art. 1 of the LHRO). The institution acts upon received complaints or ex officio (Art. 2, para. 2, LHRO).

The Ombudsman examines cases related to the poor functioning or violations of human rights and freedoms committed by any government authority in Bosnia and Herzegovina (Art. 2, para. 1, LHRO). Exercising this competence, it can conduct investigations of all complaints of human rights and freedoms violations allegedly committed by military authorities (Art. 3, LHRO), as well as investigations of all complaints related to the poor functioning of the court system or improper processing of individual cases. As an outcome of these investigations, the Ombudsman may recommend appropriate individual or general measures (Art. 4, para. 1, LHRO).

The Ombudsman does not have the authority to interfere with the court decision-making process, but it can initiate court proceedings or intervene during on-going proceedings, whenever it finds, in the performance of its duties, that such activity is necessary. It is authorized to make recommendations to a government authority in Bosnia and Herzegovina that is a party to proceedings, and it may receive advice from a party to proceedings (Art. 4, para. 2, LHRO).

The Ombudsman is authorized to forward cases of alleged violations of human rights to the highest judicial bodies of Bosnia and Herzegovina having jurisdiction for human rights issues, in accordance with the rules governing the lodging of complaints to these bodies, whenever it finds that this is necessary for efficient performance of its duties (Art. 6, LHRO). Decisions are issued in the form of a recommendation, decision and report[136], and an appeal against a decision of the institution is not admissible (Art. 22, LHRO).

[135] Article 42, para 4. of the B&H LAP (Official Gazette of B&H, Nos. 29/02, 12/04 88/07 93/09 41/13 and 53/16).
[136] Article 9 of the Rules of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina (Official Gazette of B&H, no. 104/11).

Laws on Administrative Procedure in B&H: B&H LAP, FB&H LAP, RS LGAP and B&H Brčko District LAP

Article 41 of the B&H LAP defines that a party to administrative procedure is a person under whose request the procedure was initiated or against whom the proceedings are being conducted, or who, in order to protect his/her rights or legal interests, has the right to participate in proceedings.

The first 3 paragraphs of Article 42 of the B&H LAP prescribe who can be a party to administrative procedure. It can be any natural or legal person, and the status of a party may also pertain to a public administration body and other body, settlement, group of persons and others who do not have the status of a legal entity, if they can be holders of rights and obligations that are dealt with in administrative procedure. In addition, a party may also be a trade union organisation if the administrative procedure relates to any right or legal interest of a civil servant in administration bodies, as well as to employees in an institution having public authorities. The statutory provision in the FB&H LAP/B&H Brčko District LAP and in the RS LGAP is almost identical.

However, para. 4 of Art. 42 of the B&H LAP explicitly stipulated that the Ombudsman may be a party to administrative procedure: "where it finds, in the performance of duties within the limits of its competence, the basis for initiating an administrative procedure in view of exercising the rights and freedoms of citizens enshrined in the Constitution of Bosnia and Herzegovina, the Convention for the Protection of Human Rights and Fundamental Freedoms and the instruments listed in Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

Entity laws on (general) administrative procedure, as well as the Brčko District LAP do not include such a provision. Nevertheless, Art. 49, para. 4 of the FB&H LAP enables the Ombudsman to attend the administrative procedure until the finality of the administrative act, as well as in extraordinary legal remedies procedures.

Within the meaning of Art. 36, para. 4 of the B&H Brčko District LAP: "Where the Ombudsman finds, while performing the duties within its competence, that a final administrative act violates human dignity, rights and freedoms of citizens enshrined in the B&H Constitution and the Statute of the District, the Ombudsman can attend and participate in administrative procedure pending the rendering of a final judicial decision, as well as in extraordinary legal remedies procedures.

Party status in administrative procedure

A party to administrative procedure is considered to be a person (physical or legal), and a certain collective or state authority, which, although without legal capacity, may be a holder of a certain right or obligation dealt with in administrative procedure, at the request of whom the procedure is being conducted (active party), or against whom the procedure is being conducted (passive party), or who has the right to participate in administrative procedure for the protection and exercise of its interests based on law (intervening party, concerned person). Only a person having legal capacity can independently undertake actions in the procedure (capacity to sue). A person without legal capacity in administrative procedure is

represented by a legal representative, whose scope of authority is determined by an act of the competent body appointing the legal representative. A party may have a proxy, to whom it may delegate part of or all of its procedural authorizations.

In order to understand and properly define the concept of a party, it is necessary to know the types of administrative procedure in which the party appears. Thus, laws on (general) administrative procedure in Bosnia and Herzegovina lay down one-party and multi-party administrative matters. A one-party administrative matter defines that administrative matter in which only one or more persons appear in proceedings, but who do so jointly (having the same legal interest). It is useful to mention here that the legislator knows and defines the so-called procedural community. It will exist when two or more persons together have the same legal interest and seek that a single decision be rendered, or when the authority renders a decision involving multiple persons (for example, a decision on the expropriation of real estate which is co-owned by several persons, if all co-owners agree with the expropriation).

A multi-party/adversarial administrative matter is a matter in which there are two or more persons whose interests are mutually opposed. There can be several different situations here:

a) colliding parties - parties with opposite interests, but which do not have any mutual legal relationship; and
b) contrary/counter-parties - there is a mutual legal relationship between them.

Therefore, the basic presumptions of party action to that effect are:

- party capacity (i.e., ability to be the holder of rights and obligations that are decided in administrative procedure),
- capacity to sue - *legitimatio ad processum* (ability to independently take procedural actions in administrative procedure), and
- capacity to be a party in the case - *legitimatio ad causam* (existence of a direct relationship between the subject matter decided in administrative procedure and the rights or obligations of a particular person).

Relation of Art. 42, para. 4 of the B&H LAP and the LHRO

According to the contents of the LHRO, the Ombudsman acts as a preventive and remedial factor for a prompt, proper and legal functioning of state, entity and district authorities aimed at the exercise of the rights and freedoms of citizens. Such a role of the Ombudsman derives precisely from its legally prescribed position and competences. Accordingly, the Ombudsman is an independent control body.

In view of such a legally prescribed legal nature of the Ombudsman and also its law-based function of a controller, it would be difficult to defend the statutory designation giving the Ombudsman party status, even when it finds the basis for initiating administrative procedure, for the purpose of exercising the rights and freedoms of citizens.

From the aspect of nomothetics and legislative drafting, this provision of the LAP is irregular. In fact, within the meaning of Article 114 of the B&H LAP, administrative procedure is initiated ex officio or on the request of a party. Therefore, the Ombudsman can not initiate proceedings, but only request the initiation of administrative procedure.

However, it is beyond doubt that the Ombudsman *per se* has party capacity because it can be a holder of rights and obligations, but those directly related to some individual administrative law interest or obligation of the institution which is decided in administrative procedure (e.g. tax liabilities of the Ombudsman institution, inspection over the legality of application of labour legislation to Ombudsman employees, or Ombudsman institution as an investor in the field of urban planning and construction). However, it is difficult to imagine that the party status of the Ombudsman is based on and derived from its legally defined position of the "controller" of legality and regularity of work of a certain administrative body in a certain administrative procedure in which a certain right, freedom or obligation of an individual is dealt with, i.e., party referred to in Article 41 of the B&H LAP. To wit, it is difficult to imagine the party status of the Ombudsman in this sense, since this provision of the B&H LAP is based on the substantive-law relationship of a person towards an administrative matter, which is always individual, that is, refers to a precisely defined person and the decision-making effect extends only to that person.

The party status of the Ombudsman, as prescribed by Art. 42, para. 4 of the B&H LAP, refers more to the fact that the Ombudsman is a substitute of the actual party from the administrative procedure, whose individual rights, freedoms or obligations should or must be decided in administrative procedure. However, account should be taken of the fact that, as a rule, the substantive-law interest of a party (as the subject of administrative procedure) is non-transferable, i.e. in administrative procedures, the party exists (acts in procedure) personally, on its own behalf and for its own account. It may transfer to another person its procedural authorizations, and then the other person acts on its own behalf, but for the account (in the substantive-law interest) of the party. This person has the status of a proxy, and where the requirements prescribed by a separate law and the B&H LAP are met, legal representative, temporary proxy and joint representative also appear in administrative procedure. It is clear from the contents of the LHRO and B&H LAP that the Ombudsman can not appear in administrative procedure in any of these roles.

Therefore, the question raised is as to whether such substitution is possible and necessary. According to this provision of B&H LAP, the need to initiate a procedure arises when the Ombudsman, on the basis of a citizen's complaint (claim, application) or through another means of finding about the need or possibility to exercise its competence (e.g., finding about a phenomenon based on information from the media), concludes that it is necessary to initiate administrative procedure. In such a situation, the essence of Ombudsman's existence takes the stage, primarily advisory one - with regard to the person whose rights and freedoms are concerned. This advisory function is quite certainly achieved by instructing the person that s/he, not the Ombudsman, needs to request the initiation of appropriate administrative procedure. Once the procedure is initiated on the request of the actual party, Ombudsman's powers (preventive and remedial) may be exercised, but only if it is shown that the administrative procedure is conducted in a manner contrary to law, aiming to prevent the person from exercising his/her rights and freedoms. Therefore, it can be concluded that Art. 42, para. 4 is in an unnecessary conflict with Art. 41 of the B&H LAP.

Bearing in mind that within the meaning of the LHRO the Ombudsman is not a legal representative of the party, nor its proxy, the statutory provision of Art. 42, para. 4 of the B&H LAP can very easily be turned into its exact opposite. In explanation, the possibility that the parties may request the Ombudsman to initiate administrative procedure by invoking this provision of the B&H LAP is not excluded, although there is no obstacle preventing them from doing so themselves. This would overburden the work of the Ombudsman, result in excessive use and dissipation of institution's resources, which in turn leads to a real hampering of efficient exercise of Ombudsman's competences in other areas of encouraging respect for human rights and freedoms.

It can be concluded from the foregoing that Ombudsman's competence, as defined by Art. 2-4 and 6 of the LHRO does not give the institution party capacity in terms of Art. 42, para. 4 of the B&H LAP, since the LHRO subject-matter, as defined by Art. 1 of that law, represents a general objective (interest) of the state of B&H. Of the other part, the interest of the party in administrative procedure is always of an individual character and refers only to an individual, precisely defined administrative-law matter.

Conclusion

Art. 42, para. 4 of the B&H LAP gives the B&H Human Rights Ombudsman the procedural position of a party, when the institution, while exercising its competences, finds it necessary to initiate administrative procedure for exercising the rights and freedoms of citizens enshrined in the Constitution of Bosnia and Herzegovina, Convention for the Protection of Human Rights and Fundamental Freedoms and instruments listed in Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina.

However, this provision of the B&H LAP does not have a theoretical justification, given the elements of party status (party capacity and capacity to sue, as well as capacity to be a party in the case), and given the fact that the Law on the B&H Ombudsman has a general objective - to provide respect for the rights and freedoms of citizens enshrined in the B&H Constitution and international legal instruments to which B&H is a signatory, and especially in view of the fact that the interest of a party to administrative procedure is always individual, individually defined. Such a statutory designation may also lead to an unnecessary and inappropriate request of persons to the Ombudsman to initiate administrative procedure in their place.

Having in mind the competence of the B&H Ombudsman stipulated in Art. 2, para. 1 of the LHRO - that the Ombudsman considers cases related to the poor functioning or violations of human rights and freedoms committed by any government authority in B&H, and that the Ombudsman initiates an investigation with reference to that, and may ultimately make a recommendation, this "initiation" of an administrative procedure in the legal interest of a person may lead to an unjust favouritism of precisely that person. In other words, it would be very easy for all persons who find themselves in the same legal situation not to have the same treatment in administrative procedure, because a particular administrative procedure was initiated exactly upon an Ombudsman's request, while another one was not. The delicate issue of the different treatment of "users" of its services is thus opened for the Ombudsman.

If the legislator wanted to emphasize the importance of Ombudsman's competences related to the administrative procedure, which falls within the scope of legislator's assessment of the purposefulness of a statutory norm, then it could have done so following Art. 44, para. 1 of the B&H LAP. It should be kept in mind that the LHRO explicitly prescribes a specific type of Ombudsman's intervention in court proceedings – naturally, without interfering with the outcome of these proceedings, and that there is no such explicit stipulation regarding Ombudsman's intervention in administrative procedures. Therefore, the Ombudsman institution is forced to base its participation in administrative procedure on a very broadly set competence from the aforementioned Art. 2, para. 1 of the LHRO.

There is no doubt that the Ombudsman is necessary in B&H, precisely as an advisory, preventive and remedial factor for the functioning of the existing legal systems in the country. It is not an enemy of any branch of power; rather, it is their "soft" controller. Prompt and lawful enforcement of justice is a rule of law principle based on constitutional law, which must never be abandoned, nor ignored. However, this requirement also implies legislator's activity in passing laws and other regulations, which must be based on commonly accepted legal rules and understandings.

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PROVING RACIAL AND RELIGIOUS DISCRIMINATION OFFENCES IN COURT PROCEEDINGS

Discrimination proceedings and the burden of proof

There are various examples of discriminatory conduct in important areas of social life based on a person's racial, ethnic and religious affiliation. International and national law provides appropriate legal remedies for the protection of victims of discrimination. However, most of the discrimination cases never end in court. This is a consequence of insufficient and superficial recognition of discrimination by its victims, as well as by judges, prosecutors, lawyers and civil servants who decide every day on the granting of different rights. Dissuasion from lawsuits is also a result of the fact that international and national case law regarding racial and religious discrimination is in a rather short supply and meagre.

Anyone who deems himself/herself to be a victim of discrimination with reference to his/her enjoyment of rights and freedoms may file an action to the court against the alleged offender. A trade union organisation or other non-governmental organisation for human rights protection, in countries in which that is permitted, may institute discrimination proceedings on behalf on an injured third party. If the victim of discrimination opposes the procedure, it will be immediately terminated.

The biggest issue related to discrimination in any area of social life is how to prove in court proceedings that it has occurred at all. The number of successfully completed cases in court depends on the possibility to prove acts of racial and religious discrimination. The burden of proof lies first and foremost with the plaintiff - one or more persons who claim to be victims of discrimination. In a traditional discrimination lawsuit, the plaintiff will prove that s/he was treated differently as compared to the other two persons, who, although in the same position as s/he, were treated better. The complainant usually does not have a problem in determining what is the way in which s/he was treated with less favour than others.[138] Identifying affiliation with a racial and religious minority as one of the possible criteria on the basis of which a difference in treatment has been made represents an additional obligation for the complainant. If the plaintiff submits obvious evidence of discrimination prohibited by law, the respondent is obliged to submit evidence that such a difference was not made on account of the specifically prohibited basis. Therefore, the burden of proof shifts to the possible perpetrator, state or public institution, private entity (e.g. an employer), which needs to prove that there was no discrimination or that the existing differences are justified or unavoidable due to the nature of work or business activity.

The distinction between a traditional evidentiary procedure and a specific approach to proving the acts of discrimination is that defence against discrimination or suspicion of discrimination will not exclusively lie with the injured party.[139] The legal principle of the so-

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[138] For example, see *Schmidt v. Germany*, series A 291-B.

[139] Eduard Picker, "Anti-discrimination as a Program of Private Law?" German Law Journal Vol. 4 No 8 (2003), p. 776.

called professional plaintiffs is also introduced. In cases of "group discrimination" in Italy, trade unions can take the position of discriminated workers in litigation.[140]

In international and national law, there are no specific, detailed rules for proving acts of discrimination. Therefore, the creative role of courts with regard to recognizing adequate instruments for establishing worse treatment of a particular person because of his or her identity becomes greatly important. Introducing a clause into the Race Equality Directive on the shifting of burden of proof to the respondent is clearly useful, but jurists nevertheless express doubts as to how this clause should be applied in practice, and in terms of how it is understood by the court.[141] Since there are significant differences in national laws in respect of the admissibility of evidence, the aim is for the creative role of courts to move within the limits of the existing evidentiary rules.[142]

Types of evidence

In many cases, members of racial, ethnic and religious minorities experience discrimination, when they do not get served in cafés or restaurants, do not get a job, an apartment or adequate medical care. Direct racial and religious discrimination can be committed explicitly and nonexplicitly. Where a waiter or an owner tells a guest in a café or restaurant that s/he does not serve the "Roma" or "Negroes", that is discrimination. The same is true, where a boss in a company refuses to hire a candidate to a vacancy by telling him that he is doing so because of his darker skin colour. This latter example of discrimination happened in Denmark to the current president of European Network against Racism (ENAR), Bashy Quraishy. A dark-skinned young engineer, he travelled from Canada to Denmark in 1970 and stayed in Copenhagen in search of work. After 69 job applications, he was finally invited to an interview in an international construction company, where he experienced a humiliating verbal rejection. The human resources officer looked at his documents and said: "Mr. Quraishy, your qualifications are excellent, but your skin colour is wrong. I do not think that any employed Dane wants to be subordinate to a man of your origin." This attitude is an explicit act of racial discrimination. Thirty-four years of this event, the situation is even worse. According to the research conducted, almost 50% members of ethnic minorities are unemployed.[143] A great problem is provability of discrimination in such cases. It can be proven by using documents, recordings or witness statements, but in specific cases discrimination victims are commonly without any of that. Without a written document, recording, or statement of a witness who has seen or heard the discriminatory conduct, it is impossible to prove a case of racial and religious discrimination respectively.

Another way to commit racial discrimination is conduct in which the words "Roma" and "Negroes" are not explicitly used, but discrimination is still provable. For example, many bars and disco clubs, especially in France, do not allow the Roma and other darker skin persons to enter their facilities under the pretext that one needs to be a "member of the club"

[140] Migrants, Minorities and Employment - EUCM, October 2003, p. 71.
[141] Strategic litigation of Race Discrimination in Europe: From Principles to Practice, European Roma Rights Center (ERRC), Budapest, 2004, p. 70.
[142] *Ibid.*

[143] Barbara Liegl, Bernhard Perching, Birgit Weyes, Combating Religious and Ethnic Discrimination in Employment from the EU and International Perspective, Preface, European Network Against Racism, 2004, p.3.

to enter, or by saying that a private party is in progress. It often happens that Roma who apply for a job are told on the phone to come to an interview, but when they come, the person who placed the ad sees that they are Roma, and tells them that there is no job vacancy or that it has recently been filled. As for proving such and similar cases of discrimination, additional experimental and statistical evidence have been developed.

Some non-governmental organisations, such as SOS Racism in France, have written entire studies on discrimination by using the **"testing" methods** in the form of "sampling" and "couple sampling". The study does not include the entire population, but only carefully selected representatives of racial or ethnic minorities. Discriminatory conduct is proven by sending, for example, couples composed of Roma and non-Roma persons who are very similar in terms of their clothing, qualifications, to apply for a job or seek an apartment or entry into a restaurant or discotheque suspected of continuously discriminating against Roma. These organisations record their testimonies in detail, if the non-Roma couple are allowed to enter the discotheque, while at the same time asking the Roma couple to show a membership card and denying them entry. This type of a survey following a sample system represents evidence of discriminatory conduct and in many countries it can be used as evidence in court.[144]

Case law in France has remained rather conservative regarding such situation testing as evidence of conduct motivated by racial discrimination. This is visible in the case law of the Court of Cassation in Case 3294 of 11 June 2002.[145] Testimonies of the couples from surveys can be subjective discrimination, which does not necessarily mean that a person is a victim of discrimination only because s/he feels that he has been discriminated against, and such a testimony should therefore be taken with reservation. The public prosecutor filed an indictment against certain owners of bars and disco clubs, as well as their gatekeepers for not allowing persons of North African origin to enter those bars and disco clubs, thus committing the criminal offence of racial discrimination under the Criminal Code which provides for such a crime on the basis of origin or ethnicity. The background of this case was a group experiment organised by the activists of SOS Racisme. Persons of European descent made up three groups, while persons of North African origin were included in other groups. The experiment was aimed at confirming unproven discriminatory practices against darker skin persons by banning them entry into disco clubs and bars. The results of the experiment were troubling, as people of North African origin were denied access. The Montpellier Criminal Court[146] declared innocent some owners of bars and disco clubs, as well as their gatekeepers.

The appeal filed by citizens and SOS Racisme to this judgment was dismissed by the Court of Cassation. The reasons stated were formal in nature – that it is necessary, in order to establish the factual truth in the criminal procedure, to establish facts that resulted from an investigation carried out by the police, gendarmerie, customs and other authorized government agencies. This position is a consequence of the judicial right to a free evaluation of evidence in criminal proceedings. The court evaluated the evidence collected by the activists of SOS Racisme as unconvincing because they were not collected in compliance with the basic procedural obligations of undertaking "good faith" actions, as is done by the

[144] Further information on testing can be found on the ERRC website: http://errc.org/rr_nr3_2000/legal_defence.shtml

[145] Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, European Roma Rights Center (ERRC), Budapest (2004), p. 175. Cour de Cassation is France's highest instance court for civil and criminal proceedings.

[146] Judgment No. 870 of 5 June 2001.

above-mentioned government services. However, this means that the evidence collected in this way by private individuals do not fulfil the basic principle of impartiality of evidence collection. Investigation of alleged discriminatory conduct was carried out by groups of potential clients and organized by SOS Racisme itself, without informing their members of the scope of activities, and especially of the objective that was not mere entry into bars or disco clubs. But this practice results in evidence of segregation with regards to entry to such places. The Court of Cassation evaluated the said benchmark of discrimination that refers to personal and descriptive experiences of darker skin persons as an unreliable source of evidence of racial discrimination. In other words, the court seemed to take into account Wrench and Modood's warning that "a victim may perceive discrimination where it does not exist; conversely, (…) .") ethnic minorities can underestimate the discrimination they are in reality exposed to."[147]

Subjective discrimination can be a significant addition to other evidence of discrimination. The Court of Cassation evaluated that there was no other evidence in the case at hand. Statements collected from the witnesses of SOS Racisme were the only evidence in the aforementioned court proceedings,[148] which was why the court concluded, due to formal reasons, that there racial discrimination had not occurred in the specific case. Furthermore, testimonies before the court showed that visitors of these bars and disco clubs in two out of three places were not exclusively of the same racial affiliation. With the exception of the subjective opinion expressed by private parties, as the only measure of discrimination in the particular case, nothing led the court to conclude that the respondents were selecting their visitors on the basis of racial criteria. A certain restriction of entry into such places may be considered permissible, if done for business reasons of increasing the earnings of the owners of bars and disco clubs. The Court of Cassation relieved the respondents of any liability for the criminal offence of racial discrimination.

