

# Legal Protection Against Discrimination in South East Europe - Regional Study -

# **Legal Protection against Discrimination in South East Europe - Regional Study -**

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# **Legal Protection against Discrimination in South East Europe - Regional Study -**



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# CONTENT

<b>FOREWORD .....</b>	<b>9</b>
 <b>PART ONE - LEGAL PROTECTION AGAINST DISCRIMINATION IN SOUTH EAST EUROPE - SYNTHESIS REPORT .....</b>	 <b>11</b>
LEGAL PROTECTION AGAINST DISCRIMINATION IN SOUTH EAST EUROPE - SYNTHESIS REPORT .....	13
<i>by Barbara LIEGL</i>	
 <b>PART TWO - NATIONAL REPORTS ON LEGAL PROTECTION AGAINST DISCRIMINATION .....</b>	 <b>77</b>
LEGAL PROTECTION AGAINST DISCRIMINATION IN ALBANIA .....	79
<i>by Arta MANDRO BALILI, Flutura KOLA TAFAJ</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN BOSNIA AND HERZEGOVINA .....	135
<i>by Maja ČOLAKOVIĆ, Ivana GRUBEŠIĆ, Fedra IDŽAKOVIĆ, Midhat IZMIRLIJA, Zlatan MEŠKIĆ</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN CROATIA .....	185
<i>by Nada BODIROGA-VUKOBRAT, Mario VINKOVIĆ, Antonija PETRIČUŠIĆ</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN KOSOVO* .....	237
<i>by Naim OSMANI, Visar MORINA</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN MACEDONIA .....	287
<i>by Margarita TSATSA NIKOLOVSKA, Atanas GEORGIEVSKI, Elena MIHAJLOVA</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN MONTENEGRO .....	341
<i>by Ivana JELIĆ, Snežana ARMENKO</i>	
LEGAL PROTECTION AGAINST DISCRIMINATION IN SERBIA .....	401
<i>by Ivana KRSTIĆ DAVINIĆ</i>	
 <b>PART THREE - CONCLUSIONS AND RECOMMENDATIONS .....</b>	 <b>459</b>

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.



## FOREWORD

Anti-discrimination is anchored in the constitution of the South East European (SEE) countries and is expressed in their substantive law. SEE countries are faced to reaffirm the strong focus on the principle of "fundamentals first" and to prioritise reforms in the key areas of rule of law, including fighting discrimination. With regards to the priorities deriving from the EU approximation process, SEE countries implemented reforms to align with the respective EU acquis Chapter 23 (Judiciary and fundamental rights) and Chapter 19 (Employment and Social Affairs). Accordingly, the legal protection against discrimination on grounds of gender, nationality, religion, sexual orientation and political affiliation is most widely guaranteed by national laws in SEE countries.

Nevertheless the enforcement of anti-discrimination legislation in practice in SEE countries is not on satisfactory level due to many complex reasons behind. This is regularly emphasized in the annual EU Progress reports where stated that the relevant anti-discrimination laws are not sufficiently implemented.

The lack of the awareness of the problems in society and justice makes the access to justice more difficult. People suffering discrimination rarely succeed in completing the complex procedure from the violation to the granted legal protection. Numerous judicial and extrajudicial institutions have to work together and have to complement one another. This comprehensive procedure of legal protection entails countless errors and requires profound knowledge of anti-discrimination cases in practice. Frequently, judicial practitioners lack the necessary methodological capacities to grant effective legal protection.

Aiming to facilitate the process of better enforcement of anti-discrimination in SEE countries, regional project "Legal protection against discrimination in SEE" was launched in 2015 with duration of one year. The project is implemented with a support from Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe-Legal reform and gathering as key partners the twelve public law faculties represented through the South East European Law School Network (SEELS), the state anti-discrimination authorities from SEE countries and the Ludwig Boltzmann Institute of Human Rights (BIM) from Vienna. The overall objective of the project was to improve the methodological capacities of relevant stakeholders to act against discrimination in SEE.

In the framework of the project, multidisciplinary regional research on anti-discrimination in SEE countries was carried out by eighteen national experts (13 professors in law, 2 judges, 1 attorney and 2 NGO representatives) and one international expert from BIM. The focus of the research was on the legal and institutional framework for combating discrimination, the role of courts, procedural aspects in discrimination cases, the role of universities, developing a culture of rights, good practice examples and statistics of Equality Bodies and Ombudsman institutions.

During the regional research the project enabled launching of a regional dialogue between relevant stakeholders and facilitated national and regional exchange of experiences and transfer of successful solutions/models on anti-discrimination. The research detected legal and institutional gaps and obstacles in the procedure of legal protection and anti-discrimination enforcement and educational programs in SEE countries and developed joint recommendations for ways forward. The regional research revealed successful solutions to support and promote anti-discrimination in SEE region effectively.

