

## Horizontal Facility for Western Balkans and Turkey



### Strengthening the Human Rights Ombudsman to Fight Discrimination

#### Human Rights Institutions of the Western Balkans

Regional conference “Exchange of Best Practices of Addressing Human Rights Violations with a Special Focus on Combating Discrimination”

#### *Conference conclusions*

The regional conference “Exchange of Best Practices of Addressing Human Rights Violations with a Special Focus on Combating Discrimination” was jointly organized by the Council of Europe, the OSCE Mission to Bosnia and Herzegovina and the Institution of Human Rights Ombudsman of Bosnia and Herzegovina at the premises of the Parliamentary Assembly of Bosnia and Herzegovina on 15<sup>th</sup> and 16<sup>th</sup> of February.

With the objective of *exploring the avenues and exchanging available practices concerning the role of human rights institutions (HRIs) in judicial procedures and administrative actions, as well as increasing the HRIs’ effectiveness*, the conference hosted representatives of human rights institutions from the region, including the Republic of Turkey, representatives of judiciary, legal scholars and civil society organizations<sup>1</sup>.

The opening speeches were given by the Ambassador of the Council of Europe in BiH, Mr. Drahoslav Stefanek, Ambassador Bruce Berton, Head of the OSCE Mission to BiH and Mr. Jan Snidauf, Head of Political and Economic Section in the EU Delegation to BiH. Mrs. Nives Jukic, Human Rights Ombudsman in BiH, addressed the participants, emphasizing the importance of the human rights institutions for the human rights protection in BiH in general. Also, Mr. Borislav Bojic, Chair of the Joint Committee on Human Rights, PA BiH, emphasized the positive steps taken recently by the BiH Parliamentary Assembly with regards to adoption of the Law on Amendments to the Law on Human Rights Ombudsman, and particularly in terms of ensuring financial independence, introduction of the role of the national preventive mechanism, promotion of the Institution and improving cooperation with civil society organizations.

During the conference, representatives of nine human rights institutions from Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Macedonia, Kosovo<sup>2</sup>, Albania and Turkey presented the role of their respective HRIs in judicial and administrative procedures, achievements, obstacles in exercising the mandate, as well as shortcomings stemming from their national legislation. This was followed by presentations of legal scholars who reflected on the role of the HRIs in these procedures. Also, the representatives of judiciary discussed the HRIs’ role in court proceedings, focusing on application of the Law on Prohibition of Discrimination. The conference hosted representatives of CSOs, who highlighted the particular importance to the role of the Ombudsman Institution of BiH and cooperation with CSOs.

The conference has provided an opportunity to exchange experiences among key stakeholders responsible for the human rights protection.

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<sup>1</sup> Full list of participants is attached as annex 1

<sup>2</sup> \* All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Some of the main conclusion of the conference can be summarized as follows:

- It was explicitly advocated for the use of the Paris principles relating to the status of HRIs (the Paris Principles of 1993) that envisage a wide competence in the field of human rights protection.
- The intervenor role of HRIs in judicial and administrative proceedings is very significant, and some of the countries in the region have stipulated this possibility in their national legislation. However, there are several other ways in which the HRIs may contribute to promoting human rights in these proceedings and at the same time preserve the neutral position of the HRI. These may include consultations, issuance of recommendations, expert observations, etc. Some participants opined that, for example, the Institution of Ombudsman for Human Rights of Bosnia and Herzegovina should always intervene in the proceedings in cases of strategic litigation.
- Some HRIs act as *amici curiae*, which was commended by all the participants of the conference.
- Some countries in the regions do not have clear legal provisions relating to the role of the HRIs in the judicial and administrative procedure; very often these provisions are mutually contradictory;
- When it comes to initiating procedures, as in the case of BiH, where the position of a party in the administrative procedure has been raised as problematic, it has not been clearly defined whether the Ombudsman Institution can act as a “substituent” of a party in the proceedings. This, as agreed, would not be a good solution as it would create enormous costs. Also, the laws on administrative procedure are not harmonized at different levels in BiH.
- The significance of HRIs in strategic litigation has been largely emphasized during the conference. The experience of the Commissioner for the Protection of Equality, who serves as a central institution in the protection of equality in Serbia, was shared. Namely, the representative addressed the issue of potential victims’ consent as a precondition for the initiation of the strategic litigation by the HRI. The presented case was featured by a so-called ping-pong effect in referring the case from one court to another.
- The critics concerning the inability of the HRIs to submit a request for constitutional and legislative review of laws and by-laws, as is the case of BiH, were discussed. In BiH, the Constitution does not allow citizens and the Ombudsman Institution to initiate review proceedings on constitutionality. Even in the countries which do have this possibility, HRIs are sometimes reluctant to request the review in certain cases due to various political circumstances (Montenegro).
- It is also important to emphasize the role of the HRIs as mediators that favour a friendly approach when dealing with complaints. A great number of complaints can be solved in the process of investigation, which would not require issuing recommendations and alieve the complainant from initiating court or other proceedings. This is perceived as a natural and the most important role of the HRIs. The intention should be to decrease the number of civil and administrative procedures, and to promote other democratic instruments of dealing with potential human rights violations and incidents of discrimination.
- It is important to note that some members of the academia gave a comparative overview of the enforceability of the HRIs recommendations, such as in cases of Cyprus, Estonia, Latvia, and some Scandinavian countries. With regards to BiH, there is no consensus on how to enforce the recommendations which rely on the power of HRIs authority – and not as documents which are legally binding.
- The judiciary demanded that the HRIs should be a “soft controller“of all three branches and serve as a guiding and mildly correcting mechanism of regular procedures.

- In some countries, HRIs' recommendations on human rights violations and discrimination are considered to be a test for the initiation of judicial proceedings.
- It seems to be a common issue for the countries in the region that discrimination occurs mainly in the areas of employment, in the form of age and gender-based discrimination, access to health care, national minorities, as well as length of court proceedings.
- Majority of participants welcomed the need of the Ombudsman Institution acting as a PM in BiH, which is a common practice in the region. Also, the need for inclusion of CSOs, but in a more meaningful way, was raised.
- The CSOs emphasized that the recommendations in discrimination cases are used as evidence in court proceedings, generally with a positive impact. However, sometimes it happens that the recommendations and judgements are not in line one with another, which, according to CSOs can potentially lead to lack of trust of claimants in public institutions. It should be noted, however, that this was not perceived as problematic by the judiciary, as it may happen that recommendations and court decisions differ due to various procedural, but also substantive reasons.
- The attention of participants was drawn to the forthcoming ECRI's new General Policy Recommendation No 2 on Equality Bodies, containing standards to help States to further strengthen their equality bodies. It focuses on the key elements for the establishment, independence and effective functioning of equality bodies that make a real impact in the field of equality.
- CSOs urged for more prominent and proactive role of the HRIs in issuing recommendations and participating in proceedings, as the CSOs consider the HRIs as their natural partners in protecting human rights. According to them, potential victims of discrimination consider the presence of the HRIs in their case as an encouragement.
- Also, some of the participants stressed the importance of a full and correct implementation of the Law on Prohibition of Discrimination. They further spoke about the various instates and options stipulated by this Law, which could lead to a better protection of human rights and prohibition of discrimination, including situational testing (not yet utilized in BiH) and collective lawsuits.
- There were observations on the burden of proof and its significance in discrimination cases, with a remark that it is sometimes forgotten that the reversed burden of proof principle is only to be applied in the initial stage in order to determine whether discrimination occurred, and that regular burden of proof should be respected in the further proceeding stages to all other points.