What do such case law and positions mean in the light of the new Race Equality Directive[149] which emphasizes prohibition of direct and indirect discrimination based on race and ethnic origin in the public and private sectors? The significance of subjective discrimination lies not so much in the ultimate proving of the very act of discrimination. It is reflected in the creation of a presumption to shift the burden of proof from the plaintiff to the respondent. The key question is what are the conditions necessary to prove discrimination in the specific case? The reason for accepting subjective discrimination as initial evidence in court should be sought in the fact that acts of discrimination are very difficult to prove and that many lawyers therefore agree that the burden of proof must be shifted to the respondent. In evidentiary procedure, the experiences of the London Workshop should be applied regarding the actions of Great Britain courts in relation to subjective discrimination in the form of **consistent drawing inferences** on the shift of the burden of proof to the respondent with a view to the respondent justifying the alleged discriminatory treatment.[150] A victim of alleged discrimination may, at the stage preceding court proceedings, fill out a survey questionnaire presented by UK special equality bodies.[151] The completed questionnaire is delivered to the

[147] Wrench, J., Modood, T., The effectiveness of employment equality policies in relation to immigrants and ethnic minorities in the UK. Report commissioned by the International Labour Office, Geneva, International Migration Papers 38, p. 31, available at: http://www-ilo-mirror.coronell.edu/public/english/protection/migrant/download/imp/imp38.pdf.

[148] It is a biased observation that does not provide a confirmation of the testimony of private parties.

[149] For EU Member States this directive entered into force in December 2003.

[150] Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, European Roma Rights Center (ERRC), Budapest (2004), p. 70.

[151] Equality Commission for Northern Ireland and Racial Equality Commission.

respondent for the purpose of stating the elements contesting the alleged discriminatory treatment. If the respondent fails to complete the questionnaire or writes unreasonable responses, the court may find justification for the application of consistent drawing inferences and shift the burden of proof to the respondent. Although such a position does not have the character of an official judicial position, numerous discrimination cases in Great Britain have been adjudicated in favour of the plaintiff due to the respondent's inadequate response to the questionnaire. This questionnaire was applied by analogy in other European countries by lawyers dealing with discrimination.[152] The Court of Justice of the European Union supports this practice on the merits of "prima facie" cases of discrimination, which is significant for the future development of case-law in this respect.

Statistical data also provide useful evidence to establish the existence of direct and indirect discrimination, including discrimination based on race and ethnicity. his is illustrated by a research conducted by the European Roma Rights Centre[153] in 1999 in the district of Ostrava, eastern part of Czech Republic, with the aim of proving the discriminatory treatment of authorities towards Roma children in the field of education.[154] The numbers of Roma and other children attending primary schools in the district of Ostrava were counted. Figures have shown that the district was strictly divided on an ethnic basis. Most Roma children were attending schools which do not enable them to acquire the necessary knowledge to compete in the labour market and lead a dignified life.[155]

One of the reports of the International Labour Organisation[156] lists statistical evidence among the five most important means of proving discrimination. Statistical data is only an indirect proof of discrimination that can not prove its existence until the other significant evidential parameters have been identified and accounted for.[157]

Most European countries lack valid statistical data on issues relevant to racial, national and ethnic minorities. In some countries, efforts to come up with data related to such minorities are being blocked. This is the case in the Czech Republic, where ERCC representatives often received a response from school administrations that they are not keeping records on the ethnicity of pupils or, even that it is not lawful to do so.[158] A justification lies in the fact that the state did not recognize any special legal status to such minorities, so there is no legal basis for a proper collection of statistical data on them. Recognition of national and ethnic minorities can be done by means of the constitution and law on national minorities.[159] Some

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[152] Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, European Roma Rights Center (ERRC), Budapest (2004), p. 70.
[153] European Roma Rights Center (ERRC).
[154] Recognising and Combating Racial Discrimination: A Short Guide, Publication of the European Roma Rights Centre, available at: http://lists.errc.org/publications/pamphlets/discrimination_bos.shtml
[155] Half of Roma school-age children attended special schools and over half of the total number of children in such schools were Roma. Most Roma children who did not attend schools for children with special needs are concentrated in a few primary schools in certain suburbs of Ostrava; in over 30 schools out of 70 mainstream elementary schools in Ostrava, there was not a single Roma child attending them.
[156] Wrench, J., Modood, T., The effectiveness of employment equality policies in relation to immigrants and ethnic minorities in the UK. Report commissioned by the International Labour Office, Geneva, International Migration Papers 38 (2000), p. 24, available at: http://www-ilo-mirror.coronell.edu/public/english/protection/migrant/download/imp/imp38.pdf.
[157] Migrants, Minorities and Employment - EUCM, October 2003, p. 56.
[158] Recognising and Combating Racial Discrimination: A Short Guide, Publication of the European Roma Rights Centre, available at: http://lists.errc.org/publications/pamphlets/discrimination_bos.shtml.
[159] In theory, the prevailing view is that the minority status should not be recognized to a national or ethnic affiliation, whose share in the total population is not sufficiently representative, as its members barely exist in

countries absolutely deny the existence of national and ethnic minorities. This is the case when the state identifies with the nation, and equals the majority national and ethnic group with the nation understood as a collective of all its citizens. In Denmark, statistical data on national and ethnic minorities can not be collected, because ethnic monitoring is prohibited.[160] The French Constitution[161] excludes any possibility of recognizing a special status to national minorities. The state recognizes only to the French the enjoyment of rights and freedoms in full capacity, regardless of their identity affiliation.[162] Any collection and provision of statistical data relating to racial, national and ethnic affiliation constitutes a violation of the constitution and laws. Application of the afore-mentioned constitutional provision produces statistical discrimination towards members of such minorities. Victims of discrimination are left only with submitting to the court as evidence a recording of a telephone conversation with the employer, which directly proves the existence of discrimination in a specific case. These recordings have been successfully used in the practice of some European countries, as reflected in a number of out-of-court settlements concluded between such parties.

The Immigration Law of the Republic of Italy of 1998 provides various possibilities to prove discrimination. Here we emphasize the possibility for the plaintiff to invoke in court collected statistical data in order to prove discrimination, such as data on filled vacancies, paid contributions, distribution of duties and work tasks.[163] This can be an important comparative example in terms of possibly amending the legislation in other European countries in order to take into account statistics as evidence in court.

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the country. But according to the upper limit, their number must be below half of the total population of a state. See Zoran Radivojević and Nebojša Raičević, *Protection of Minorities in International Law*, in Dragan Žunić (ed.), Rights of Minorities (Niš: OGI, 2005), p. 51.

[160] Strategic Litigation of Race Discrimination in Europe: From Principles to Practice, European Roma Rights Center (ERRC), Budapest (2004), p. 70.

[161] Article 3, para. 2, Article 53, para. 3 and Article 27, para. 3 of the 1958 Constitution of the Republic of France.

[162] Foreigners with a permanent residence in France enjoy equal rights and freedoms as French nationals in countries of origin of the foreigner that have reciprocal agreements with France.

[163] Migrants, Minorities and Employment - EUCM, October 2003, p. 71

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PLACE AND ROLE OF THE CIVIL SECTOR IN THE NATIONAL PREVENTIVE MECHANISM

Introductory considerations

As Norberto Bobbio points out, "man, that is, all people without exception, possess by their nature and thus independently of their will, and especially of the will of one or several others, certain fundamental rights such as the right to life, freedom, security and happiness" (Bobbio, 1995: 23). The idea itself originates from the theory of natural law (Finnis, 2005), but until the 18th century human rights were reduced to privileges that were guaranteed to individual social classes. Human rights were introduced into constitutions only in the era of major civil revolutions (Friedrich, 2005), and the period between the two world wars, especially after World War II, represents a period of time in which they were internationalised, and ultimately made universal on a worldwide scale (Milosavljević, 2011). Therefore, human rights are the rights that every human being has, they are not conferred by the state to individuals, rather, they are rights that everyone has by birth. They existed before the state, so the individual does not owe it to the state, and the state must respect them. The basic principles on which human rights are based are respect for human dignity, universality, inalienability and equality (Mitrović, Grbić Pavlović, Pavlović, 2016: 201).

There are numerous classifications of human rights, and it seems that the most common one categorizes human rights into three generations according to the time of creation. Thus, the first generation includes personal and political rights, the second economic, social and cultural rights, and the third so-called solidarity rights (Weston, 1984). It is particularly important to emphasise the meaning of personal rights and freedoms, which lies precisely in restricting the power of repressive state bodies up to the boundary of the area legally protected from the interference of third persons and state authorities (Dvorkin, 2001), that is, the requirement that all such actions must be based on the constitution and law. Accordingly, human rights have a certain dialectical role in the life of the state and the individual. In other words, they should reconcile the efficiency of the authority of government, with defence from the same authority. On the one hand, the state is the guarantor of human rights and provides an institutional framework for their protection, while on the other hand, the state or its bodies are the ones that most often threaten certain rights of individuals (Tomušat, 2006: 58). At the same time, democracy based on the rule of law implies legally permissible possibilities for limiting certain human rights in order to protect other interests, in particular national and public security. Therefore, with a significant number of specific human rights, especially those defined as freedoms, there is a possibility of their restriction by law and the reasons for introducing such limitations on regular occasions are stated (Mitrović, Pavlović, 2017: 2). However, when interfering with individual human rights, unlawful violence by the state, i.e. officials acting on behalf of the state is prohibited - an absolute prohibition of torture.

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Prohibition of torture is treated in general international law as *ius cogens*, or an imperative norm of general international law. Therefore, numerous international and regional instruments govern the prohibition of torture: Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe, Article 4 of the EU Charter of Fundamental Rights (Dimitrijević et al., 2007). In parallel with the prohibition of torture, some of the mentioned instruments for the protection of human rights set up treaty bodies, i.e., committees for monitoring compliance with the provisions of these treaties.

Thus, the Committee against Torture (CAT) was set up by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which includes a group of experts authorized to report on what states are doing to prevent and punish torture and other forms of ill-treatment. Furthermore, in 2002, the United Nations General Assembly adopted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*OPCAT)*[165], which provides for the introduction of both new international preventive mechanisms and those at state party level. We will discuss their significance in the text below, especially the significance of the latter mechanism. On the other hand, the enormous significance of the Council of Europe Convention is manifested in the establishment of a special supra-national body for the prevention of torture - the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). This Committee primarily carries out regular or periodic visits to places of detention and persons deprived of their liberty, and examines their actual position regarding the respect of freedoms and rights guaranteed by international and European standards in order to increase the level of protection of all arrested, detained or convicted persons in certain countries by means of advice, opinions or warnings. It should be noted that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) can inspect police stations and their detention units at any time. After each visit, a report is drawn up, which is then discussed with the representatives of the particular country.

Also, the provisions of Article II of the Constitution of Bosnia and Herzegovina apply in full to human rights and fundamental freedoms. In other words, the provisions of this Article contain a list of rights and freedoms enshrined in the Constitution of Bosnia and Herzegovina. Thus, on the basis of the Constitution, all persons in the territory of Bosnia and Herzegovina enjoy the following human rights and fundamental freedoms: the right to life; *right not to be subjected to torture or inhuman or degrading treatment or punishment*; right not to be held in slavery or subordination or forced or compulsory labour; right to personal liberty and security; right to a fair trial in civil and criminal matters and other rights in connection with criminal proceedings; right to private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly and freedom of association; right to marry and to found a family; right to property; right to education and the right to freedom of movement and

[165] *The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly in 2002 and entered into force in 2006.

residence (Pavlović, Grbić Pavlović, 2011). Naturally, the constitutions of entities, as well as the Statute of the Brčko District of Bosnia and Herzegovina, list the human rights that are applicable in their territories, including, in addition to the afore-mentioned ones, a number of economic and social rights.

Given that torture and ill-treatment are among the most serious forms of violation or threat to human dignity, but also human rights violation committed by representatives of state authorities, the system of prohibitions of this conduct is governed precisely in domestic law. Torture is regulated in the criminal law of Bosnia and Herzegovina in several criminal codes. Thus, for example, B&H Criminal Code[166] includes several criminal offences containing prohibited treatment in connection with torture. Consequently, Article 190 of the B&H Criminal Code prescribes torture and other forms of cruel, inhuman and degrading treatment as a separate criminal offence. The perpetrator of this offence may be an official person, or another person acting on the basis of official authority, explicit order or consent of an official person. Furthermore, the Criminal Code of Bosnia and Herzegovina also criminalises those acts of ill-treatment committed by private entities, for example: genocide (Art. 171), crimes against humanity (Art. 172), war crimes against the wounded and sick (Art. 174), war crimes against prisoners of war (Art. 175), trafficking in human beings (Art. 186), etc. (Živanović et al., 2014: 84). On the other hand, the Criminal Code of the Federation of Bosnia and Herzegovina[167] prescribes in the group of criminal offences against the freedom and rights of persons and citizens, in Article 182, the criminal offence of "ill-treatment during performance of an official duty". This offence is committed by an official person who ill-treats another in the performance of his/her service, inflicts on him/her severe physical or mental suffering, intimidates or offends him/her (Petrović and Jovašević, 2005). This criminal offence under the same name, with the same elements and characteristics and the prescribed punishment exists with identical formulation in the Criminal Code of the Brčko District of Bosnia and Herzegovina in Article 178.[168] Moreover, the new Criminal Code of Republika Srpska[169], includes within criminal offences against the freedoms and rights of citizens in Article 149 "ill-treatment, torture and other inhuman and degrading treatment", a criminal offence consisting in ill-treating another or causing grave physical or mental suffering to another by coarse behaviour (Jovašević, Mitrović, Ikanović, 2017).

It is clear from the aforementioned statutory provisions that the applicable criminal laws in Bosnia and Herzegovina do not regulate torture in an identical way. Mutual non-compliance of valid criminal legislation applied within B&H, ultimately leads to unequal protection of citizens in the exercise of their human rights. It should be noted that there is a greater degree of inconsistency in the penalties for these offences in the valid criminal laws in Bosnia and Herzegovina, none of which seems adequate, given the gravity of acts of torture, inhuman or degrading treatment and punishment.

Obligations of States Parties to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

[166] Official Gazette of B&H, Nos. 3/2003, 32/2003, 37/2003, 34/2004, 61/2004, 30/2005, 33/2006, 32/2007, 8/2010, 47/2014, 22/2015 and 40/2015.
[167] Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 36/2003, 37/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016.
[168] Official Gazette of the Brčko District of Bosnia and Herzegovina, No. 33/2013 - Consolidated text.
[169] Official Gazette of the Republic of Srpska, No. 64/17.

Torture is inhuman and any other cruel or degrading treatment or punishment and as such, it is strictly prohibited and constitutes a serious violation of human rights. Articles 2 and 16 of the Convention[170] oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction. The World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention. One of these efforts is certainly the adoption of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, which aims to establish a preventive system of regular visits to detention units. In 2002, the United Nations General Assembly drew up the said Protocol, the objective of which is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment..

In October 2008, Bosnia and Herzegovina ratified the aforementioned Optional Protocol and thus committed itself to meeting all the standards outlined therein. The Optional Protocol consists of seven parts: 1) General principles; 2) Subcommittee on Prevention; 3) Mandate of the Subcommittee on Prevention; 4) National preventive mechanisms; 5) Declaration; 6) Financial Provisions and 7) Final Provisions.

The first part defines the general principles. In explanation, the objective of the Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Also, the first part defines the establishment of the Subcommittee, principles and objectives of its governance, and the obligation of State Parties to set up one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (the national preventive mechanism) (Article 3). It includes a definition of deprivation of liberty for the purposes of the present Protocol, which is any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

The second part of the Optional Protocol regulates the Subcommittee on Prevention in more detail. Article 5 specifically emphasizes that the members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty. This part also defines the manner of choosing the members of the Subcommittee. The third part provides for the mandate of the Subcommittee on Prevention. Thus, Article 11 of the Optional Protocol provides that the Subcommittee on Prevention: (a) visits the places where persons are or may be deprived of their liberty and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; (b) in regard to the national preventive mechanisms: (i) advise and assist States Parties, when necessary, in their establishment; (ii) maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities; (iii) advise and assist them in the evaluation of the needs and the means

[170] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Official Gazette of B&H - International Treaties, No. 8/08).

necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; (iv) make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment; (c) cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

In order to enable the Subcommittee on Prevention to comply with its mandate, the States Parties undertake (Article 12): (a) to receive the Subcommittee on Prevention in their territory and grant it access to all places of detention; (b) to provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; (c) to encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms; (d) to examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures. Furthermore, the third part of the Optional Protocol provides that the Subcommittee on Prevention shall organise regular visits to the States Parties. To that effect, in order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it: (a) unrestricted access to all information concerning the number of persons deprived of their liberty, as well as the number of such sites and their locations; (b) unrestricted access to all information relating to the treatment of such persons as well as the conditions of detention; (c) unrestricted access to all detention facilities and their installations and facilities; (d) the ability to speak individually with persons deprived of their liberty without a witness, either personally or with the assistance of an interpreter, if considered necessary, as well as with any other person whom the Subcommittee on Prevention believes may provide relevant information; (e) the freedom to choose places to visit and persons with whom they wish to interview. This part of the Optional Protocol provides for the confidential manner in which the Subcommittee on Prevention communicates its recommendations and observations to the State Party and, if relevant, to the national preventive mechanism.

The fourth part of the Optional Protocol speaks about the national preventive mechanisms. To explain, each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level (Article 17); to guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel, to take the necessary measures to ensure that the experts of the NPM have the required capabilities and professional knowledge, but also to make available the necessary resources for the functioning of the national preventive mechanisms.

Article 19 of the Optional Protocol provides for the minimum powers of national preventive mechanisms, such as:

(a) to regularly examine the treatment of the persons deprived of their liberty in places of detention;

(b) to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; and

(c) to submit proposals and observations concerning existing or draft legislation.

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them (Delaplace and Pollard, 2006, 244):

(a) access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location;

(b) access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) access to all places of detention and their installations and facilities;

(d) the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) the liberty to choose the places they want to visit and the persons they want to interview;

(f) the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with its representatives.

Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned. The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures (Article 22).

The fifth part of the Optional Protocol provides that, upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

The sixth part refers to financial provisions. It is important to emphasize here that a Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

The seventh part includes final provisions which, inter alia, state that the present Protocol is open for signature by any State that has signed the Convention and that the provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Role of the civil sector in the preventive mechanism

As an international agreement, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), contains explicit provisions and therefore establishes the standards of independent monitoring. It is the most developed international agreement dealing with this issue so far. As previously stated, the OPCAT requires that all state parties set up or designate as the national preventive mechanism one or several visiting bodies to institutions holding persons deprived of their liberty (Art. 3) with the aim of preventing acts of torture and other cruel, inhuman or degrading treatment or punishment at the domestic level (Art. 17). By their ratification of the Optional Protocol, state parties confirm that torture, inhuman, degrading treatment or punishment are prohibited and constitute grave violations of human rights. Besides, state parties agreed to establish a system of regular visits by international and national authorities to places where persons are deprived of liberty (e.g., prisons, police stations, psychiatric hospitals, psychiatric wards in general hospitals, or clinical centres, social welfare institutions, asylum centres) (Mitrović and Pavlović, 2017:10-11).

The aim of the preventive mechanism is to regularly visit places where persons are deprived of their liberty, to act preventively so as to impede torture, to regularly examine the treatment of the persons deprived of their liberty, to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty; and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations, to submit proposals and observations concerning existing or draft legislation (Art. 19). In this respect, in order for a state party to fulfil its obligations under the Optional Protocol, it needs to set up a national body, i.e. a preventive mechanism competent to visit places where persons deprived of liberty are held (B&H Ombudsman, 2010; Association for the Prevention of Torture, 2006).

Based on available information, primarily contained in publications issued by the Association for the Prevention of Torture (APT) from Geneva, it appears that most of the states assigns the competences of the preventive mechanism to some of the existing preventive mechanisms - these are usually already existing human rights commissions or Ombudsman institutions. Also, analysing in parallel the solutions to this issue in the countries of the region, it is also clear that the obligation to set up a preventive mechanism under the OPCAT is generally solved by designating already existing human rights mechanisms, that is, Ombudsman institutions. Such examples exist in Montenegro[171], Croatia[172] and Serbia[173].

[171] According to Article 25b of the Law on the Protector of Human Rights and Freedoms of Montenegro (Official Gazette of Montenegro, Nos. 42/2011 and 32/2014), torture prevention duties are: visiting authorities, institutions or organizations where persons deprived of their liberty or persons with restricted movement are held or could be held, in order to increase the level of their protection against torture and other forms of cruel, inhuman or degrading treatment or punishment; making recommendations to the competent authorities,

For an NPM to be effective, it is not enough that its members are independent from the government, the judiciary, and the authorities responsible for places of detention. As Optional Protocol Article 18 explicitly requires, the members must each have relevant expertise and the NPM overall must bring together the required variety and balance of different fields of professional knowledge. As often stated, a mix of the following capabilities and professional backgrounds should be included in the NPM:

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institutions and organizations in order to improve the treatment of persons deprived of their liberty and their conditions, and to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment; giving opinions to proposed laws and other regulations for the protection and promotion of human rights and freedoms of persons deprived of their liberty and persons with restricted movement; cooperation with the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and other bodies. In accordance with the Law, when performing the duties of torture prevention, the Protector and other persons authorised by him, shall have the right to: visit authorities, institutions and organizations, and inspect premises persons deprived of their liberty are held or could be held in, without prior notice; the right to access information on: authorities, institutions and organizations in which persons deprived of their liberty are held; number of persons deprived of their liberty in the authority, institution, or organization they are visiting and on the treatment of persons deprived of their liberty; and to talk, without the presence of an official person, with the persons deprived of their liberty and other persons who can provide appropriate information regarding the suspicion of violation of human rights in the authority, institution or organization they are visiting.

[172] Since 2012, the work of the National Preventive Mechanism has been carried out by the Ombudsperson. This includes regular and unannounced visits to institutions where persons deprived of their liberty are or may be, such as prisons, psychiatric institutions, police stations and others. During the visit, members of the national preventive mechanism have free access to information about the place they are visiting, and about the treatment of persons deprived of their liberty, with whom they can talk without supervision. They can also examine all rooms. After the visit, the Ombudsperson makes recommendations and warnings to the competent bodies and institutions in order to improve the treatment of persons deprived of their liberty and the conditions in which they are held. Where it happens that its recommendation or warning is not acted upon within the prescribed time-limit, the Ombudsperson informs the Croatian Parliament thereof. Likewise, the Ombudsperson cooperates with the United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and makes proposals and objections to laws and other regulations in view of promoting the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. See more at http://ombudsman.hr/hr/npm.

[173] In the Republic of Serbia, the Law on the Ratification of the Optional Protocol to the 2011 Convention against Torture (Official Gazette of the Republic of Serbia - International Treaties, No. 7/11) stipulates that NPM activities will be performed by the Protector of Citizens of the Republic of Serbia. The National Preventive Mechanism in Serbia has the following powers: to enter all places where persons are or may be deprived of their liberty, freely, unannounced and at all times; to talk in private with any person deprived of his/her liberty, as well as with any official who may have information relevant to the treatment of persons deprived of their liberty; to access all documentation relating to such persons; to make recommendations to the competent authorities in order to improve the treatment of persons deprived of their liberty and to improve their conditions; to submit proposals and observations concerning existing or draft legal acts. After the visit, the National Preventive Mechanism draws up visit reports, with recommendations on remedial measures and delivers them to government authorities. Annual reports are submitted to the National Assembly of the Republic of Serbia and the Subcommittee on the Prevention of Torture of the United Nations. In order for the National Preventive Mechanism to exercise its powers, the state is obliged to provide the following: access to all data on the number of persons deprived of their liberty, as well as on the number of institutions and their location; access to all data on the treatment of these persons and the conditions of their deprivation of liberty; access to all institutions where persons are deprived of their liberty, their installations and facilities; opportunity to conduct unobstructed and unsupervised conversations with persons deprived of their liberty in the absence of witnesses, either personally or with an interpreter, if necessary, as well as with any other person it believes may supply relevant information; the liberty to choose the places they want to visit and people with whom they want to talk. It should also be noted that the National Preventive Mechanism does not act on individual complaints of persons deprived of their liberty. Such persons may address their complaints to the Protector of Citizens. On the other hand, the state is obliged to examine the recommendations of the National Preventive Mechanism and to engage in a dialogue with the NPT regarding their implementation. See: Protector of Citizens, *National Preventive Mechanism - Report for 2013 with Conclusions of the National Assembly of the Republic of Serbia* (Belgrade, 2014), p. 22.

• lawyers (especially with expertise in national or international human rights, criminal law, refugee and asylum law, and in some cases humanitarian law),

• doctors (including but not limited to forensic specialists),

• psychologists and psychiatrists,

• persons with prior professional experience regarding policing, administration of prisons and psychiatric institutions,

• *NGO representatives,*

• persons with prior experience visiting places of detention,

• persons with prior experience working with particularly vulnerable groups (such as migrants, women, juveniles, persons with physical or mental disabilities, indigenous peoples, and national, ethnic, religious or linguistic minorities),

• anthropologists,

• social workers.

Therefore, and as stated at the start, non-governmental organisations and other members of civil society should also be involved in the work of the National Preventive Mechanism. In most cases, the primary role that non-governmental organisations can have in relation to the national mechanism is to be an important source of information, but also to externally oversee the implementation of the activities by the national mechanism.

Civil society organisations dealing with the protection and promotion of human rights are often leaders in defending the interests of persons deprived of their liberty, especially against torture and other forms of ill-treatment. Non-governmental organisations and other civil society organisations may already be involved in monitoring places of detention, by providing various types of services to detainees. In such a way they can be an excellent source of information for the preventive mechanism, especially in the context of planning visits and giving other advice related to reactions to unforeseen situations that can be noticed during *ad hoc* visits (Association for the Prevention of Torture, 2006). Through their advice or work, non-governmental organisations can acquire a special level of trust by detainees. When such a non-governmental organisation considers it necessary, it can greatly increase the effectiveness of the national mechanism by raising awareness among the detention population of the existence of the national NPM, on subsequent visits, its mandate and method of work, as well as by encouraging detainees to cooperate and provide information to the national mechanism.

Finally, some non-governmental organisations can also be an important source of control, analyses and feedback on the work of the national mechanism itself. The necessity to secure a strong independence of the national mechanism from the executive branch and the judiciary means that these institutions are inadequate as a source of control over the responsibility of the national mechanism (Association for the Prevention of Torture, 2006). The general power of political pressure that NGOs and the civil sector can often focus on the authorities by raising public awareness of certain issues, is also an important source of incentives at the

national level for the authorities to fully engage in constructive dialogues with the NPM and to take concrete measures for implementation of NPM recommendations. Non-governmental organisations may be in a good position to exercise control over the implementation of NPM recommendations by officers in individual places of detention, through their frequent presence in those places and their links to the local community. Proactive provision of these information to the NPM can greatly increase its effectiveness.

Concluding considerations

Torture is particularly dangerous because of the status of its perpetrator. As a rule, they are persons who are representatives of state bodies, especially criminal law repression bodies, including the police, prosecutor's office, courts, prison administration and others. The fact that Bosnia and Herzegovina ratified the Optional Protocol in October 2008 also implies the obligation to meet all the standards outlined therein. Regardless of the importance and the need to establish a NPM, it has not been established in Bosnia and Herzegovina to date. However, certain efforts to that end have been made.

The proposed Law on Amendments to the Law on the Human Rights Ombudsman of Bosnia and Herzegovina from 2017 provides for the establishment of a preventive mechanism within the Ombudsman institution, following the examples of countries from the region. Article 4a of the proposed Law defines NPM competences and powers, as well as the manner in which certain experts needed for the work of this mechanism will be hired. Art. 4, para. 2 provides that the Ombudsmen may, at any time and without prior notice, visit places where persons are deprived of their liberty, places for persons whose freedom of movement is restricted and places in which certain groups are accommodated or held. Ombudsmen have the right to access all places - premises where persons deprived of their liberty are held, respecting the rules of conduct and the established prohibitions of access issued by the prison establishment which they are visiting. Ombudsman's annual activity report in the future would have to contain a special chapter on NPM functioning, with appropriate recommendations.

As for the role of the civil sector in NPM work, Art. 4a, para. 4 of the proposed Law provides that the Ombudsman institution regulates in a Rulebook its organisation and method of work, criteria for the appointment of representatives of civil society organisations, academic community and other experts involved in NPM functioning.

It is clear that this issue will be regulated in more detail in secondary legislation. What is really necessary is that NGOs and other members of civil society are involved in full capacity in the process of NPM functioning, so that the national mechanism would be convincing and thus efficient.

In most cases, the primary role that non-governmental organisations can have in relation to the national mechanism is to be an important source of information for the NPM, but also to externally oversee and control the NPM.

The regulations for OPCAT implementation in B&H should provide for a mixture of relevant professions of NPM members, including: lawyers, doctors, psychologists and psychiatrists, persons with prior professional experience in policing, prison administration and psychiatric institutions, NGO representatives, previous with prior experience in visiting prisons, persons

with prior experience in working with particularly vulnerable groups, anthropologists and social workers. Accordingly, the expertise of the preventive mechanism can be supplemented by hiring external experts. The Rulebook should explicitly allow these experts to be engaged by the national preventive mechanism and allow them to work together with National Preventive Mechanism members. However, this can not undermine the need for an adequate level of expertise within the national preventive mechanism itself. Its members should also have strong personal integrity and commitment to the prevention of torture, ill-treatment, and the improvement of conditions in all places of detention.

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EXPERIENCES OF OTHER COUNTRIES

Janja Pavković[174]

ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN ADMINISTRATIVE AND COURT PROCEEDINGS FROM OMBUDSMAN'S PERSPECTIVE

Introduction

This text aims to illustrate the development of Ombudsman institution in the Republic of Croatia.

Ombudsman institution[175] is based on the Constitution. It was introduced into the legal and political reality of the Republic of Croatia by the "Christmas" Constitution of 1990 (Official Gazette, hereinafter referred to as the "OG", No. 56/90). The Constitution of the Republic of Croatia designated the Ombudsman as the plenipotentiary of the Croatian Parliament, to protect the constitutional and legal rights of citizens in proceedings before the state administration and bodies that have public authorities.

Two years later, the first Ombudsman Act was adopted (OG, 60/92), and the status of the institution has been growing stronger ever since. According to the 1992 Act, the focus of the Ombudsman is good governance and the fight for citizens' rights before state administration bodies and bodies with public authorities in a wide range of administrative areas: health care, social welfare, civil service relations, property and housing rights, and the like. In those years, a big portion of its work was dedicated to complaints related to the consequences of Croatian independence and war events, such as payment of pensions, rights of refugees and returnees, status-related problems of citizens, problems with housing and the recovery of property.

In accordance with the general democratic changes and decentralization initiative, under the 2000 Constitution of the Republic of Croatia (OG, No. 113/00), the competence of the Ombudsman expanded to include protection of constitutional and legal rights of citizens in proceedings conducted at the Ministry of Defence, armed forces and security services, protection of the rights of citizens before local and regional self-government bodies and the protection of the rights to local and regional self-government in front of state government authorities.

The International Coordinating Committee of National Institutions, representative body of national human rights institutions before the United Nations Human Rights Council, accredited the Ombudsman in 2008 as an independent national institution for the promotion and protection of human rights with the highest existing status A according to the so-called Paris principles.

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[174] Adviser to the Ombudsman, Ombudsman, Republic of Croatia

[175] Words and combinations of terms used in the male form shall refer equally to the male and female gender.

In 2008 also, the Anti-Discrimination Act was adopted (OG, Nos. 85/08 and 112/12), and the Ombudsman became the central body responsible for the suppression of discrimination in almost all areas of public life, with powers to deal with all natural and legal persons.

According to the 2010 amendments of the Constitution of the Republic of Croatia (OG, No. 76/10), the Ombudsman is the plenipotentiary of the Croatian Parliament for the promotion and protection of human rights and freedoms established by the Constitution, laws and international legal acts on human rights and freedoms accepted by the Republic of Croatia. Thus, the Ombudsman received the task to promote human rights and freedoms enshrined in the Constitution, laws and international legal acts on human rights and freedoms, and in 2012 a new Ombudsman Act entered into force (OG, No. 76/12).

Since 2013, the Ombudsman has also been acting as the National Preventive Mechanism, which allows its Office to visit prisons and penitentiaries, psychiatric institutions, homes for the elderly and physically helpless and police stations unannounced.

Actions of the Ombudsman

Everyone may file a complaint to the Ombudsman if s/he deems that his/her constitutional or legal rights have been threatened or violated as a result of any illegal or irregular act by governmental bodies, local and regional self-government bodies and bodies vested with public authority.[176]

A discrimination complaint may be filed by anyone who deems himself/herself to be a victim of impermissible unequal treatment, both in terms of commission or omission. However, the Anti-Discrimination Act prescribes that all legal and natural persons, including state bodies, local and regional self-government bodies and legal entities with public authorities should report reasonable suspicion to discrimination to the Ombudsman or special ombudsmen, with the consent of the person suspected of being a victim of discrimination.

No one should be prevented from filing a complaint to the Ombudsman or placed in a less favourable position by addressing the Ombudsman, and protection against victimization of persons who have reported discrimination in good faith or who have somehow participated in discrimination proceedings can be exercised in a misdemeanour procedure in accordance with the Anti-Discrimination Act.

The Ombudsman also acts on anonymous complaints, if they are understandable and contain sufficient data. Their numbers indicate that citizens do not trust the institutions. In practice, there is an increasing number of filings that are not, in their nature, citizen complaints, but requests for assistance or information.

The Ombudsman can initiate proceedings ex officio as well, and most often that happens in situations it is informed about through the media.

[176] Constitution of the Republic of Croatia, Art. 93, para. 2: "Everyone may file a complaint to the Ombudsman if s/he deems that his/her constitutional or legal rights have been threatened or violated as a result of any illegal or irregular act by governmental bodies, local and regional self-government bodies and bodies vested with public authority".

Seeing that the Constitution of the Republic of Croatia guarantees autonomy and independence of the judicial branch of power, there is a rule that the Ombudsman does not act in cases in which court proceedings are conducted, unless they concern a complaint to unnecessary delay of proceedings or obvious abuse of power. The Ombudsman does not act on complaints which fall within the competence of other Ombudsman institutions - the Ombudsman for Gender Equality, Ombudsman for Persons with Disabilities and the Ombudsperson for Children.

The Ombudsman Act stipulates that the Ombudsman freely decides whether to examine the complaint and to what extent, and may decide not to act in cases in which proceedings are underway, except in cases of unjustified delay or obvious abuse of power, if the time-limit for filing a legal remedy or means of legal protection under special regulations is running, if the right to file a legal remedy has not been exercised within the time-limit, if three years have passed since the irregularity or decision of the competent authority, unless where it deems to be a matter of exceptional interest for the protection of human rights and freedoms.[177] According to the Ombudsman's Rules of Procedure, the decision on whether the Ombudsman will examine a complaint depends on the significance of the value of the protected asset, the number of persons whose rights could be violated, manners and circumstances under which a right was violated or may be violated, as well as the legal possibilities for the protection of rights.[178]

On that account, the circumstance that administrative or court proceedings are currently pending in a specific case to which the complaint relates generally also constitutes an obstacle to actions of the Ombudsman as a result of the separation of powers and defined Ombudsman's role in the society.[179] As Aviani points out: "In my judgment, setting forth a general rule that the Ombudsman does not act in matters that are undergoing administrative or other proceedings, was primarily motivated by a desire not to duplicate proceedings before various bodies, which would be done to the detriment of efficiency and cost-effectiveness principles. On the other hand, this approach of the legislator was probably also conditioned by the circumstance that it is necessary to ensure autonomy of work of the relevant bodies that could be threatened if the Ombudsman were to conduct the procedure with state administration bodies or courts, especially when such proceedings are finalised by taking an appropriate position by the Ombudsman before the administrative or court proceedings are completed."[180]

There are situations in which, independently of the results of, for example, administrative complaint procedures, it becomes clear from the complaint itself and the accompanying documents or multiple identical complaints that it is threat or violation of a right or an unacceptable practice. Thus, the 2016 Ombudsman's Report regarding the issue of transfer of police officers stated: "Although most of the complaints indicate to circumstances that are in parallel the subject of an appeal procedure before the Committee, that is, disciplinary or court proceedings, making Ombudsman's possibilities to act limited, the shared element of most of

[177] The Law on the Ombudsman of 1992 stipulated that the Ombudsman, as a rule, does not act in matters in which administrative or other proceedings are on-going.
[178] Ombudsman's Rules of Procedure, Art. 25.
[179] The Law on General Administrative Procedure, the so-called "old LAP" explicitly prescribed the possibility for the Ombudsman to participate in the administrative procedure on extraordinary legal remedies, by giving the Ombudsman the authority to file a request for annulment or termination of a final decision by law.
[180] Damir Aviani, Control of Administration through the Ombudsman, *A Collection of Papers of the Faculty of Law in Split*, Vol. 53 (2016), p. 156.

them is indication to mobbing and arbitrary actions of managerial police officers at the Police Directorate and police stations when deciding on work schedules, overtime and payment of such work, assignment of tasks, transfers and re-assignments, and the initiation of disciplinary procedures. Many complaints mention that the decisions of managerial officers are motivated by the fact that the complainants have previously pointed out to irregularities in their work or the work of colleagues, or simply invoked the rights that belong to them, and got on their wrong side by doing so. The motives behind these decisions are difficult to prove, especially if all the formal requirements for their adoption are fulfilled, but it is nevertheless clear that decisions on transfers are often made due to the 'needs of the service', but without a proper explanation." Having in mind the observed, the Ombudsman pointed to the need to amend regulations so as to explicitly define the longest duration of the performance of duties in another position under a written order of the superior manager. [181]

Summary proceedings or inquiry proceedings can be conducted on the basis of the complaint submitted. The subject-matter of control and examination of allegations from the complaint is commission or omission by official persons, including their free evaluation, hence, legality and regularity of their work.[182]

In this context, Đerđa and Antić state that: "..It is tasked with examining, in a relatively informal manner, cases of violations of the rights of individuals caused by unlawful and irregular work of administrative bodies; and it is empowered to state noticed unlawfulness or irregularity in the work of bodies which it is authorised to supervise, as well as to make suggestions and recommendations concerning the measures to be taken in order to eliminate the unlawfulness or irregularity found. However, the Ombudsman has no authority to repeal an unlawful or irregular act, just as it has no authority to solve an administrative matter on its merits."[183]

In inquiry proceedings, delivery of information, data, explanations, and documents is requested within a specified time-limit, with a view to obtaining as broad a view as possible of the potential violation. Both the Ombudsman Act and the Anti-Discrimination Act contain provisions on the obligation of bodies to ensure the availability of information and documentation related to the complaint submitted. However, for failures to submit data related to complaints of discrimination by a state body, local and regional self-government unit, misdemeanour proceedings can be instituted against the responsible person and s/he can be punished by a fine ranging from 1,000 to 5,000 HRK.

The Anti-Discrimination Act introduced the rule on shifting the burden of proof in proceedings before the Ombudsman as well. According to this provision, a party that claims in court or other proceedings that its right to equal treatment has been violated is obliged to make it plausible that discrimination had occurred. If it does so, the burden of proof that discrimination had not occurred lies with the opposite party. The plausibility, that is, the degree of certainty, must be such that the conviction of the existence of discrimination seems more plausible than the decision that discrimination had not occurred. The complainant should present facts that arouse suspicion of the existence of a link between the discriminatory basis and some form of adverse treatment - direct or indirect discrimination,

[181] The 2016 Report of the Ombudsman, pp. 62-69, available at www.ombudsman.hr
[182] See more in Damir Aviani, Control of Administration through the Ombudsman, *A Collection of Papers of the Faculty of Law in Split*, Vol. 53 (2016), pp. 144 -152.
[183] Dario Đerđa and Teodor Antić, Supervision of the Work of Executive and Administrative Bodies of Local Government Units in Croatia, *Collection of Papers of the Faculty of Law in Split,* Vol. 53 (2016), p. 196.

harassment, and the like - and the court and the Ombudsman, should determine the threshold that must be satisfied in order to shift the burden of proof to the other party.

Upon completion of inquiry proceedings, the Ombudsman develops a report on the case containing an assessment of the threat or violation of constitutional or legal rights and, where possible, a recommendation, proposal, warning or an opinion on how the violation or threat may be eliminated. The Ombudsman does not have any cassation powers, it can not revoke or annul an act or a court judgment, but if violations with elements of a crime, misdemeanour or breach of discipline at work are found in the procedure, the Ombudsman may propose initiation of the relevant procedure. The bodies to whom the recommendation or proposal are addressed have to inform the Ombudsman of their actions within a specified time limit, and where they fail to do so, the supervisory body, followed by the Government of the Republic of Croatia, will be notified.

The Ombudsman submits a regular annual report to the Croatian Parliament. The report has to comprise an analysis and assessment of the state of the protection of rights and freedoms in the Republic of Croatia, an analysis and assessment of the situation related to certain forms of violations of the rights of individuals or certain social groups, an assessment of the extent to which specific bodies have acted in accordance with Ombudsman's prior recommendations, opinions, and warnings, as well as a list of Ombudsman's recommendations for elimination of systemic deficiencies and irregularities that lead to violations of constitutional and legal rights of citizens.

The Ombudsman may also submit special reports to the Croatian Parliament on certain issues within its scope of work, especially if there is a threat to constitutional and legal rights of a higher level or importance. For example, that was the case in catastrophic flooding in Slavonia of May 2014. After several months of field work on the shortcomings observed in the functioning of the system, Ombudsman's report on human rights in the context of the disaster caused by floods in the Vukovar-Srijem County was submitted to the Croatian Parliament in December of the same year.[184]

Furthermore, the Ombudsman participates in the work of Croatian Parliament's working bodies, primarily of the Committee for Human Rights and Rights of National Minorities. It can attend the sessions of the Croatian Parliament when it debates matters falling within the competence of the Ombudsman. It may indicate to the Government to the need to pass laws, by-laws, strategies, programmes and other acts in the field of human rights and freedoms protection and rule of law and it participates in the drafting of regulations falling within its competence. Moreover, this institution may file a request to initiate proceedings for assessing the conformity of laws with the Constitution in accordance with the Constitutional Act on the Constitutional Court of the Republic of Croatia and initiate the procedure for assessing the legality of a general act before the High Administrative Court of the Republic of Croatia in accordance with the Law on Administrative Disputes.

As Đerđa and Antić concluded: "With these powers, which do not involve objective repealing or meritorious resolution, but only stating the unlawfulness, the Ombudsman is classified

[184] Ombudsman's Report on human rights in the context of the disaster caused by the flood in Vukovar-Srijem County of 5 December 2014, available at www.ombudsman.hr

among supervision entities which contribute to lawfulness in the society more by their authority than by their direct supervisory powers. Its effectiveness depends more on the reputation of its position in the legal system and its personal authority than on the nature of the largely informal powers it has."[185]

Complaints about the work of the judiciary

As stated earlier, as a rule, the Ombudsman does not act in the course of court proceedings, unless when there is an issue with the prolonged duration of proceedings or obvious abuse of power. The Ombudsman then requests a statement from the president of the competent court, and where that is not provided, the Ombudsman informs the president of the Supreme Court of the Republic of Croatia about the circumstances.

Complaints about the work of the judiciary addressed to the Ombudsman have been the most numerous for years or are at the very top; in 2016, out of 2,792 newly received ones, 320 were related to the judiciary. In their complaints, citizens indicate that judgments are rendered after superficial proceedings and rough assessment of evidence, in a manner and under circumstances that do not reflect lawfulness nor the guarantees of a fair trial, which leads to suspicion of corruption, conflict of interest and grave abuse of office, and consequently to revolt, feelings of frustration and mistrust in the judiciary. Complaints apply not only to lower instance courts, but also to the Supreme Court of the Republic of Croatia and the Constitutional Court of the Republic of Croatia. Citizens' distrust in the judicial system is also evident from the results of the World Bank survey conducted in 2016, which suggests that more than two thirds of citizens have a negative opinion on the functioning of the judiciary. The number of complaints about the work of the State Attorney's Office is growing, because in many cases it does not communicate with citizens, it does not respond to their complaints and does not provide information on the state of the case. It was also noticed that in cases in which the State Attorney's Office represents the Republic of Croatia it reluctantly proposes settlements, which would shorten the duration of proceedings and ultimately bring savings to the budget.[186]

Due to its constitutional autonomy and independence, the actions of the Ombudsman on complaints about the work of the judiciary are limited, but regardless of that, many complaints serve as a basis to detect problems in the judiciary, staring from HR, financial, and organisational problems in exercising the right to free legal aid. On that basis, systematic recommendations for improving the situation in that area should be developed and included into annual reports.

The Ombudsman as the central anti-discrimination body and its role in court proceedings

[185] Dario Đerđa and Teodor Antić, Supervision of the Work of Executive and Administrative Bodies of Local Government Units in Croatia, *Collection of Papers of the Faculty of Law in Split,* Vol. 53 (2016), p. 198.
[186] The 2016 Report of the Ombudsperson, pp. 13-29, available at www.ombudsman.hr.

The Anti-Discrimination Act provides protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia, creates preconditions for achieving equal opportunities and governs protection against discrimination, i.e., against placing a person into a less favourable position on a number of grounds enumerated in detail.

The law applies to all legal and natural persons in almost all areas of public life, from work and employment, through health care, to public information and the media.

By its entry into force, the Ombudsman becomes the central body responsible for the suppression of discrimination, having broad powers. Within the mandate of a central body, the Ombudsman acts on discrimination complaints and provides information on rights and obligations, makes recommendations and warnings, proposes appropriate legal and strategic decisions, warns the public of occurrences of discrimination. With the consent of the parties, it can conduct a conciliation procedure with the possibility of concluding an out-of-court settlement, conduct research, and report to the Croatian Parliament on occurrences of discrimination.

Additionally, the Ombudsman can file criminal charges related to cases of discrimination, as well as motions to bring charges for misdemeanours prescribed by the Anti-Discrimination Act. On the side and with the consent of the plaintiff, it can join individual civil litigation cases that are conducted on discrimination issues. Determination of civil liability for discrimination is possible in litigation on special discrimination lawsuits, for the purpose of determining, prohibiting or eliminating discrimination, for compensation of damages due to discrimination, or the publication of a judgment in media outlets determining a violation of the right to equal treatment. The Anti-Discrimination Act prescribes the possibility to resolve discrimination issues as preliminary rulings.

The Ombudsman may also submit group actions for the protection of collective interests of a certain group of persons whose rights it protects and request the determination of discrimination, prohibition or elimination of discrimination, or the publication of a judgment in media outlets determining a violation of the right to equal treatment. These are lawsuits conducted before county courts and into which the Ombudsman can intervene if other authorised parties or civil society organisations filed the group action.

Using the afore-mentioned powers, the Ombudsman intervened in several civil actions, initiated one misdemeanour procedure and filed a criminal charge for hate speech. The civil proceedings in which it participated concerned the determination of discrimination and compensation of damages based on nationality and age, in the fields of education and work. The procedures have been finalized with final force and effect by accepting the claim. It also intervened in a lawsuit based on a group action filed against the head of the football federation for discrimination on grounds of sexual orientation. This case was also finalized with final force and effect by acceptance of the claim and the respondent's apology in the media.[187]

For misdemeanours of harassment, sexual harassment, failure to provide information to the Ombudsman and victimization[188], the Ombudsman is authorized to file a motion to bring charges. The misdemeanour procedure initiated by the Ombudsman for harassment on the

[187] Ombudsperson's reports are available at www.ombudsman.hr.
[188] Misdemeanour provisions of the Law on Suppression of Discrimination, Art. 25-29.

grounds of nationality against a municipal company was completed because it became time-barred, and the criminal charge for hate speech against members of national and religious minorities in one written publication was dismissed because the court found no reasonable grounds for suspecting that the elements of the crime existed.

In court proceedings, Ombudsman's filings were based on the knowledge of European anti-discrimination law and case law, but also on the experiences gained in working with vulnerable groups and could therefore be considered as a kind of strategic litigation that, in addition to the well-being of individuals, should contribute to the shaping of domestic case law, have a deterring and warning effect and point to treatment that is inadmissible and unacceptable in a democratic society.

Monitoring case law in cases involving discrimination

According to the Anti-Discrimination Act, all judicial bodies are obliged to keep statistical records on court cases involving discrimination and submit them to the Ministry of Justice, which forwards them to the Ombudsman. However, apart from statistical data on civil, criminal and misdemeanour procedures that are analysed in annual reports, the Ombudsman also has at its disposal a part of court civil, criminal, misdemeanour and administrative decisions involving discrimination.[189] Trends and challenges in the implementation of anti-discrimination legislation are identified on their basis. In this context, events related to hate crimes are closely monitored.

Although the Anti-Discrimination Act entered into force at the beginning of 2009, case-law is still inconsistent, and incomplete claims indicate to the need to continue educating all participants in court proceedings involving discrimination. The staff of the institution is working on that as well. Apart from acquiring and upgrading the required knowledge, effective treatment against discrimination requires decisions that will act as deterrents on potential perpetrators. Only a comprehensive approach enables the creation of a high-quality and effective case law that will have positive effects on gaining the trust of victims of discrimination to exercise their rights by judicial means. [190]

In lieu of a conclusion

The Ombudsman, in its capacity as the plenipotentiary of the Croatian Parliament, examines complaints of citizens to unlawfulness and irregularities in the work of state bodies, bodies of local and regional self-government units and legal entities with public authorities, and, in accordance with separate laws, it also examines complaints related to the work of legal and physical persons. Although citizens often expect from the institution to do so, it is not authorised to represent citizens, provide free legal aid, abolish, annul or modify an

[189] Upon an Ombudsperson's letter rogatory, in a letter of 8 May 2012 sent to the High Misdemeanour Court of the Republic of Croatia, High Administrative Court of the Republic of Croatia and all county courts, the Supreme Court of the Republic of Croatia recommended them to submit copies of decisions in cases related to discrimination.

[190] More details on the analysis of 2016 case law in the Report of the Ombudsperson for 2016, pp. 23 – 28 available at www.ombudsman.hr

administrative act or a judicial decision. It can intervene or initiate court proceedings only under the presumptions set out in the Anti-Discrimination Act.

In its actions, the Ombudsman acknowledges the fact that the legal system recognised to official persons, whether judges or civil servants, autonomy in decision-making and resolution, while the legality and purposefulness of their work is controlled by higher-instance bodies/courts.

The Ombudsman can and should contribute to the development of democratic values, rule of law and, in particular, society free of discrimination, through different modes of action: working on individual cases, participating in public debates on regulations that are to be adopted, human rights and non-discrimination training sessions, or campaigns. However, the most powerful tool are the annual reports of the Ombudsman to the Croatian Parliament, because the recommendations, suggestions and warnings addressed to various entities in order to correct systemic irregularities have the force of authority arising from the connection with the Croatian Parliament.

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LEGAL INSTRUMENTS

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2. Constitutional Law on the Constitutional Court of the Republic of Croatia, *Official Gazette* Nos. 99/99, 29/02 and 49/02

3. Law on the Ombudsman, *Official Gazette* No. 60/92

4. Law on the Ombudsman, *Official Gazette* 76/12

5. Law on Suppression of Discrimination, *Official Gazette* Nos. 85/08 and 112/12

6. Law on the National Preventive Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Official Gazette* 18/11, 33/15

7. Law on Administrative Disputes, *Official Gazette* Nos. 20/10, 143/12, 142/14, 94/16 and 29/17

8. Law on General Administrative Procedure, Official Gazette of SFRY 47/86 - consolidated text, *Official Gazette* Nos. 53/91, 103/96

9. Law on General Administrative Procedure, *Official Gazette* No. 47/09

10. Law on the National Preventive Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Official Gazette* Nos. 18/11, 33/15

11. Ombudsman's Rules of Procedure, Official Gazette No. 99/13.

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IMPORTANCE AND ROLE OF STRATEGIC LITIGATION FOR PROTECTION AGAINST DISCRIMINATION IN THE REPUBLIC OF SERBIA

Introductory remarks

Discrimination is a phenomenon that is as old as civilization itself, but the prohibition of discrimination was introduced only in 1948 by the Universal Declaration of Human Rights. It took many years for the protection against discrimination to be introduced into national legal systems as well. The Republic of Serbia established a comprehensive anti-discrimination system only in the 2009 Law on Prohibition of Discrimination. This protection mechanism includes civil law, criminal law and misdemeanour law mechanisms, depending on the violation itself. Likewise, the Law on Prohibition of Discrimination established the institution of the Commissioner for Equality Protection, as an independent and specialized body, tasked both with protecting persons exposed to discrimination and acting in the field of prevention and improvement of equality.

These two goals can best be reconciled by conducting a strategic lawsuit, which implies representation of individual interests in order to achieve a broader social goal, or a method for achieving through judicial decisions broader social change, influencing legal practice and public policies, and improving the position of discriminated social groups (Schokman, Creasey, Mohen, 2012).

The first cases of strategic litigation can be discerned in late 18th century England, although they were not called by that name at that time. Thus, in one case, the judge took the view that slavery should be abolished because it is contrary to morality (*Somerset v. Stewart*, 1772). Although this judgment did not lead to the abolition of slavery, two centuries later it was useful to the American fighters against slavery[193].

A judgment judged by many to be a model for all future strategic litigation is *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).[194] In this judgment the Court declared establishing separate public schools for black and white students to be unconstitutional and found that racial segregation existed. The position taken by the chamber of judges in this case was of great importance in the fight against racial discrimination and development of strategic litigation.

Strategic lawsuits are gaining importance in the Republic of Serbia, and the first cases served precisely to make clear certain legal positions, which will be discussed in the text below.

Applicable international law

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[193] "Guide to Strategic Litigation", The Public Law Project, Legal Services Commission UK (2014).
[194] See https://supreme.justia.com/cases/federal/us/347/483/case.html

Even before the adoption of the Law on Prohibition of Discrimination, the Republic of Serbia accepted a large number of international instruments in the field of human rights protection, which prohibit discrimination. Among the most important instruments are the International Covenant on Civil and Political Rights (Official Gazette of the SFRY, No. 7/71) and the International Covenant on Economic, Social and Cultural Rights (Official Gazette of SFRY - International Treaties, No. 7/71). However, international agreements that are specifically related to the prevention and protection against discrimination are especially important. Among these documents, the following should be underlined: the International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette of the SFRY, No. 31/67), Convention on the Elimination of All Forms of Discrimination against Women (Official Gazette of the SFRY - International Treaties, No. 11/81), Convention on the Rights of Persons with Disabilities (Official Gazette of the Republic of Serbia - International Treaties, No. 42/09) and the Convention on the Rights of the Child (Official Gazette of the SFRY - International Treaties, No. 15/90). As for the universal instruments, a special place in the prevention and protection against discrimination belongs to the International Labour Organisation instruments, especially the ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (Official Gazette of the FPRY – Appendix International Treaties, No. 3/61).

As the Republic of Serbia is a Council of Europe member, it has accepted a large number of instruments adopted under the auspices of this organisation. In particular, the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides a very broad protection against discrimination, as well as the Framework Convention for the Protection of National Minorities (Official Gazette of the FRY - International Treaties, No. 6/98), the European Charter for Regional or Minority Languages (Official Gazette of Serbia and Montenegro - International Treaties, No. 18/05) and the European Social Charter (Revised) (Official Gazette of the Republic of Serbia - International Treaties, No. 42/09).

Although the Republic of Serbia is not yet an EU member state, it finds important numerous acts of primary and secondary legislation related to the prohibition of discrimination, particularly since 2012, when it acquired the candidate country status. With the opening of Chapter 23 in the process of EU accession negotiations, it is necessary for the Republic of Serbia to align its law and practices with the acquis. Although all founding treaties contained a provision prohibiting discrimination, the Charter of Fundamental Rights of the European Union, incorporated in the Treaty of Lisbon, provides the first comprehensive catalogue of human rights, and an entire chapter deals with equality and the prohibition of discrimination. Moreover, a number of directives prohibiting discrimination have been adopted in the European Union, but two such directives of 2000 are specifically important: the Race Equality Directive[195], which prohibits discrimination on grounds of racial or ethnic origin in the fields of employment, social security, education, goods and services and the Employment Equality Directive[196], which prohibits discrimination in the field of employment based on sex, religious belief, age and disability. Both directives served largely as a "model" for the adoption of the domestic Law on Prohibition of Discrimination, in particular provisions on shifting the burden of proof in civil litigation from the plaintiff to the respondent, so that the plaintiff should only make plausible that discrimination occurred, while the respondent has to prove that discrimination has not occurred.

[195] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Union, 19/07/2000 - 180/22.
[196] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Communities L 303/16, 02/12/2000.

National legal framework

Discrimination is prohibited by the Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 98/06), which stipulates in Article 21 that everyone is equal before the Constitution and law and that everyone has the right to equal legal protection. Constitution prohibits any discrimination, either direct or indirect, on any ground, and in particular based on race, sex, nationality, social origin, birth, religion, political or other belief, financial status, culture, language, age and mental or physical disability. In addition, the Constitution stipulates that special measures that the Republic of Serbia may impose in order to achieve full equality of a person or group of persons who are essentially in an unequal position with other citizens are not to be deemed as discrimination.

The constitutional prohibition of discrimination is governed in more detail in the Law on Prohibition of Discrimination (Official Gazette of the Republic of Serbia, No. 22/09), which regulates in detail the general prohibition of discrimination, forms and cases of discrimination, and introduces a special procedure of discrimination claim filed in civil court. In addition to this law, separate anti-discrimination laws were adopted: Law on the Protection of the Rights and Freedoms of National Minorities (Official Gazette of FRY, No. 11/02, Official Gazette of Serbia and Montenegro, No. 1/03 - Constitutional Charter and Official Gazette of the Republic of Serbia Nos. 72/09 - second law and 97/13-CC), Law on the Prevention of Discrimination of Persons with Disabilities (Official Gazette of the Republic of Serbia Nos. 33/06 and 13/16) and the Law on Gender Equality (Official Gazette of the Republic of Serbia, No.104/09), which also introduced a special discrimination lawsuit. Additionally, anti-discrimination provisions exist in many other laws that contain misdemeanour provisions for violation of rights immanent to certain areas of social relations that are regulated by them: Labour Law (Official Gazette of the Republic of Serbia, Nos. 24/05, 61/05, 54/09, 32/13, 75/14 and 13/17), Law on Vocational Rehabilitation and Employment of Persons with Disabilities (Official Gazette of the Republic of Serbia, Nos. 36/09 and 32/13), Law on Health Care (Official Gazette of the Republic of Serbia, Nos. 107/05, 72/09 - second law, 88/10, 99/10, 57/11, 119/12, 45/13 - second law, 93/14, 96/15 and 106/15), Law on the Foundations of the Education System (Official Gazette of the Republic of Serbia, No. 88/17), Law on Primary Education (Official Gazette of the Republic of Serbia, No. 55/13), Law on Secondary Education (Official Gazette of the Republic of Serbia, No. 55/13), Law on Churches and Religious Communities (Official Gazette of the Republic of Serbia, No. 36/06), Law on Patients' Rights (Official Gazette of the Republic of Serbia, No. 45/13), Law on Protection of Persons with Mental Disorders (Official Gazette of the Republic of Serbia, No. 45/13), Law on Movement with the Help of Guide Dogs (Official Gazette of the Republic of Serbia, No. 29/15), Law on the Use of Sign Language (Official Gazette of the Republic of Serbia, No. 38/15), and many other laws.

Criminal law and misdemeanour law protection against discrimination

Criminal law protection against discrimination is regulated by the Criminal Code (Official Gazette of the Republic of Serbia, Nos. 85/05, 88/05 - corrigendum, 107/05 - corrigendum, 72/09, 111/09, 121/12, 104/13, 108/14 and 94/16). The aforementioned Code provides for a number of criminal offences related to the prohibition of discrimination. Article 387, which specifically criminalizes racial and other discrimination, is particularly important. Spreading ideas about the superiority of one race over another or propagating racial hatred and

incitement to discrimination are punished as qualified forms of crimes. In addition, Article 54a of the Criminal Code stipulates as the only compulsory aggravating circumstance hatred due to race or religion, nationality or ethnic affiliation, sex, sexual orientation or gender identity, unless it is prescribed as an element of crime.

Also, misdemeanour law protection was established by the Law on Misdemeanours (Official Gazette of the Republic of Serbia, Nos. 65/2013, 13/2016, 98/2016 - CC decision), which regulates the concept of a misdemeanour, conditions for misdemeanour liability, conditions for application of misdemeanour sanctions, as well as misdemeanour procedures. The Law on Prohibition of Discrimination contains several misdemeanour provisions including fines ranging from 10,000 to 100,000, while many of the other laws mentioned also contain misdemeanour provisions.

Position and role of the Serbian Commissioner for Equality Protection

As already said, the Commissioner for Equality Protection was set up by the Law on Prohibition of Discrimination (Official Gazette of the Republic of Serbia, No. 22/09, Art. 1, para. 2) as an autonomous state body, independent in the performance of the tasks set forth in law. The competence of the Commissioner can be divided into its preventive and protective roles. The Law on Prohibition of Discrimination stipulates that the Commissioner receives and considers discrimination complaints, provides information to the complainant about his/her right and the possibility to initiate court or other protection proceedings, recommends a conciliation procedure, files discrimination lawsuits and submits requests for initiating misdemeanour proceedings on account of violations of anti-discrimination provisions, submits annual and special report to the National Assembly on the situation in the field of protection of equality, warns the public of the most frequent, typical and severe cases of discrimination, monitors the implementation of laws and other regulations, initiates the adoption or amendments of regulations for the implementation and improvement of protection against discrimination and issues opinions on provisions of draft laws and other regulations concerning the prohibition of discrimination, establishes and maintains cooperation with the bodies competent for equality and protection of human rights in the territories of autonomous provinces and local self-governments, and recommends to the public authorities and other persons measures for achieving equality (Law on Prohibition of Discrimination, Art. 33).

In accordance with the Law on Prohibition of Discrimination, the Commissioner for Equality Protection has a professional support service, assisting it in the exercise of its competences.

Strategic litigation in the Republic of Serbia

In the Republic of Serbia, the Law on Prohibition of Discrimination introduced a special discrimination lawsuit. In accordance with the above law, anyone who is injured by discriminatory treatment has the right to file a lawsuit with the court, the procedure is subject to the provisions of the Civil Procedure Law, it is urgent and appeal is always permitted (Law on Prohibition of Discrimination, Art. 41). Discrimination lawsuits may be submitted by the Commissioner in accordance with law, provided that if the discriminatory treatment relates

solely to a particular person, the Commissioner may file a lawsuit only with the consent of that person in writing (Law on Prohibition of Discrimination, Art. 46, paras. 1 and 2).

Lawsuits initiated by the Commissioner (strategic lawsuits) constitute a particular type of discrimination lawsuits and a mechanism that can contribute to the fight against discrimination and promotion of equality. The Commissioner for Equality Protection has the right of action in this procedure. It is authorized to file lawsuits to the court for violations of regulations prohibiting discrimination, on its own behalf and with the consent and for the account of the discriminated person, if court proceedings on the same matter have not already been initiated or finally terminated (Law on Prohibition of Discrimination, Official Gazette of the Republic of Serbia, Art. 33, item 3.)

The Commissioner initiates these lawsuits in the public interest. Since the initiation of these lawsuits is one of the powers of the Commissioner prescribed by Article 33 of the Law on Prohibition of Discrimination, the Commissioner assesses on its own when and in which cases to file a discrimination lawsuit. In so doing, the Commissioner should be led by the fact that the purpose of the lawsuit that it initiates has to outweigh the importance they have in terms of protecting the rights of the discriminated persons themselves. It is important to point out that the complaint procedure does not have the character of preliminary proceedings and does not represent a procedural presumption on which the initiation of a discrimination lawsuit is dependant, and that the bringing of a discrimination lawsuit is not a mechanism for ensuring compliance with Commissioner's recommendations. By means of a discrimination lawsuit, the Commissioner cannot claim compensation for pecuniary and non-pecuniary damage, but only the following: prohibition of an act that threatens with discrimination, prohibition of further commission of a discriminatory act, or prohibition of repeating an act of discrimination; finding that the respondent has discriminated against the plaintiff or another person; commission of an act in order to eliminate the consequences of discriminatory treatment and publication of the judgment (Law on Prohibition of Discrimination, Art. 43).

The rule of distribution of burden of proof applies in these proceedings. If the court has determined that an act of direct discrimination has been committed, or it is indisputable among the parties, the respondent can not be relieved of his accountability by proving that s/he is not guilty. If the plaintiff makes it plausible that the respondent has committed an act of discrimination, the burden of proof that the act did not violate the principle of equality or the principle of equal rights and obligations is borne by the respondent (Law on Prohibition of Discrimination, Art. 45). According to this rule, in the case at hand, the plaintiff should make plausible that the respondent has committed an act of discrimination, and if it succeeds in doing so, the burden of proof that there has been no violation of the principle of equal rights and obligations lies with the respondent.

In discrimination proceedings, in addition to the court of general territorial jurisdiction, the court situated in the area where the plaintiff’s head office or residence is located also has subject-matter jurisdiction (Law on Prohibition of Discrimination, Art. 42). It follows from the provision itself that the rules applicable to general territorial jurisdiction can be used. This is especially significant in some cases where the respondent's permanent place of residence or head office is in another place as compared to the plaintiff's place of permanent residence or head office. Bearing in mind that, among other things, the goal of strategic litigation is to develop discrimination case law, application of the court's general territorial jurisdiction rule can further contribute to the development of the case law of all high courts having

competence. In this regard, the Commissioner initiated two strategic lawsuits in 2017, led precisely by this principle.

Objectives and criteria for selecting a strategic litigation case

There are various and numerous objectives for initiating and managing strategic lawsuits, granted that these objectives can be changed over time, depending on the society itself and the level of its development. However, the objectives of strategic litigation always involve addressing widespread and systematic discrimination cases, but also filling in the observed legal gaps in the protection of vulnerable groups by creating case law (Coomber, 2012).

Comparative case law criteria were developed over the years by which equality bodies are led when selecting cases for strategic lawsuits. These criteria are developed, upgraded and shaped in time, in accordance with the development and improvement of anti-discrimination case law.

Criteria for strategic litigation[197] can be various and generally relate to the following:

1. Criteria for the case:

- the case has the opportunity to improve the legal framework; inequality can easily be presented/noticed; there is sufficient evidence of discrimination;

- legal remedies in domestic and international law are being considered;

- the fact that strategic litigation is not the same as the provision of legal assistance is taken into account, as legal assistance provision is client-oriented and limited in terms of means, and the claim may request only what the client wants).

Before joining the case, one of the strategies may be public advocacy, i.e., attracting groups/organisations/bodies dealing with similar issues in order to join the proceedings.

2. Criteria for making a decision:

- take account if there is a legal issue that can later serve to address a social problem/legal gap;

- analyse if a judicial decision could change past practice/solve that problem and if a judicial decision would have a more far-reaching effect;

- consider whether the media and the broad public would understand this legal issue in the true sense and the potential for good media coverage of the case;

[197] The criteria were taken and consolidated from the following publications: Patrick Geary, Children's Rights: A Guide to Strategic Litigation (London: CRIN, 2008), pp. 8-9; Ben Schokman, Daniel Creasey, Patrick Mohen, Short Guide - Strategic Litigation and its role in promoting and protecting human rights, Advocates for International Development (2012), pp. 3-5; European Roma Rights Centre, Priručnik za advokate o zastupanju Roma-žrtava diskriminacije, Budapest, 2005 (Handbook for Lawyers on the Representation of Romani Victims of Discrimination).

- consider whether other means of achieving the goal are available or possible, in addition to the court proceedings, and if so, how effective they are in comparison with court proceedings;

- take into consideration if judges are well-trained and sensitized for cases of discrimination.

3. How to approach the case before bringing it to court:

Due to the sensitivity of issues and often unexpected case complications, it is desirable to examine all the facts, evidence, allegations and jurisdiction before filing a lawsuit. In this regard, the following questions should be answered:

- What are the laws relevant to the case? Are they precise, applied in practice (risk is greater if laws are rarely or unclearly applied in practice)?

- How strong are the allegations from the legal point of view? How will they affect the court and the legal system? How popular will they be in the country?

- What is the chance of success?

- Does the case deal with the protection of the rights of one person or a collective right (greater chances)?

- What is the best interest of the minority group to be protected?

- Is this problem recognized within the minority group?

- What is the purpose of the lawsuit?

- Can some other cases before the court affect this process, whether positive or negative?

- Will the court be able to provide a new and non-traditional solution in this case?

- Is there a risk of political pressure in case of success/failure?

- Is the claim clear, precise and easy to apply?

- Is there any other group or organisation that would be more successful?

The above criteria are also taken into account by the Commissioner when deciding on a strategic litigation. Nevertheless, some of the criteria that have stood out in time in the practice of the Commissioner for Equality Protection are as follows:

1. Discrimination against particularly vulnerable and other particularly significant groups;
2. The form of discrimination is common and widely accepted in society;
3. The discriminator is a powerful social actor, or in a situation that allows impact on a significant group of people;
4. Balance of power between the victim and the perpetrator justifies Commissioner's intervention;
5. The phenomenon is on the Commissioner's list of strategic objectives;

6. The case has great chances of leading to a judgment on the merits, instead of being dismissed on grounds of procedural defects;
7. Benefits are greater than risks;
8. Discrimination denies access to goods and services.

The 2015 Annual Report of the Commissioner for Equality Protection, as well as previous years' reports stated that the objectives pursued by strategic litigation are to be met by the Commissioner through its initiation and conduct of these lawsuits in the public interest, with the aim to contribute, through its procedural activity as plaintiff in the lawsuit, to the consistent application of regulations and to case law improvement, to further stimulate and encourage victims of discrimination to initiate anti-discrimination litigation, and to legally educate and sensitize the public about the problem of discrimination. Additionally, the Commissioner's goal through its procedural activity is to make sure more favourable court judgments are rendered, which, in addition to providing legal protection to discriminated persons, send a clear message to the public that discrimination is prohibited and efficiently punished. The 2016 regular annual report of the Commissioner for Equality Protection, in addition to the previous objectives, also pointed out that the objective or purpose of strategic litigation should be to ensure proper interpretation or correct application of anti-discrimination legislation, and hence to clarify through case law the meaning of a particular regulation, or indicate that a particular regulation needs to be amended, supplemented or improved.

These goals are correlated to the vision and mission of the Commissioner for Equality Protection. The 2016-2020 Strategic Plan of the Commissioner for Equality Protection stated that the following goal needs to be achieved: Serbia is an open and tolerant society of equal people, giving everyone equal opportunities, while the mission is: suppressing all forms of discrimination and achieving full equality in all areas of social life (page 11).

An example of strategic litigation from the work of the Commissioner for Equality Protection

Case

It is noticeable in one case in which the Commissioner for Equality Protection filed a discrimination lawsuit in 2012, that there exists an issue with a lack of understanding of certain procedural provisions by judges, which can lead to complications in proceedings , thereby delaying the effects of the judgment.

In this illustrative case, the lawsuit was filed against a fast food restaurant, due to direct discrimination on grounds of affiliation with the Roma national minority, as a personal capacity. The claim was based on the facts that on a particular day security guards of the respondent banned juvenile Roma children from entering the restaurant, while a woman, accompanied by children (three Roma children aged 5 to 8 years) was allowed to enter the restaurant and buy food, eaten by the children after that in the garden of the restaurant. Bearing in mind that the act of discrimination concerned a group of persons, the Commissioner did not submit consent to initiate proceedings with the lawsuit. The Commissioner requested the following in the action: that the court find that by banning the entry of Roma children into the restaurant the respondent had committed direct

discrimination in the provision of public services and use of facilities and surfaces on the basis of ethnic affiliation as a personal capacity; to prohibit the respondent from repeating an act of discrimination in the future while performing its activity, by refusing to provide services or prohibiting the use of the facility to members of the Roma national minority; to order the respondent to publish, within 15 days, this judgment in a daily newspaper with state-level circulation at its own expense, and to order the respondent to compensate the plaintiff for the costs of civil proceedings within 15 days.

First instance decision

The court of first instance dismissed the action by means of a decision. The first instance court stated that its reasons for the dismissal were that during the preliminary examination of the action the court found that it could not act on it in the case at hand because the Commissioner for Equality Protection did not have the consent of the persons in relation to whom the act of direct discrimination is alleged. In this case, since juveniles are concerned, the court took the position that it was necessary to obtain the consent of legal representatives of juveniles in respect of whom the act of direct discrimination is alleged. The Court further stated in the reasoning that when passing the decision it "took into account that the respondent's action was directed to specific persons, to the specific event, not on banning members of the Roma national minority entry into the restaurant of the respondent", and the court found that "it was necessary to get their consent for both filing the complaint and initiating court proceedings."

Second instance decision

The Commissioner for Equality Protection lodged a timely appeal to the second instance court against this decision, citing unlawfulness of the decision. The justification of Commissioner's appeal stated that this position of the first instance court is based on incorrect application of Art. 46, para. 2 of the Law on Prohibition of Discrimination, which stipulates that if discriminatory treatment applies only to a certain person, the plaintiffs referred to in para. 1 of this Article (the Commissioner and the organisation dealing with the protection of human rights, that is, the rights of a particular group of persons) may file a lawsuit only with his consent in writing. The appeal states that the Commissioner requires consent to file an action only when it comes to discrimination that was exclusively committed against a particular person, and that this also follows from the phrasing of the provision, which begins with the words "If ...". In other words, it claimed that there is a special condition for filing a discrimination lawsuit that applies only in cases of discrimination committed exclusively against a particular person. The appeal also stated that the Commissioner's authorization to initiate discrimination lawsuits provides an opportunity for the so-called "strategic litigation" whose purpose is to make sure that the Commissioner for Equality Protection, as a plaintiff in discrimination lawsuits, contributes through its procedural actions during the lawsuit to the proper interpretation and consistent application of anti-discrimination legislation, to raising public awareness, encouraging victims of discrimination to seek judicial protection through durable changes in actions and conduct of legal entities, and the like. The appeal also pointed out that, even when a discrimination lawsuit is brought to protect a particular person, the Commissioner for Equality Protection does so in the public interest, which implies that in

such a case the Commissioner brings an action in its own name, as a party in the functional sense, and not in the name of the discriminated person as his/her representative. The Commissioner further stated in the appeal that it should be kept in mind that the significance of judgments rendered on strategic litigation initiated by the Commissioner is not solely reflected in the fact that they provide legal protection to the discriminated person (or group of persons), but also in the fact that they, by virtue of the finality and authority they have in the legal order, send a clear message to the public that discrimination is unlawful conduct that is not tolerated but rather effectively sanctioned. Regarding the allegations from the decision that a specific event is concerned, the Commissioner stated that discrimination always represents a specific event regardless of whether it refers to an individual or a group and that even though the respondent in the specific case committed an act of direct discrimination towards three Roma children specifically, that is a reflection of his position towards the entire Roma population.

The High Court rejected the appeal of the Commissioner for Equality Protection and confirmed the first-instance decision. The reason for rejecting the appeal was that the allegations were unfounded and unacceptable since the plaintiff did not provide with the lawsuit, apart from newspaper articles that can not be considered valid evidence, evidence of the allegation that the described respondent's relationship is such towards all Roma (the Roma population), and as such, that they are not relevant to the lawfulness of the impugned decision.

Appeal before the Supreme Court of Cassation

In 2013, the Commissioner for Equality Protection lodged an appeal to the Supreme Court of Cassation against the final judgment of the High Court, by reference to a violation of the provisions of the Civil Procedure Law, violation of the provisions of the Law on Prohibition of Discrimination and violations of substantive law. In its statement of reasons, the Commissioner for Equality Protection points out that the position of the second-instance court is based on an incorrect application of the provisions of the Law on Prohibition of Discrimination, which, as a separate law, regulates court jurisdiction and procedure, and thus the plaintiff's right of action as a state body in discrimination lawsuits, because the Commissioner is entitled to file discrimination lawsuits and it is explicitly stated that it does so on his own behalf, as a party in the functional sense of the word. As an autonomous and independent state body specialized in preventing and suppressing all forms and types of discrimination, the Commissioner for Equality Protection has the right of action to file a discrimination lawsuit even without the consent of the person who has suffered discrimination, if the act of discrimination concerns two or more persons, and not only in cases when the act of discrimination refers to a group of individually undefined persons, but also when two or more specific persons or members of a group are discriminated against by the same act of discrimination, at the same time and on the basis of their personal capacity. It also pointed out that, even when a discrimination lawsuit is raised to protect a particular person, the Commissioner for Equality Protection does so in the public interest, which implies that in such a case the Commissioner brings a lawsuit on his own behalf, as a party in the functional sense, and not on behalf of the discriminated person as its representative. Pursuant to all of the above, the Commissioner for Equality Protection emphasized that it was granted the right of action in all lawsuits in accordance with the provisions of the Law on Prohibition of Discrimination, regardless of the form and case of discrimination, and whether

the victim of discrimination is an individual or a group of persons. The Commissioner for Equality Protection further stated that the position of the second-instance court that "the plaintiff had no evidence that it had acted upon the complaint in a legally prescribed manner", was based on a misinterpretation of the provisions of the Law on Prohibition of Discrimination, since the discrimination lawsuit is permitted irrespective of that whether the Commissioner had previously conducted a complaint procedure or not. On the basis of all of the above, the Commissioner for Equality Protection proposed to the Supreme Court of Cassation to uphold the appeal and to abolish, both the decision of the second instance and the first instance court, and to remand the case for a new decision.

Deciding on the appeal of the Commissioner for Equality Protection, in September 2014 the Supreme Court of Cassation abolished the decision of lower-instance courts, and remanded the case for a new decision and decision-making. The Supreme Court of Cassation took the view that the Commissioner did not need a written consent to bring a lawsuit in the specific case, since it brought the lawsuit for the purpose of determining discrimination against a group of persons - children of Roma nationality. The Supreme Court of Cassation pointed out that the Commissioner's lawsuit was not directed at determining discrimination against a particular person, in which case the Commissioner would need written consent to bring the lawsuit, but rather to determine discrimination against a group of persons.

Epilogue of the case

Due to the decisions being abolished, the Supreme Court of Cassation remanded the case for a new decision to the High Court, as the one having subject-matter jurisdiction to decide on discrimination disputes, since amendments to the Law on the Organisation of Courts (Official Gazette of the Republic of Serbia Nos. 116/08, 104/09, 101/10, 31/11 – sec. law, 78/11 – sec. law, 101/11, 101/13, 106/15, 40/15 - sec. law, 13/16 and 108/16), which entered into force on 1 January 2014, transferred subject-matter jurisdiction for deciding on discrimination disputes from the basic courts to high courts. However, in its decision dated 16 March 2015, High Court in Belgrade declared itself lacking subject-matter jurisdiction on this legal matter and determined that, once the decision becomes final, case files should be submitted to the First Basic Court in Belgrade, as the court having subject-matter and territorial jurisdiction. In this decision, the High Court stated that in accordance with Art. 23, para. 1, item 7 of the Law on the Organisation of Courts, it has jurisdiction in discrimination and ill treatment in the workplace disputes, and since the case at hand does not concern discrimination in the workplace, but discrimination in another field, the basic court has jurisdiction to adjudicate in this case. The First Basic Court caused a conflict of subject-matter jurisdiction, by deeming itself non-competent to act in this legal matter, but that the High Court in Belgrade had subject-matter jurisdiction for all cases of discrimination and it submitted the case to the Appellate Court in Belgrade in order to resolve the conflict of subject-matter jurisdiction. The Appellate Court in Belgrade decided on 1 July 2015 that the High Court has jurisdiction to try this legal matter.

When the issue of conflict of jurisdiction was resolved, the preliminary hearing was held on 9 December 2015, even three and a half years after the lawsuit was brought. The first instance procedure was completed in July 2017 with a judgment in favour of the Commissioner as the plaintiff, that is, the Commissioner’s claim as a plaintiff was adopted in full.

Concluding considerations

The Republic of Serbia has a developed anti-discrimination system that consists in undertaking criminal and misdemeanour sanctions, as well as in conducting anti-discrimination litigation. Discrimination lawsuits are the most frequent and most effective means of protection against discrimination, especially if they have a deterrent effect and are aimed at changing the social mind-set about the harmfulness of discrimination in a particular field or in relation to certain persons. The lawsuits brought by the Commissioner for Equality Protection of the Republic of Serbia are important both to encourage victims of discrimination to initiate anti-discrimination litigation, and to sensitize and inform the public about the fact that it is an unlawful social phenomenon that can be efficiently sanctioned. In the presented case, litigation was initiated because the complaints of the Roma national minority took the largest share in the number of complaints filed on grounds of nationality or ethnic origin. Moreover, conducted surveys recognise the Roma national minority as one of the most discriminated social groups in the Republic of Serbia.

On the other hand, this litigation has illustrated that the anti-discrimination system is new and that the role of judges has not become clear enough yet, both in terms of court's jurisdiction, as well as in terms of the need to give consent to the Commissioner to initiate a lawsuit. This decision was rendered with several years of delay, but nevertheless it significantly contributed to the improvement of case law, and to the future proper interpretation and application of anti-discrimination statutory norms, thus achieving another important strategic goal concerning the interpretation of the provisions of the Law on Prohibition of Discrimination. Thus, the Supreme Court of Cassation took the view that, in the case of several persons, the Commissioner did not require consent to initiate proceedings. Likewise, unclarities were eliminated as to whether the High Court has subject-matter jurisdiction in discrimination proceedings, and that discrimination lawsuits are allowed irrespective of whether the Commissioner had previously conducted the complaint procedure, or whether it issued an opinion on the complaint or not.

Finally, the court took the decision that in this case direct discrimination on grounds of nationality in the field of public service provision and use of facilities and areas had occurred and it clearly prohibited the respondent from repeating an act of discrimination in the course of performing its activity in the future.

Based on the experience in this case, the Commissioner pointed to the need to amend the Law on Prohibition of Discrimination by specifying the meaning of the term "group of persons" and prescribing cases when civil society organisations do not need the consent of the Commissioner to initiate discrimination lawsuits, to prevent these norms from causing diverse interpretations in practice.

The importance of strategic litigation was also recognized by the European Network of Equality Bodies (EQUINET), umbrella organisation of all European equality bodies, by launching the Cluster on Strategic Litigation in 2016, in which national equality bodies' representatives presented current challenges in the field of strategic litigation. It is particularly important to pay attention to the objectives for the selection of strategic litigation, which have proved to be crucial in the practice of equality bodies, which certainly include the provision of proper interpretation and application of anti-discrimination laws, as one of the prerequisites for effective protection against discrimination.

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EXCHANGE OF BEST PRACTICES OF ADDRESSING HUMAN RIGHTS VIOLATIONS WITH A SPECIAL FOCUS ON COMBATING DISCRIMINATION: EXAMPLE AND EXPERIENCES OF THE OMBUDSPERSON INSTITUTION OF THE REPUBLIC OF TURKEY

Introduction

As we know, owing to the development and establishment of rule of law principles, citizens gained the right to appeal against decisions and acts of the administration before courts in order to protect their rights. However, due to the increase in the number and complexity of public services, conventional methods of checking and supervising have become insufficient (Şengül, 2007: 126), so alternative methods and institutions have been created and/or developed, such as the Ombudsman, national human rights bodies and other organisations, in order to protect, guarantee and promote the human rights of individuals.

According to some authors, establishment of an Ombudsperson institution in Turkey began to be discussed in the 1960s (Aktel and Others, 2013:26), while according to others, that happened in the 1970s (Sobacı and Köseoğlu, 2014:31). However, it was not possible to establish an Ombudsperson institution in Turkey before the amendment of Article 74 of the Constitution of 2010. Following the amendment of Article 74 of the Constitution of the Republic of Turkey, the right to submit complaints to the Ombudsman was constitutionally recognized. Consequently, the Ombudsperson institution of the Republic of Turkey, established in Ankara and having an office in Istanbul, is a constitutional institution set up under a separate law (No. 6328, published in the Official Gazette of 29/06/2012).

The Ombudsperson institution also has a separate budget. The chief Ombudsman and five other Ombudsmen are selected by the Turkish Grand National Assembly for a four-year term and they are independent in their work. Independence and impartiality of the Ombudsperson institution is guaranteed by law. Thus, the Ombudsperson institution performs its duties in order to meet the expectations and needs of the society, solely for the purpose of checking compliance with the law, without orders or instructions of a higher authority. Therefore, the Ombudsperson institution is an independent and effective mechanism for lodging complaints in relation to the work of public services, and it conducts enquiries and makes recommendations on the correctness of all types of actions, procedures, positions and behaviour of the administration in terms of legality and fairness regarding the respect of human rights.

Similarly, the definition of "administration" in the law is quite wide and comprehensive. Administration is generally defined as all types of "public administration within the central government, social security institutions, local governments, district offices of local governments, local government unions, circulating capital organisations, funds established under law, public organisations with legal entity status, public commercial enterprises, associated majority state-owned public organisations and their affiliates and subsidiaries,

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professional organisations that have the status of public institutions and private legal entities providing public services".

However, in accordance with law, the institution can not intervene in the following four very limited fields:

a) acts of the President on his/her competencies and decisions and orders signed by the president by virtue of office;
b) acts relating to the exercise of legislative authority;
c) acts relating to the exercise of the judicial authority;
d) activities of the Turkish Armed Forces that are purely military in nature.

In the performance of their duties, no body, authority, institution or person may issue orders, instructions or circulars, make suggestions or give advice to the Chief Ombudsman or Ombudsmen, who are obliged to act in full accordance with the principle of independence.

There is no doubt that the existence of an efficient Ombudsperson, which oversees the work of public administration in terms of legality and respect for the principles of justice, is useful both for citizens and the administration itself. All natural and legal persons, including foreign nationals, may submit complaints to the Ombudsperson. Within the Ombudsperson institution, one Ombudsman is specifically in charge of investigating cases of human rights violations and he has a team of experts working with him.

Ombudsperson institution in terms of numbers

An overview of the Ombudsperson institution work in the previous five years is presented hereinafter. Ending with 2017, the Ombudsperson institution received 41,982 complaints for the entire five-year period. Of this, 17,131 complaints were received in 2017 only. Out of the total number of complaints received, work on 775 or 4.5% of them was finalised by making a recommendation or partial recommendation (Kamu Denetçiliği Kurumu, 2018a).

In addition, 1,575 complaints in 2017 were resolved by amicable settlement after negotiations between the administration and the parties before the launch of an enquiry. Also, 312 complaints were forwarded to the competent administrative authorities in 2017, as the applicants did not exhaust all administrative remedies prior to submitting the complaint to the Ombudsperson institution. Therefore, it can be concluded that 1,887 complaints in 2017 were resolved by way of a settlement.

In 2017, the Ombudsperson institution made 245 recommendations and 177 partial recommendations. The Ombudsperson institution, as well as special Ombudsperson's offices, monitors the situation after the making of recommendations - whether the competent administrative body has acted in accordance with the recommendation or not. The compliance rate with the recommendations made by the institution reached 62% in 2017, while that rate was 45% in the previous year. This shows a growing recommendations compliance rate of 50% within one year only.

Special and thematic reports drawn up by the Ombudsperson institution

In addition to the obligation to conduct enquiries based on complaints received, the Ombudsperson institution also has a legal authority to create special reports on certain issues, if it considers it necessary, without having to wait for them to be published in the Annual Report.

Owing to this authority to create special reports, as well as the obligation of public institutions to respond to the Ombudsperson's requests, the institution has grown into a credible mechanism for monitoring and assessing the situation in specific fields in Turkey.

The authority to draw up special reports was used several times in connection with events that had a serious impact on the state in the country, including sensitive issues such as the tragedy in the SOMA mine and the recent massive influx of Syrian refugees to Turkey. Owing to its reports that were characterized by balanced views, the Ombudsperson institution proved to be a valuable actor in difficult debates on these issues.

Special reports also played a significant role as a means of presenting the findings of the Ombudsperson institution on the functioning of the judicial system, in which the institution can not interfere under law. For example, the institution prepared a special thematic report on the functioning of the judicial system that was submitted to the Grand National Assembly and was made publicly available. Also, a recommendation was given to the administration regarding the amendment of certain laws, regulations and directives.

Ombudsperson institution's role as a facilitator

In addition to investigating complaints received and making special thematic reports, the Ombudsperson institution also has the role of a facilitator in solving complex and structural problems. In the recent past, numerous parents who were awarded child custody after divorce addressed the Ombudsperson institution on the grounds that the relationship between the parent who did not receive custody and children after divorce is not properly maintained due to existing laws and their interpretation. These parents also claimed that their rights guaranteed by international agreements and the Constitution were violated.

During the enquiry into these cases and objections, the Ombudsperson institution brought together representatives of the Ministry of Family and Social Policy and the Ministry of Justice. After that, the Ombudsperson institution finalized the recommendations and submitted them to these ministries and other relevant parties.

In order to monitor compliance with the recommendations, the Ombudsperson institution organized a workshop in its premises, attended by all the relevant ministries, representatives of non-governmental organisations and the academic community. During the workshop, the Ministry of Justice provided detailed information on the proposed legislative amendments that were prepared following a recommendation of the Ombudsperson institution, and the participants had the opportunity to discuss these amendments and other issues.

Besides, the Ombudsperson institution gives great attention to its relations with non-governmental organisations and journalists. Due to these relationships, the Ombudsperson institution is able to summon great public support.

The Ombudsperson institution also has strong ties with 184 universities in Turkey. The Ombudsperson institution has helped universities to establish 'Ombudsperson's Clubs' that work with 7,250,000 university students in order to popularize among the student population the concept of Ombudsman, justice and equality.

Ombudsperson's role in eliminating discrimination

Elimination of discrimination is one of the key priorities of the Ombudsperson institution. This is contained in the good governance principles that the Ombudsperson institution protects and applies when conducting enquiries into complaints and developing special reports (Kamu Denetçiliği Kurumu, 2018a: 416).

For this reason, the Ombudsperson institution examines very carefully allegations of discrimination, especially when it comes to discrimination based on gender and discrimination of persons with disabilities.

In view of its socio-economic impact, the migration sector is another area in which allegations of discrimination can be reported. As we know, there is a civil war in Turkey's neighbouring countries, Syria and Iraq. Turkey has a border of 1,300 km with these countries. Fleeing from indiscriminate violence, nearly 3.5 million Syrians escaped to Turkey. These people live in Turkey together with our citizens. The Turkish government and the people of Turkey have accepted and embraced this huge number of refugees in the name of humanity and provided them with shelter and assistance. These 3.5 million Syrian refugees are entitled to free health services and pharmaceuticals. Also, 650,000 Syrian children attend Turkish schools. The amount of humanitarian aid to the Syrians has reached 30 billion US dollars.

The Ombudsperson institution has therefore developed a special thematic report on Syrians in Turkey and it is extremely impressed with the work of the competent authorities and administration. The same was confirmed by international and non-governmental organisations.

Nevertheless, Syrians who escaped from violence in Syria and found shelter in Turkey have the right to file complaints to the Ombudsperson institution just as nationals of Turkey and other foreign nationals. Therefore, the Ombudsperson institution receives complaints from Syrian refugees, records them and conducts enquiries from the aspect of human rights and discrimination avoidance.

A common enemy of all humanity: terror and terrorism

At the end of this article, it is very important to touch upon the growing terror and terrorism threat to all the values defended and protected by the Ombudsperson institution and to the entire humanity.

There are three terrorist organisations in Turkey. These are:

- the PKK that has been killing innocent people for the last forty years by placing bombs in towns;
- terrorist organisation ISIL that is the enemy of the whole world. This organisation carried out the bloodiest terrorist attacks in Turkey and took the lives of hundreds of people;
- Terrorist organisation FETÖ, which attempted a coup on 15/07/2016 with 30 planes, 60 helicopters, 100 tanks and 10,000 soldiers. They bombed the building of the Grand National Assembly and tried to kill the president. This terrorist organisation killed 250 and wounded 2,500 people and tried to overthrow the democratically elected government. The people of Turkey opposed the conspirators and went out into city squares. They threw themselves in front of the tanks to stop them. The people protected the constitution and democracy and fought for democracy.

Under circumstances of the civil war in Syria and Iraq, 3.5 million Syrian refugees in the country and the fight against cruel terrorist organisations such as the PKK, ISIL and FETÖ, the Ombudsperson institution is fighting for the preservation of justice and equality.

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COMPETENCES OF THE ANTI-DISCRIMINATION COMMISSIONER IN ALBANIA AND ITS ROLE IN COURT PROCEEDINGS

Introduction

The Albanian Anti-Discrimination Commissioner (ADC) was established in May 2010 in accordance with the Law on Prohibition of Discrimination, as a specialized institution for the protection of victims of discrimination, tasked with ensuring compliance with the principles of equality and non-discrimination. The Commissioner provides assistance to victims of discrimination, conducts awareness raising activities, supervises, develops studies and conducts surveys, issues opinions on cases of discrimination, makes recommendations, including recommendations for drafting new or amending the existing laws.

Enabling victims of discrimination to achieve access to justice is a prerequisite for the application of laws protecting equal treatment and non-discrimination. In this respect, the European Union Agency for Fundamental Rights (FRA) emphasizes that it is important to set about addressing discrimination issues. In fact, the Agency implies: legislation and mechanisms, accessibility of complaints mechanisms, fairness and effectiveness of procedures, and support. Access to justice is also closely related to legal aid, without which many victims of discrimination would not be able to defend their rights. In its Fifth Report on Albania, the European Commission against Racism and Intolerance (ECRI) recommended to the authorities to ensure to victims of discrimination effective access to justice through a functioning and adequately funded legal aid system. Due to the latest amendments to the law, legal aid is now also provided to "persons whose rights are violated by some act or omission that constitutes discrimination based on a decision of the competent authority in accordance with the applicable law on protection against discrimination".

Authorities of the Anti-Discrimination Commissioner in administrative proceedings

The Commissioner provides assistance to victims of discrimination by:

- examining complaints of individuals or civil society organisations active in the field of human rights;
- initiating ex officio investigations based on reliable information;
- representing victims in court.

In case of a complaint submitted by an NGO on behalf of a person or group of persons, that organisation must have a special authority to represent such persons. This requirement constitutes proceedings before the Commissioner more rigid than the proceedings before a court and makes it difficult for the victims of discrimination to access this institution. ECRI explicitly requested the deletion of this provision (ECRI Report on Albania, 2015:16). The

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ECRI Report states: "*Law should stipulate that organisations, such as associations, trade unions and other legal entities that, in accordance with the criteria prescribed by the national legislation, have a legitimate interest in combating racism and racial discrimination, have the right to initiate litigation, intervene in administrative proceedings or file criminal complaints, even if no specific victim is listed. If a specific victim is listed, it is necessary to obtain his/her consent*" (ECRI - GPR Nos. 7 and 25).

NGOs play a significant role in uncovering cases of discrimination when discriminatory conduct violates the rights of certain communities that are often more susceptible to discrimination than others. However, the most important actions are mostly initiated by the Commissioner on the basis of reliable information usually obtained from NGOs or the media.

The Commissioner has a range of responsibilities such as: the right to seek information from the parties, authority to conduct investigations and checks. Penalties are imposed on entities that do not provide the requested information. This law does not provide for situation testing as a right of the Commissioner or NGO to determine discriminatory views or discriminating entities.

Organizing discussions and attempts at conciliation between the parties are crucial. The law does not prescribe procedures for attempting conciliation between the parties and to that effect, it does not refer to the Law on Mediation. Due to a lack of such provisions, this procedure has its advantages and disadvantages (EQUINET, 2011: 19-22). In 2017, the Commissioner conducted 52 checks and held 16 discussions (ADC, 2017:39).

One of the novelties in the Law on Protection against Discrimination relates to the powers of the Commissioner to make decisions. Where it finds that discrimination exists, the Commissioner defines in its decision appropriate measures and adjustments and sets a time-limit for their implementation. When the Commissioner has imposed appropriate adjustments or measures, the person against whom the complaint was filed makes a statement before the Commissioner within 30 days in connection with the actions taken in order to execute the decision. If the person against whom the complaint was filed fails to inform the Commissioner or does not execute the decision, the Commissioner imposes a penalty. The penalty shall be annulled if the person against whom the complaint was filed executes the decision within 7 days of sentencing. Penalties are imposed in the form of a fine, and where a natural or legal person fails to comply with the Commissioner's decision or fails to pay the fine within three months or fails to file an appeal against it before the court, the Commissioner may ask the competent authorities to deprive the physical or legal person of the license to perform its activity. When imposing the penalty, the nature and extent of the violation, its impact on the victim, as well as personal and financial circumstances of the offender are taken into account.

This law guarantees protection on an unlimited number of grounds. It is important to also explicitly prescribe other grounds such as nationality (ECRI Report on Albania, 2015: 14) or other forms of discrimination such as: sexual harassment and segregation or multiple and intersectional discrimination (ECRI - GPR No. 7 and 6). Multiple discrimination reflects the reality that an individual's identity can include numerous protected characteristics, so inequality can often be complex and multiple (EQUINET, 2016:24). Most of the complaints received by the Commissioner concern the basis such as race, health, social status, disability, political beliefs, or affiliation with a particular group.

Role of the Anti-Discrimination Commissioner in court proceedings

The Law on Protection against Discrimination explicitly regulates certain important aspects of the relationship between the Commissioner and courts.

In addition to initiating administrative proceedings, victims of discrimination have the right to initiate civil proceedings before the court and to submit claims for damages, as well as criminal reports to the competent prosecutor's offices.

In accordance with this Law, the entities entitled to initiate civil proceedings are:

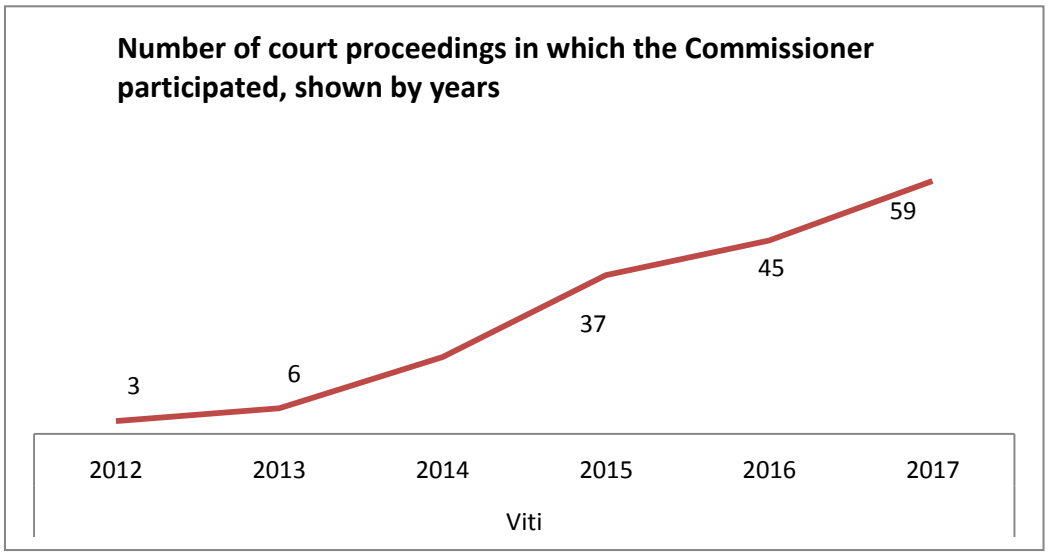
- any person or group of persons who claim to be victims of discrimination;
- an organisation with legitimate interests;
- the Anti-Discrimination Commissioner.

These two latter entities must receive consent of the victim in the form of a special authorization for representation, that is, the person or group of persons who are victims of discrimination must give their consent via a statement before the court. The Commissioner has no authority to initiate proceedings in court of its own initiative.

It is important to emphasize certain aspects regulated by law regarding the relationship between the plaintiff, Commissioner and court.

- It is not necessary to exhaust the right to appeal in administrative proceedings in order to file a lawsuit with the court. ECRI considers that government authorities should regulate the issue of simultaneous conduct of proceedings before the Anti-Discrimination Commissioner and courts (ECRI Report on Albania, 2015: 15-16).
- The injured party is not obliged to notify the Commissioner prior to filing a discrimination lawsuit in court.
- The court informs the Commissioner of any discrimination lawsuit filed.
- The court may ask the Commissioner to submit its written opinion, results of the investigation, if investigation was conducted, or other information relevant to the case.

Where it finds that there has been a violation of the Law on Prohibition of Discrimination, the court shall issue a decision ordering compensation, determining the time-limit for payment of such damages and informing the parties to the procedure and the Commissioner thereof. It is worth noting that the imposition of measures in accordance with this Law does not exclude imposition of measures in accordance with other laws.



In 2017, the Commissioner participated in 59 court proceedings: in 24 as the plaintiff, in 23 as a third party, in 12 for issuing an order for execution (ADC, 2017:42).

After the constitutional amendments of July 2016, the Commissioner became one of the entities entitled to initiate proceedings before the Constitutional Court in relation to matters concerning its interests (Article 134/1.e). Prior to these amendments, the Commissioner was called on by the Constitutional Court as a concerned party in two cases.

The shifting of burden of proof in cases of discrimination is a significant issue for effective provision of assistance to victims of discrimination. The European Union Agency for Fundamental Rights (FRA) highlights the shifting of burden of proof as one of the key factors for ensuring equality in discrimination proceedings. The Agency states that procedural barriers, among other things, make it difficult for the injured parties to fight for their rights (FRA, 2012:11). Judges are generally prone to applying the general principle according to which the burden of proof remains with the plaintiff (Hoxhaj E. and Baraku I., 2014: 429). EU Directives prescribe that, in the event that they consider themselves victims of unequal treatment before a court or other competent authority, persons must present facts on the basis of which it can be concluded that there has been direct or indirect discrimination, after which the respondent has to prove that a violation of the principle of equal treatment has not occurred (Vladasch K. and Vorpsi A., 2016:13). The Law on Protection against Discrimination does not prescribe the shifting of burden of proof in the administrative proceedings before the Commissioner, but this is prescribed for proceedings before the court (Law on Protection against Discrimination, Art. 36, para. 6). ECRI draws attention to the need to adopt clear statutory provisions on the divided burden of proof in cases of discrimination (ECRI Report on Albania, 2015:14).

However, the Law on Administrative Proceedings defined that this principle also applies in cases of discrimination that are resolved by public authorities (Law on Administrative Proceedings, Art. 82, para. 2). The same principle is also provided for in Article 9, paragraph 10 of the Labour Law in relation to cases of discrimination in the field of employment. However, despite Commissioner's recommendations, there has been no change in the Law on Civil Proceedings in terms of shifting the burden of proof to allow the application of this principle in other fields, such as goods and services.

Conclusions

Amendments to the Law on Protection against Discrimination are needed in relation to the definition of bases, types of discrimination, representation of injured parties by NGOs and shifting the burden of proof, with the aim of improving access to justice for victims of discrimination.

Moreover, further efforts should be invested to standardise case law in addressing discrimination cases in accordance with international standards and national legislation on protection against discrimination.

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Hilmi Jashari[201]

ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN COURT PROCEEDINGS: LESSONS FROM THE REPUBLIC OF KOSOVO

Introduction

One of the main functions of national human rights institutions (hereinafter referred to as the "NHRIs") is to provide opinions and recommendations to state authorities on an advisory basis. For example, the so-called "Paris Principles" (Principles relating to the Status of National Institutions, adopted by General Assembly resolution 48/134 of 20 December 1993) indicate that NHRIs have responsibility to submit to the Government, Parliament and any other competent body, ***on an advisory basis*** ... opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights (Paris Principles, "Competence and Responsibilities", paragraph 3(a), emphasized by the author). In other words, there is no provision of the Paris Principles indicating that NHRIs should have executive powers or responsibilities.

This understanding of the role of the NHRIs is also shared by the European Commission for Democracy through Law (hereinafter referred to as the "Venice Commission"), which states that "the key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to hand down orders or issue directives" (CDL-AD(2007)020, Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan, Venice, 1-2 June 2007, paragraph 19).

In the same Opinion, the Commission relies on its view of the NHRIs - under which these institutions do not essentially have executive powers-, to advocate the idea that NHRIs should have a strictly limited role in court proceedings. At one point in the Opinion, the Commission states (seemingly categorically) that "the institution should not involve itself in litigation or intervention in court cases" (id., paragraph 12), although two paragraphs later it allows "that the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms "(id., para. 14). However, despite this limited authority, the Venice Commission, together with the Organisation for Security and Co-operation in Europe (hereinafter referred to as the "OSCE"), is generally sceptical about the involvement of NHRIs in court proceedings in individual cases.[202]

This article advocates the modification of the conventional position on NHRIs in favour of a better understanding of the role that these institutions can have in court proceedings. In particular, the experience of the Republic of Kosovo, a decade after its establishment, shows

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[201] Ombudsperson of the Republic of Kosovo

[202] See, e.g., CDL-AD(2011)034, Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, adopted by the Venice Commission at its 88th Plenary Session, Venice, 14 and 15 October 2010, para. 39 ("in general, it would seem preferable to ... exclude the power to intervene in individual cases") (quotation from CDL-AD(2007)024 - Opinion on the Draft Law on the People's Advocate of Kosovo, adopted by the Venice Commission at its 71st Plenary Session, Venice, 1-2 June 2007, para. 19).

that the authority to initiate or participate in court proceedings at several levels of the judicial system can serve as an invaluable instrument in fulfilling the mandate of the NHRI to protect and promote human rights. Lawsuits, of course, should not be considered as substitutes for more conventional NHRI functions, but as a useful tool that complements and strengthens these functions, ensuring a mechanism of enforcement and an additional incentive to comply with the NHRI recommendations.

Unlike the restrained position expressed in the Paris Principles and the opinion of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, this article claims that the NHRIs should enjoy at least four specific authorizations or competences in relation to judicial authorities: (1) authority to refer laws and other normative acts to the Constitutional Court for an abstract evaluation; (2) authority to seek the annulment of administrative acts; (3) authority to file *amicus curiae* briefs in cases pending before a court; and (4) the authority to participate in monitoring the execution of court decisions. These four points will be elaborated in detail in four corresponding sections, with references to both specific cases and the constitutional and legislative framework of the Republic of Kosovo. For each of these four authorities, the article also lists their constitutional or legal basis, provides at least one example when the said authority was used showing how the Ombudsman's participation in court proceedings was essential for achieving the goal of promoting and protecting human rights. There is a conclusion at the end of the article that assignment of these competences to NHRIs is even more significant in countries with relatively new or less developed democratic traditions.

The NHRI as a party to proceedings before the Constitutional Court

Let us begin with the least controversial way in which the NHRI can participate in court proceedings: as a party to the proceedings before the domestic constitutional court, by initiating the procedure of reviewing the constitutionality of laws and other normative acts. As we have already seen, even the Venice Commission, despite the generally negative view of NHRI participation in court proceedings, suggests that "the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms" (CDL-AD(2007)020 - Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan, op.cit., paragraph 14).

Despite the fact that the possibility to challenge laws and other normative acts before the Constitutional Court is relatively stable and internationally recognized NHRI competence, extensive experience of the Ombudsperson of the Republic of Kosovo in this regard can provide some useful lessons on how NHRIs in other countries can make maximum use of this authority.

In order to provide the necessary basic information, I will briefly present the constitutional basis in Kosovo that enables the Ombudsperson to initiate proceedings before the Constitutional Court. Article 135, paragraph 4 of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution") prescribes the following: "The Ombudsperson may refer cases to the Constitutional Court in accordance with the provisions of this Constitution." The determinant "in accordance with the provisions of this Constitution" is

important, because it indicates that the Ombudsman can not initiate proceedings before the Constitutional Court **in any case**; it has to do so in accordance with the constitutional limitations. What are these limitations? They can be found in Article 113 of the Constitution, which prescribes the competences of the Constitutional Court. In particular, with respect to the Ombudsperson, Article 113, paragraph 2, provides that "the Ombudsperson [is authorized] to refer to the Constitutional Court. . . . (1) compatibility issues of laws, president or prime minister decisions and Government regulations with the Constitution [and] (2) compatibility issues of municipal charters with the Constitution." Therefore, as established by the Court in one of the first cases instituted by the Ombudsperson (case no. KI 98/10, constitutional review of decision no. 06/837 of April 16th, 2009 and Npi-01/132 of April 30th, 2009, issued by the municipal assembly of Štimlje), the Ombudsperson . . . is authorized to submit to this court only requests for abstract control, in accordance with Article 113.2.2 of the Constitution "(id., paragraph 34), not to file requests on behalf of an individual in a specific case.

On this point, let us move on to the analysis of two different cases in which Ombudsperson's participation in proceedings before the Constitutional Court played a key role in achieving the goal to protect and promote human rights.

In the first case, the Ombudsperson challenged the law by which members of the Kosovo Parliament attempted to provide for themselves supplementary pensions that would be far above the average pensions received by ordinary citizens of Kosovo (case no. KO119/10, constitutional review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of MPs, no. 03/L-111 of 04/06/2010). The supplementary pension provided for by law is defined as follows:

"Where an MP has served in at least one term and has fifty-five (55) years of age", he or she "shall be entitled to a supplementary pension in the amount of fifty percent (50%) of the compensation paid to MPs. An MP who has served in two (2) terms . . . shall be entitled to a supplementary MP pension of sixty percent (60%) of the basic compensation, while an MP who has served in three or more terms shall be entitled to a pension of seventy percent (70%) of the basic compensation" (Law no. 03/L-111 on Rights and Responsibilities of MPs, Art. 22, paras. 1 and 2).

Following the adoption of this law, eleven NGOs (see paragraph 21 of the court judgment) filed a petition with the Ombudsperson calling on the institution to exercise its right and challenge the constitutionality of the law before the Constitutional Court. The Ombudsperson accepted their petition and submitted an application challenging the said law, claiming that the given law "enables Kosovo members of parliament to receive pensions that are more favourable than the pensions of all other citizens and that they are incompliant with the constitutional principles of equality, rule of law, non-discrimination and social justice" (cited from paragraph 30 of the court judgment). The Ombudsperson's application was not merely stating that the pensions that MPs have set for themselves are somewhat higher than the pensions of ordinary citizens, but that they are ***disproportionately*** higher. As the court noted, the Law tried to "lay down pensions that would be 8-10 times higher than the basic pensions that are also paid from the Kosovo budget" (id., paragraph 79). That is, the court concluded, unacceptable from the point of view of equality before the law, and therefore the court annulled the relevant provisions.

Two important lessons can be drawn from the success of the Ombudsperson in this case. First, this case shows that NHRIs' authority to refer cases to the Constitutional Court can ensure a powerful focal point for their cooperation with NGOs. This cooperation mutually strengthens and assists both NGOs and NHRIs to achieve results that they can not achieve independently. Therefore, of the one hand, according to the Constitution of Kosovo, eleven NGOs could not file a complaint to the court on their own because they did not have the authority to do so. Therefore, they needed the Ombudsperson for a successful annulment or amendment of impugned provisions. This is clearly seen from the facts of the case. The court judgment reveals that at various stages of drafting this law through the Parliament procedure, various concerned parties attempted to remove or revise the impugned provisions. Thus, for example, while the law was undergoing the Parliament procedure, the OSCE submitted comments to the Commission concerning legality and fairness, recommending that the provision on supplementary pensions be deleted (see paragraph 14 of the court judgment). This attempt was unsuccessful. Then, after the adoption of the Law, four of the eleven mentioned NGOs demanded that the President of the Republic does not promulgate the law pursuant to his right under Article 80, paragraph 3 of the Constitution. However, this attempt was also unsuccessful (see paragraph 17 of the court judgment). Therefore, had the Ombudsperson not had the authority to challenge laws before the Constitutional Court, there would have been no way to stop the entry into force of this law: NGOs could not achieve this by themselves.

However, of the other hand, NHRIs also need NGOs in such cases. In principle, the NHRIs receive thousands of complaints from ordinary citizens each year, and in many countries they have insufficient funds and insufficient number of employees. In these circumstances and given the pace of adoption of laws and other normative acts, it is clear that, without civil society and its role as an evaluator of these acts in terms of their compliance with constitutional principles, the NHRIs may not even recognise the need to submit a request for review of constitutionality in some cases. Civil society organisations can therefore serve as NHRI eyes and ears to help them recognize when it is necessary to exercise the right to challenge acts before the Constitutional Court. The case discussed shows that, together, the NHRI and civil society can achieve excellent results in the promotion and protection of human rights, results that they would not otherwise be able to achieve on their own.

Another important lesson that can be drawn from this case is that, thanks to the possibility to challenge the constitutionality of laws, the NHRI can serve as an effective rampart providing protection against the arbitrary actions of legislators and other institutions in charge of passing normative acts. Naturally, neither the Kosovo Constitution nor the constitutions of other states define NHRI as ***the only*** party authorized to contest the constitutionality of laws and other acts. In Kosovo, for example, apart from the Ombudsperson this authority also belongs to the President of the Republic and the Government. But in cases such as the one we discussed, in which MPs have a personal interest in passing a law, the NHRI is in the best position to request a constitutional review. Due to its legally guaranteed independence and the fact that in principle it operates outside the political arena, the NHRI would – as compared to the President and the Government - be more publicly credible and less subject to retaliation by the Parliament for challenging a law that favours the MPs. In such cases, the NHRI is the best institution that can file a request for constitutional review.

The issue of independence of the NHRI is at the centre of the next case we will examine. In order to efficiently implement their mandate to protect human rights, NHRIs must enjoy budgetary, organisational and functional independence vis-à-vis the government and other state institutions. Such independence was the main issue in case no. KO73/16 (constitutional review of the administrative circular no. 01/2016, issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016). The said circular attempted to subject independent institutions - including the Ombudsperson institution - to a standardized job classification within the civil service. This classification laid down a unified system of jobs, job descriptions and salary grades, which apply to almost all positions financed from the Kosovo budget. The Ombudsperson's position was that such a general approach could not have met and can not meet the unique needs and functions of Ombudsperson's office, and therefore that the circular had unconstitutionally threatened its constitutionally guaranteed independence (see the Constitution, Art. 132, para. 2: "The Ombudsperson shall be independent in the performance of its duties and shall not accept interference or instructions of other authorities or institutions exercising power in the Republic of Kosovo").

Thus, the Ombudsperson challenged the circular before the Constitutional Court, stating that the Constitution guarantees that "independent constitutional institutions [such as the Ombudsperson institution] shall have their own budget, which they independently manage in accordance with law. It is noted that constitutional independence of an independent institution is defined as decision-making independence, organisational and financial independence" (cited in para. 33 of the court judgment). In an attempt to require the Ombudsperson to comply with the civil service jobs classification, the disputed circular prevented the Ombudsperson from implementing its own internal organisational scheme, which, according to its assessment, was better adapted to the special NHRIs needs and functions. The court decided in favour of the Ombudsperson, stressing that "the staff working within the Ombudsperson institution . . . has different work duties as compared to similar positions in other institutions and that this explicit differentiation is reflected in their job descriptions and remuneration and should be kept" (id., paragraph 88).

What is the main lesson learned from this case? The lesson is that the Ombudsperson's authority to make purely advisory recommendations can not, in the absence of executive powers, be sufficient to protect its own independence. Having received the circular of the Ministry of Public Administration, the Ombudsperson rooted its objection on the constitutional basis and tried to solve this issue with an out-of-court approach. However, the Ministry refused to concede (see paragraph 24-26 of the court judgment). Without the authority to challenge the circular before the Constitutional Court, the Ombudsperson would have been incapable of securing its constitutional independence. This case can therefore serve as a model for NHRIs around the world on how to use their powers before the Constitutional Court to protect their independence when the persuasive power of arguments itself is not sufficient.

The NHRI as a party to proceedings before the Administrative Court

We have seen that the NHRI authority to refer cases to the Constitutional Court is relatively undisputed and well established. However, the competence discussed now is the one most often conferred on NHRIs. In the Republic of Kosovo, the Ombudsperson has the authority

not only to challenge laws and other normative acts before the Constitutional Court, but also to initiate "administrative disputes". In the Kosovo legal system, an administrative dispute is a legal process initiated by a natural or legal person "if it considers that his/her rights or legal interests have been violated by a final administrative act in the administrative procedure" (Law No. 03/L-202 on Administrative Disputes, Art. 10, para. 1).

The Constitution does not contain provisions on Ombudsperson's competences in this field. However, according to the Law on Administrative Disputes, "A plaintiff in an administrative dispute may be a natural person, legal person, Ombudsperson, associations and organisations acting in defence of a public interest and believing that administrative acts violated, directly or indirectly, a right or interest guaranteed by law "(id., Art. 18). In the Republic of Kosovo, the Ombudsperson has the authority not only to make recommendations to the Government for the purpose of promoting human rights and good governance, but also to directly challenge in court the content of administrative acts against which it objects.

This competence was crucial to the success of the Ombudsperson in one of the most important cases of 2017. In April last year, the newspaper Zëri published an article titled "KEDS [Kosovo Electricity Distribution Company] charges us €8 million annually for the electricity of Serbs in the north," which refers to a private company that has exclusive rights to distribute electricity throughout Kosovo. The article stated that as of the end of the war, the entire population of the four municipalities in the north of Kosovo, where most citizens and municipal authorities do not recognize the sovereignty of the Republic of Kosovo, receives free electricity from Kosovo's electricity network regardless of that. Naturally, the electricity they used was free of charge only for them: electricity costs were paid by the residents of the rest of the Republic. To make matters worse, KEDS has kept the practice secret from the public. The existence of such practice was discovered only after Zëri published the text.

Following the publication of the article, the Ombudsperson immediately initiated ex officio investigation in order to (1) confirm the existence of facts supported by the allegations of the newspaper; and (2) if the allegations prove to be correct, request the competent authorities to provide an explanation as to why they are allowing this practice to continue.

The Ombudsperson soon received a confirmation from the Energy Regulatory Office (hereinafter referred to as the "ERO"), state institution responsible for energy policy, including KEDS business operations, that the factual allegations made by the newspaper are indeed correct. However, ERO tried to justify the practice in question with an unclear administrative decision that allegedly allows KEDS to cover electrical system losses at the expense of other consumers in Kosovo.

Naturally, the Ombudsperson was not satisfied with this explanation and published a report clarifying in detail that KEDS practice violates the constitutional and legal rights of Kosovo residents who had to cover the cost of free electricity for the northern part. According to the analysis published by the Ombudsperson, this practice is a violation of the right to protection against discrimination, the right to property and consumer rights. It recommended that ERO should immediately order KEDS to terminate this practice and to abolish the order by which it intended to justify it. Despite rising public pressure, ERO rejected to do so.

Following that, the Ombudsperson decided to use its authority to initiate court proceedings. The Ombudsperson filed a lawsuit requesting annulment of the unlawful ERO decision from the court having jurisdiction (in this case the Administrative Department of the Basic Court in

Prishtina). Although proceedings are still underway in this case, the Court accepted the Ombudsperson's request for the issuance of a temporary order to defer the execution of ERO decision pending finalisation of proceedings in the case.

Based on the described proceedings in this case, it is easy to notice a certain similarity with the two already discussed constitutional cases, namely the case in which PMs tried to provide themselves with an additional pension which is grossly disproportionate to the pension of ordinary citizens and the case in which the Ministry of Public Administration attempted to influence the independence of the Ombudsperson institution. In both cases, the institutions against which the Ombudsperson filed briefs (the Parliament and the Ministry of Public Administration) were adequately warned, either by the civil society or the Ombudsperson itself, of the unconstitutionality of their actions, but they did not want to desist from them. The Ombudsperson submitted applications to the Constitutional Court only thereafter.

The case discussed here shows that such a strategy can be extremely useful in the administrative field as well. Since ERO did not accept the recommendation to annul the decision, the Ombudsperson had no other possibility than to exercise its authority and submit an application to the court challenging the decision. Indeed, although the Ombudsperson of the Republic of Kosovo exercised more often its authority to refer the cases to the Constitutional Court than the authority to challenge the legality of administrative acts, the latter may in time prove to be much more important to Ombudsperson's work. As the Venice Commission observed, "the model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration" (CDL-AD (2007) 020 - Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan, op. cit, para 12). Although the Venice Commission has certainly not envisaged that the NHRIs have the authorities to challenge administrative acts directly in court, it correctly recognized the importance of administrative acts for the NHRI mission. Therefore, the authority to file lawsuits against such acts can be an extremely powerful instrument in ensuring that their recommendations in this field are implemented. We can therefore hope that this competence will become equally widespread and recognized among the NHRIs as the authority to challenge laws and other normative acts before the Constitutional Court.

The NHRI as *amicus curiae*

In addition to its role as a party to proceedings, in the legal system of Kosovo the Ombudsperson also has the role of amicus curiae -friend of the court- in cases in which it is not one of the parties to proceedings. This competence is a relatively new addition to the instruments the Ombudsperson has at its disposal. This competence, for example, is not included in the United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 2000/38, which established the Ombudsperson institution, nor does it appear in the Constitution or in the first official Law on the Ombudsperson Institution no. 03/L-195.

However, the current version of the Law no. 05/L-019 on the Ombudsperson clearly states that "the Ombudsperson may act as a friend of the court (amicus curiae) in court proceedings concerning human rights, equality issues and protection against discrimination" (id., Article

16, paragraph 9). Almost the same phrasing is repeated in Law no. 05/L-021 on Protection against Discrimination: "The Ombudsperson may act as a friend of the court (amicus curiae) in court proceedings concerning issues of equality and protection against discrimination" (id., Article 9, paragraph 2, item 13).

Both these laws have been adopted relatively recently - in the summer of 2015-, so the Ombudsperson did not have much opportunity to exercise its authority in this field. Nevertheless, even in this short period, the Ombudsperson acted as amicus curiae in four separate cases. One of these cases will be presented here.

Ombudsperson's amicus curiae brief "regarding the state of homophobia and transphobia" was sent to the Basic Court in Prishtina based on two complaints filed to the Ombudsperson for physical attacks against members of the LGBT community. These attacks were reported to the Kosovo Police and the competent prosecutor's offices.

However, the complainants claimed that the Basic Prosecutor's Office in Prishtina and the Kosovo Police did not adequately investigate the incident. Even on the basis of this short summary of the two complaints, it is clear what the Ombudsperson should do using conventional NHRI instruments. As confirmed by the records, the staff of the Ombudsperson addressed both the Basic Prosecutor's Office in Prishtina and the Kosovo Police with a request to be informed about the status of the investigation (see pp. 2-3 of the quoted brief). In both cases, following the Ombudsperson's request, there was a noticeable acceleration in the pace of these investigations. At the time of writing this text, indictment was brought in one of the cases, while in the other case the court had already imposed a judgment of the defendants on account of "inciting national, racial, religious or ethnic hatred, discord or intolerance" (see Law No. 04/L-082, Criminal Code of the Republic of Kosovo, Article 147) and a physical attack (see id., Article 187).

Why did then the Ombudsperson have to take additional actions on top of sending inquiries on these cases to the competent authorities and asking them to continue the investigation in a timely manner? What is the purpose of filing amicus curiae brief? One of the main reasons for filing a brief was to draw the attention of the court to the contents of the Criminal Code, that is, to Art. 74, "General rules on the imposition of lighter or more severe sentences". The list of aggravating circumstances states the following: "if the criminal offense was committed against a person, group of persons or property due to . . . sexual orientation "(id., Article 74, paragraph 2, item 12). The Ombudsperson noted that the judge who convicted the perpetrators did not give specific consideration to this provision when imposing a sentence on them. One of the aims of that *amicus curiae* brief was to encourage the courts to give consideration to that provision in future cases relating to violence against members of the LGBT community.

This example of using the Ombudsperson's authority to act as *amicus curiae* in court proceedings shows what a powerful tool for the NHRIs this instrument can be, but also indicates that it should be used with caution. Let us consider each of these points. I believe that this instrument is a powerful tool because it allows to the NHRI to address the court directly on issues within their field of expertise, such as cases of discrimination and protection of vulnerable groups. Considering the large number of complaints received by the NHRIs in this field, it is likely that their expertise in such matters may assist the courts in cases in which these issues are discussed, either in criminal or civil proceedings. Giving the NHRI the authority to directly address the courts allows for a fruitful cooperation between the

NHRI and judicial authorities, which can lead to better trials and better reasoned court judgments. This is a good reason for other states to follow the example of the Republic of Kosovo in giving the NHRIs a general right to address courts in individual cases as friends of the court.

Regarding the above caution: when exercising this right, NHRIs must take care not to hinder the ability of courts to pass impartial judgments. As the European Court of Human Rights has repeatedly noted, "even appearances may be of a certain importance or, in other words, justice must not only be done, it must also be seen to be done . . . What is at stake is the confidence which the courts in a democratic society must inspire in the public" (*Micallef v. Malta*, ECtHR, application no. 17056/06, 2009, para. 98; citation *De Cubber v. Belgium*, ECtHR, application no. 9186/80, 1984, para. 26). There is a threat that the participation of NHRIs in cases before the court could irreparably impair the impartiality of the court, thereby harming public trust in the judiciary.

For this reason, the Ombudsperson cautiously stated in the said case that when imposing a sentence on the persons convicted of violence against members of the LGBT community, courts should ***consider*** whether the aggravating factor from the Criminal Code exists, not that courts should determine if that factor exists in all cases. Raising the question of whether a particular accused person should have been imposed a more severe punishment would constitute improper interference with the work of the judiciary and would cause great harm to impartiality. For this reason, even though the NHRIs should be given the right to act as *amici curiae* when they deem it necessary, they are obliged to exercise this right with the greatest possible care.

NHRI's role in monitoring the execution of judgments

We have come to the last role that the NHRIs can have in court proceedings: that of monitoring the execution of court judgments. This role is of utmost importance for the purpose of ensuring the protection of human rights. In order to have truly effective protection of human rights, it is not only necessary for courts to render decisions, but it is also important that these decisions are properly executed. As we will see in the case to be analysed, the link between delivering and executing a judgment can unfortunately not be taken "for granted".

The case I wish to analyse in this section is unique. It differs from the cases analysed above because it does not concern ***domestic*** court proceedings conducted in the Republic of Kosovo; this is a case which was examined and decided by the European Court of Human Rights: Grudić v. Serbia (ECtHR, application No. 31925/08, 2012).

In order to understand the Ombudsperson's role in the process of monitoring judgment execution in this case, we first need to present a brief summary of the facts of the case, as well as of court conclusions.

The applicants in the Grudić case are a married couple living in Kosovo who were, in 1995 and 1999 respectively, granted disability pensions by the Serbian Pension and Disability Insurance Fund (hereinafter referred to as the "SPDIF") (*Grudić*, paras. 6 to 7). In 1999 and 2000 respectively, the monthly payments provided by the SPDIF stopped without any explanation (*id*, paragraph 9). Lastly, after the applicants sought that the payment of their

pensions be resumed, the SPDIF adopted formal decisions to suspend payment of the applicants' pensions (id., paras. 10-11). The SPDIF's reason for the termination of payment, according to the court judgment, was that "Kosovo was now under international administration" (*id*., paragraph 11), and that "since the respondent State has been unable to collect any pension insurance contributions in Kosovo as of 1999, persons who had already been granted SPDIF pensions in this territory could not continue receiving them" (*id*., paragraph 13).

The court rejected this explanation unanimously. In so doing, the court reasoning was based on the Opinion adopted in 2005 by the Supreme Court of the Republic of Serbia, Civil Division, regarding pension rights in Kosovo: "In response to the situation in Kosovo, this Opinion states ... that one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act (*Grudić*, paras. 31 and 80).

Article 110, of the other part, prescribes only two grounds under which the right of the insurance user under this law can be legally limited. First of all, these rights terminate when "conditions for acquiring and exercising these rights cease to exist in the course of their exercise" (Pension and Disability Insurance Act, Article 110, paragraph 1), and the *Grudić* judgment states, "if it transpires that one no longer meets the original statutory requirements" for the acquisition and exercise of these rights (*Grudić*, paragraph 26). Secondly, the right to insurance should also be terminated "when the beneficiary exercises a right under this insurance with a compulsory pension and disability insurance organisation of a state formed in the territory of the former Yugoslavia" (*id*., Art. 110, para. 2).

The Court found that neither of the two grounds specified in Article 110 for lawful termination of pensions, had been fulfilled in the case of the applicants (*id*.). It thus concluded that "the interference with the applicants' "possessions" was not in accordance with relevant domestic law" (*id*., §81) and therefore that Serbia had violated the applicants' rights under Article 1 of Protocol No. 1 of the Convention (*id*., §83). It is important to point out the Court further noted that the finding of a violation imposed broader obligations on the Republic of Serbia, since there were likely many more Kosovo residents whose pensions had been discontinued by the SPDIF on the same unlawful basis as those of the applicants, and who were therefore - like the applicants- entitled to the resumption of pension payments and the payment of arrears, including statutory interest.

In fact, even the Republic of Serbia, in its own filings before the Court, openly admitted that the number of similarly situated Kosovo residents was considerable: "The Government noted that the total amount of the respondent State's potential debt involving situations such as the applicants' would be very high indeed . . . [O]fficial data provided by the SPDIF indicat[ed] that the sum in question had been estimated at 1,008,358,614 Euros ("EUR"), whilst the Ministry of Finance had itself set this sum at EUR 1,050.468.312 (*Grudić,* §71). The Court thus held that "[i]n view of . . . the large number of potential applicants, the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question" (*id*., §99).

Despite Serbia's assessment of the high amount of pensions it would have to pay to Kosovo residents in the event that the court ruled in favour of the applicants in the *Grudić* case, Serbian authorities found a way to refuse 96.1% of applications for resumption of pension payments to Kosovo residents after adjudication in that case. This was done in a manner that

is completely contrary to the court's judgment. In explanation, despite the *Grudić* judgment's clear statement that "concerning the situation in Kosovo . . . one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (**Grudić**, §80), Serbia based its nearly wholesale rejection of pension applications from Kosovo on a separate statutory provision, Article 119:

"Pursuant to Article 119 of the Law on Pension and Disability Insurance, *a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice*" (*Follow Up Report in the Case Grudić v. Serbia Concerning the General Measures*, submitted to the Committee of Ministers of the Council of Europe on 24/10/2013; emphasized by the author).

The Ombudsperson found that this reasoning was legally unfounded and in direct contradiction to the Court judgment in the *Grudić* case and therefore sought a way of transferring these information to the body responsible for monitoring the execution of the judgment: the Committee of Ministers of the Council of Europe. The rules of this body expressly invite NHRIs to provide comments on the adequacy of execution of the ECtHR judgments. In particular, Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* reads as follows: "The Committee of Ministers shall be entitled to consider any communication from . . . national institutions for the promotion and protection of human rights, with regard to the execution of judgments."

However, since the Republic of Kosovo is yet not a Council of Europe member state, the Ombudsperson had to submit its comments to the Committee of Ministers through a domestic NGO, the Association of Pensioners and Disabled Workers of the Republic of Kosovo. Serbian authorities were invited to respond to the Ombudsperson's comments, but deviating from their usual practice, they stayed silent, without giving any response to Ombudsperson's criticisms. This non-response to comments was explicitly highlighted in the 10th Annual Report of the Committee of Ministers *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2016*: "A new communication from an NGO . . . made available in March 2016, notably emphasising the necessity to reassess all applications from Kosovo residents for the resumption of pension payments. A response from the Serbian authorities to the issues raised in the communication is awaited" (*id*., p. 249).

Unfortunately, this story does not have a happy ending. In July last year, the ECtHR issued a decision in the *Skenderi v. Serbia case,* ECtHR, application no. 15090/08 (2017). One of the applicants in this case offered more or less the same argument that the Ombudsperson presented to the Committee of Ministers: that Serbia, in accordance with the *Grudić* ruling, can not legally reject applications for pension payments to the residents of Kosovo on any other grounds other than the grounds referred to in Article 110 of the Pension and Disability Insurance Act. However, the court did not reach the substance of this argument by dismissing the case on procedural grounds since all domestic remedies have not been exhausted (see *Skenderi*, § 109).

Following this decision, the Serbian authorities began to act. Despite the fact that the court did not decide on the merits of applicant's claims, Serbia argued that the *Skenderi* case judgment unambiguously supports their recent mass refusal to pay pensions to pensioners from Kosovo: "[the Serbian] authorities. . . assume from the Court's case-law developed in *Skenderi and Others* that these rejections are in compliance with the Convention

requirements and the Court's indications" (*Action report, Communication from Serbia concerning the case of Grudić v. Serbia*, submitted to the Committee of Ministers of the Council of Europe on 26 September 2017). On the basis of this untrue report, the Committee of Ministers abruptly terminated its supervision of the execution of the *Grudić* judgment (see the Decision of the Committee of Ministers CM/ResDH (2017) 427 of 7 December 2017).

Despite its negative outcome, this case also offers some important lessons. The most significant lesson for the Republic of Kosovo is that the case *Grudić* illustrates exceptional importance of Council of Europe membership. Had Kosovo been a member, it could have challenged the misinterpretation of the *Skenderi* judgment offered by Serbia and preserved the hope for thousands of Kosovo citizens denied access to pension funds to which they paid contributions during their working lives. However, this case also provides another lesson that is more relevant to the NHRIs worldwide: it should never be taken for granted that court rulings protecting human rights, which were passed to the prejudice of powerful interests, will be executed without a fight. As we have seen, the Rules of the Committee of Ministers explicitly define that NHRIs also have a role in providing assistance to this body in supervising the execution of judgments.

In our discussion on the case of supplementary pensions for Kosovo MPs, we noted that NGOs could serve as the eyes and ears of the NHRI in assessing the constitutionality of laws and other normative acts. However, the NHRIs can also serve as the eyes and ears of the European Court of Human Rights, as well as domestic courts, in raising awareness of the competent authorities and the public in case of inadequate execution of court judgments of vital importance for the protection and promotion of human rights.

Conclusion

Finally, I wish to offer a few words in the form of a conclusion. We have analysed four different roles that the NHRIs should have in court proceedings. They should be able to (1) refer laws and other normative acts for an abstract judgment to the Constitutional Court; (2) seek annulment of administrative acts; (3) submit amicus curiae briefs in cases pending before a court; and (4) participate in supervising the execution of court rulings.

The cases we have analysed within these four chapters suggest two ways in which these roles can contribute to the achievement of the ultimate goal of the NHRIs - to promote and protect human rights. First, as shown by the two cases of the Constitutional Court that we have discussed and the case related to electricity supply in the municipalities of northern Kosovo, bodies to whom the NHRI recommendations are addressed will unavoidably not implement some of them. In such cases, the authority to file a complaint to the court contesting the actions of these bodies may be an effective means of ensuring that these recommendations are implemented.

Secondly, as shown by the Ombudsperson's *amicus curiae* brief in cases involving attacks on the LGBT community and Ombudsperson's involvement in supervising the execution of the ECtHR judgment in the *Grudić* case, the NHRIs can assist courts by providing expertise in human rights cases. This is especially significant in those fields where the NHRIs, due to the fact that they solve thousands of individual complaints, can better understand certain factual and legal issues as compared to the courts. In such cases, the NHRIs can enhance the

protection of human rights by enabling their judicial peers to benefit from that experience and expertise.

Ultimately, I would repeat the statement made in the introduction to this article: I consider that conferral of the four authorities discussed here to the NHRI in countries with relatively new or less developed democratic traditions becomes even more significant. We are now in a position to understand why this is so: in countries with relatively new or less developed democratic traditions, it is far less likely that the most conventional NHRI instrument and the force of persuasion will be efficient without the support of a credible threat by judicial enforcement. State bodies that ruthlessly violate human rights will not necessarily be ashamed when they are identified by the NHRI as human rights violators; additionally, in countries without an established democratic tradition, it is unlikely that public pressure on the authorities to implement NHRI recommendations will suffice. In such countries, conferral of the four NHRI competences analysed here may contribute to making the "persuasive power of reason" even more persuasive - and even more powerful - to those to whom the NHRI recommendations are addressed.

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PRESENTATIONS

Vlasta Nussdorfer[203]

EXPERIENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN COURT PROCEEDINGS

The Human Rights Ombudsman of the Republic of Slovenia (hereinafter referred to as the "Ombudsman"), has been active in Slovenia since 01/01/1995. As of the entry into force of the revised Law on the Human Rights Ombudsman, on 14 October 2017, it has transformed into a national institution in one year. A national preventive mechanism (against torture) has existed for 10 years within the framework of the Ombudsman, and the project *Protector - Voice of the Child*, which became an internal organisational unit of the Ombudsman's Office in October last year, lasted for the same period of time. The Human Rights Council has been active as of 01/06/2018, which will be an advisory body of the Ombudsman, consisting of representatives of non-governmental organisations, the government, academic community, protector of the principle of equality and the Information Commissioner. The Centre for Human Rights will also start its work on 01/01/2019. Thus, we will become a complete national institution according to the Paris Principles.

Otherwise, despite the initial doubts of makers of the 1993 Law on Ombudsman, the Ombudsman oversees the judiciary as a whole, as well as courts, which constitute the third independent branch of government, in addition to the legislative and executive ones. In a broader sense we also oversee the prosecutor's office, Office of the Public Defender (now Office of the State Attorney), lawyers and notaries, the latter two through their chambers.

Now let me go back to the courts, which are also the subject-matter of my presentation. Most of the initiatives we receive are caused by people's dissatisfaction with on-going court proceedings, especially because of the long duration thereof, and their results, of course, submitted by those who do not like their outcome and who consider it unfair. Additional reasons are dissatisfaction with expert witnesses and their opinions, desire to transfer the trial to other courts, refusals of free legal aid, poor lawyers' work, rejection of appeals, unavailability of the constitutional court, if their pleadings were not admitted for consideration, asking us to be the one to submit requests for review of constitutionality of laws, bias of judges, failure to take evidence into account, etc.

It can be concluded that most of the initiatives in the field of court proceedings relate to violations of the right to judicial review, right to a legal remedy, equal protection of rights, legal guarantees in criminal procedure, and the quality of the trial, since in post-appeal stage too many cases get remanded from the second instance courts to first instance courts, hence, to the very beginning, resulting in a significant prolongation of the trial.

The Supreme Court is now implementing activities aimed at speeding up the trial, re-assigning cases from courts that are more burdened, and also supervising their work. They implemented, among other things, the Slovenian Judiciary 2020 project. On 14 February 2018, the Supreme Court Chief Justice of the Republic of Slovenia presented the Court Year, all results for the past year and plans for 2018. Due to my trip to Sarajevo, I could not attend this very important event, so it was attended by deputy Ivan Šelih, who is in charge of

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the judiciary. In my capacity of an Ombudsman, I meet at least once a year with the Minister of Justice, Supreme Court Chief Justice, General State Prosecutor, President of the Bar Chamber, General State Attorney and representatives of the Chamber of Notaries.

The judiciary reacts to irregularities in its ranks and, if necessary, disciplinary proceedings against judges are instituted, which is now supervised by the court chamber. Likewise, the Ministry of Justice has a Court Administration Supervision Service, above all for finding if court presidents are to be held accountable or not. Via a special, new service the Ministry also supervises the execution of judgments of the European Court of Human Rights. The parties use a number of means to speed up proceedings, and sometimes the Ombudsman also intermediates and includes identified irregularities into its annual reports.

We have no problems with reactions to our questions, since all sides - courts, prosecutor's offices and others - respond to us within the time-limit and take into account our conclusions. We are very satisfied with the reactions. Recommendations related to the judiciary, like all others, are seriously debated by Parliament through the Commission on Petitions, Human Rights and Equal Opportunities. All of them have been upheld and the government responds by publishing reports - last year for the first time, even an extraordinary report on the implementation of recommendations.

New laws in the field of judiciary are given to us in the stage of drafting thereof, so we give our opinions and many of our proposals have been taken into account in this regard.

Let us go back to concrete examples.

In the field of the judiciary, our law primarily gives us the ability to control the temporal course of the trial or the abuse of power. Many initiative proponents consider such phenomena to be present in courts, which is ordinarily only a personal conviction. On judiciary-related issues, we receive many people during our external work, when we are active once a month in municipalities around Slovenia, and professional associates often discuss these matters with citizens via telephone. By doing so, we solve many cases. Owing to that type of work, written initiatives are often not submitted. About 500 written initiatives are received annually on the subject of court proceedings, and they have merits in approx. 6% of cases, since many address us before having exhausted the legal remedies or even after the cases have become final. People find it very difficult to accept explanations that the Ombudsman can not change the decision of judicial authorities, they threaten with the European Court of Human Rights, and sometimes they do not agree with their decision either and they believe that such a decision should be annulled, as it is completely unjust in their view. There are many initiatives regarding misdemeanours and family law cases related to divorces and entrusting children to one of the parents, violations of the provisions on contacts of children with parents, removing children from the custody of a parent, guardianship or foster care. We have specifically made an analysis of court proceedings on entrusting the custody of children held before one family court during a certain period of time, since the fathers claimed that the custody of children is always assigned to mothers, because all participants in proceedings are women (judges, lawyers, expert witnesses ...). The analysis did not confirm this, but it has pointed out to some irregularities, especially to an extremely high number of settlements among partners.

The Ombudsman can also intermediate at every stage of proceedings in the role of amicus curiae - "friend of the court", which we have used on a number of occasions, last year even before the European Court of Human Rights - the first time to do so.

The Ombudsman may, with reference to the provisions of our law, also assess every case from the perspective of fairness and good governance. We often use that possibility, and in terms of fairness, we are, of course, very careful, because it is a very sensitive area which pertains primarily to bodies of the judicial branch of power. We have noticed many instances when the good governance principle was breached. Often, with criticism or opinion, we achieve an apology, settlement of damages or another solution.

The only situation in the field of the judiciary when we have judged that both principles had been violated at the same time concerned undeclared and misplaced wills in almost all courts. The Ombudsman discovered them when one of the initiative proponents in the field explained to us that a several years old will was found in one court which had not been declared, leading to an unlawful inheritance to her detriment. The case - without personal data - was presented by us at a press conference and we began to investigate it. A number of such wills were found in various courts, and now there are many procedures for damages from the state, which is at fault in these cases. In these cases, the principle of trust in the judicial custody of wills was violated, as well as the principle of fairness, because there was no inheritance based on will, but contrary to the will of the testator. To many, this has completely changed their lives. The Ombudsman carefully monitors the resolution of these issues, and now all the wills are kept via notary offices - electronically, so that they can no longer be misplaced.

Before the end of this presentation, I wish to emphasize that the Ombudsman also has direct access to the Constitutional Court. So far, we have filed 30 requests for review of constitutionality and three constitutional complaints. Last year, for the first time, one of our constitutional complaints was upheld and the Constitutional Court annulled the judgments of three courts: cantonal, high and the supreme, which is a great success.

Conclusions

Courts should treat all cases equally, involving the poor and the rich, the powerful or the homeless. Justice must follow the principle of equality before the law, and many still warn that they are rather powerless when they do not have quality legal assistance provided to them, and when it exist on the opposite side.

The judiciary has to gain more trust of people, which is of course difficult when the strongest voices are those of the unsatisfied, who have the impression that judgments are unfair. It is certainly not just when media outlets present family dramas involving under-age children, who are marked for life by the public nature of proceedings. The Ombudsman resolutely opposes this, and that is why we have co-developed guidelines for reporting about children involved in various procedures by journalists and have managed in making sure they are adopted, and largely respected.

Let the last thought be that justice delayed is not proper justice and that no financial satisfaction can compensate for a violation of rights in court proceedings.

Vlasta Nussdorfer[204]

ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN FIGHT AGAINST DISCRIMINATION AND COOPERATION WITH CIVIL SOCIETY ORGANISATIONS

In recommendations included in its annual reports the Human Rights Ombudsman of the Republic of Slovenia (hereinafter referred to as the "Ombudsman") repeatedly asked the state to set up an independent equality body, that is, a protector of the principle of equality, in line with the EU acquis. The Slovenian Law on Protection against Discrimination was adopted on April 21st, 2016. At the end of the same year we also received an independent protector of the principle of equality, Mr. Miho Lobnik, to whom the state has yet to provide adequate financial resources for his work. He also examines the private sector, which the Ombudsman can not do, as the Constitution states that he is in charge of supervising all state and local bodies and holders of public authorities.

What is the Ombudsman encountering in the field of discrimination and what are good practice examples in dealing with cases in that field?

We deal with national and ethnic minorities, especially the Roma population, equal opportunities in terms of sex, disability, employment issues, as well as with all the differences between people which should enrich us, but which often separate us, that is, which serve as the basis for various forms of intolerance and hate speech. We often speak about the ethics in public speaking and we ask the Parliament to adopt the code of ethics for MPs and the Court of Honour.

A few years ago, the Ombudsman, together with the Austrian Ludwig Boltzmann Institute of Human Rights implemented a comprehensive **project *Let us Face Discrimination*.** It started in the Parliament of the Republic of Slovenia, and it continued by training experts – with a train-the-trainer seminar. A group of attendees visited Ireland, and numerous seminars were organized. The titles of seminars were: Legal remedies and sanctions, Accessibility of services and housing, Education against discrimination, Ethics in public speaking, Multiple discrimination and gender equality policy, Discrimination because of religion, Discrimination at work, Ethnic and racial discrimination, Roma and discrimination, Discrimination based on sexual orientation, Age and disability discrimination.

The project has achieved excellent results, but in view of the new situation in the society and the growing intolerance, especially during the arrival of refugees and migrants, we would even have to repeat it.

Roma remain the subject of every annual report of the Ombudsman and of its numerous recommendations. Integration was completely successful in one part of Slovenia, there are many employed Roma, they graduate from school, at least primary school, and live in developed settlements. The south-eastern part of Slovenia still has a lot of problems in that field. There are many illegal settlements that do not have water and electricity, many Roma children do not attend school regularly and they do not graduate from school, they are unemployed, there is a lot of crime and residents in the surrounding settlements are looking for solutions. The state transfers the resolution of these problems to municipalities, some are

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more successful, others are not, and the Ombudsman believes that the state should intervene in these issues. The Ombudsman also meets with the Roma and with other residents, invites representatives of the state for talks and seeks solutions. We regularly meet representatives of Roma organisations as well.

Persons with disabilities are under permanent care of the Ombudsman, so we pay a lot of attention to them. We take part in all of their events at which they present problems, we appeal to the state to solve them, and in doing so, we actively cooperate with numerous organisations of persons with disabilities. Thus, with our support, a new legal framework was adopted last year in the field of early treatment of children with special needs. We mark all the special days regarding the rights of persons with disabilities, who use them to inform us about their problems and possible discrimination.

Since the Ombudsman took office in 2013, the Ombudsman has been hiring at least one person with special needs as a trainee every year, which is already a way to encourage others to follow our example. In addition to that, persons with special needs, children with Down's syndrome, blind people, and others whose disability made them 'invisible' perform at the annual Human Rights Day event. That means a lot to them.

We also pay attention to **religious intolerance and discrimination of believers**, when we are alerted to it. We react to such phenomena primarily through the media.

Gender inequality deserves all our attention. Over the years, it has declined significantly, but it is still present and we warn of it, especially on days dedicated to women's rights and fight against violence of all kinds. It is precisely in this field that the Ombudsman is particularly active; many statutory provisions have been introduced that improved the position of victims and made the course of both police and judicial proceedings more efficient. This is a great success.

The Ombudsman will devote 2018 primarily to **the elderly citizens**, who often emphasize that they are facing discrimination. They are facing issues also due to their poor financial situation, illness, inability to work while retired, with accommodation in old people's homes which are lacking accommodation facilities, as well as in respect of the treatment, accommodation and organized assistance to persons with dementia. During January this year, we met with non-governmental organisations active in the field, we will explore all the problems of the elderly, and in September we will prepare a big conference on the subject at the State Council (second home of the Parliament). It is a very important contribution to the non-discrimination of the elderly.

An example of good practice of cooperation with the non-governmental sector in the field of rights of the elderly is the fact that in the summer of 2017, the Ombudsman, in cooperation with the Organisation *Spominčica*, opened **the first dementia-friendly spot**, and before that, in cooperation with UNICEF, **child-friendly spot**.

Media conferences certainly count among the good practices as well. In cooperation with NGOs, we use them to alert the general public to numerous discrimination issues.

Some of the cases we examine are published on our website, and every week we send e-news to about 800 electronic addresses, in which recipients, especially the media, are regularly informed about our conclusions and all events.

In recent years, we have devoted considerable attention to **minorities**. We have met representatives of both officially recognized minorities, Italian and Hungarian, and visited places where their members live, not only in Slovenia, but also in Italy, Hungary and Austria. We also spoke with representatives of organisations dealing with minority issues.

Conclusions

The Ombudsman regularly meets and cooperates with non-governmental organisations addressing discrimination issues through their programmes and missions. They represent a sort of citizen's voice. These organisations respond fastest to the needs of people, register individual and systemic cases of human rights violations and attempt at eliminating them. The Ombudsman organizes meetings with non-governmental organisations in order to exchange information about successes in face to face conversation, and in particular about issues of discrimination based on any personal circumstance.

We also organize regular meetings with representatives of organisations dealing with the rights of LGBT people, organisations of persons with disabilities, humanitarian organisations, or the Association of Slovenian Roma Societies. The Ombudsman meets with the representatives of registered religious communities within the Council for Dialogue on Religious Freedoms, which works with the Ministry of Culture.

Discrimination in all its forms threatens people and determines their destinies, makes their lives difficult, and often causes the suffering of people.

Therefore, in this field the Ombudsman does not react only after receiving an initiative, but also treats these issues from a broader perspective. Having investigated those and found violations of rights, it sends criticisms, initiatives, opinions or recommendations to the state and its institutions and seeks solutions. That is why the work and mission of the Ombudsman are so important.

In the countries that respect human rights, the work of the Ombudsman is also respected. Despite many difficulties, Slovenia is among the countries whose legislative and executive branches of government consider with all the necessary seriousness Ombudsman's work and recommendations. However, the Ombudsman is not always satisfied with adherence to and implementation of some recommendations in the field of discrimination, as even when the authorities agree with the Ombudsman's recommendation, it often takes too much time until the human rights violation is eliminated.