Good examples of successful legal protection mechanisms against discrimination, appropriate legal educational and training modules and relevant target groups were conceptualized and shared among different state authorities dealing with anti-discrimination issues, universities, judicial training institutions, NGOs and representatives from international organisations in the region at the Regional Conference organized end of June 2016 in Montenegro.

The papers compiled in this book present the expert's results and findings from the implemented comprehensive regional research and comparative overview of anti-discrimination in SEE countries. The book is structured in three parts: 1. Synthesis Report on Legal Protection against Discrimination in SEE; 2. National Reports; and 3. Conclusions and Recommendations. The papers assess the actual situation and progress made in the field on a national level, by identifying joint deficiencies for all SEE countries and developing regional recommendations to support these countries in enabling state authorities to improve protection against discrimination in practice and to improve the quality of education on anti-discrimination anchored in legal training at judicial educational institutions and law faculties.

*Skopje, August 2016.*

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## **PART ONE**

# **Legal Protection against Discrimination in South East Europe Synthesis Report**





# **Legal Protection against Discrimination in South East Europe**

## **Synthesis Report**

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Belgrade, June 2016

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# Table of Contents

<b>Executive Summary.....</b>	<b>17</b>
<b>1. Introduction .....</b>	<b>21</b>
Table 1: Elements of Access to Justice in Cases of Discrimination .....	21
<b>2. Legal Framework Determining Access to Justice in Discrimination Cases .....</b>	<b>23</b>
2.1 Constitutional and Specialized Legal Provisions Preventing and Prohibiting Discrimination.....	23
Table 2: Laws Preventing and Prohibiting Discrimination.....	24
2.2 Other Legal Provisions Prohibiting Discrimination .....	30
2.3 Free Legal Aid .....	30
2.4 Interim Analysis .....	31
<b>3. Stakeholders Putting Prevention and Protection of Discrimination into Practice.....</b>	<b>32</b>
3.1 Equality Bodies .....	33
3.1.1 <i>Types of Equality Bodies</i> .....	33
3.1.2 <i>Competences of Equality Bodies</i> .....	34
3.1.3 <i>Cooperation of Equality Bodies with Relevant Stakeholders in the National Context</i> .....	36
3.1.4 <i>Membership in the European Network of Equality Bodies</i> .....	38
3.2 Ombud Institutions.....	38
3.3 Public Bodies .....	40
3.4 Police.....	41
3.5 Intermediaries.....	42
3.5.1 <i>NGOs and CSOs</i> .....	42
3.5.2 <i>Lawyers</i> .....	43
3.5.3 <i>Trade Unions</i> .....	43
3.6 Interim Analysis .....	44
<b>4. The Role of the Courts in Combating Discrimination.....</b>	<b>46</b>
4.1 Quantity and Quality of Judgments in Cases of Discrimination .....	46
4.2 Capacities of Courts in Combating Discrimination.....	48
4.2.1 <i>Burden of Proof</i> .....	48
4.2.2 <i>Statistical Data as Evidence</i> .....	49
4.2.3 <i>Protection against Victimization</i> .....	49
4.2.4 <i>Determining Damages</i> .....	50
4.2.5 <i>Easy Accessibility</i> .....	50
4.3 Role of Equality Bodies and Other Organizations with a Legitimate Interest .....	50
4.4 Anti-Discrimination within Educational Programs of Judicial Training Academies ...	52
Table 3: Training Courses for Judges .....	52
4.5 Interim Analysis .....	53
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>54</b>
5.1 Courses on Anti-discrimination within the SEELS.....	54
Table 4: Courses on Anti-discrimination within the SEELS .....	55
5.2 Legal and Structural Frameworks for Combating Discrimination at Universities .....	55
5.3 Awareness of Rights of University Staff and Students .....	57
5.4 Interim Analysis .....	57

<b>6. Developing a Culture of Rights .....</b>	<b>58</b>
6.1 Achievements in Awareness Raising .....	59
6.2 Assessing the Levels of Awareness .....	60
6.3 Preventing Future Discrimination .....	62
6.4 Interim Analysis .....	63
<b>7. Conclusions and Recommendations.....</b>	<b>65</b>
7.1 Legal Framework .....	65
7.2 Equality Bodies .....	66
7.3 System Promoting the Prevention of and Protecting against Discrimination.....	67
7.4 Judicial System .....	67
7.5 Strengthening Competences and Skills of Stakeholders .....	68
7.6 Developing a Culture of Rights.....	68
<b>8. References .....</b>	<b>71</b>
8.1 National Reports .....	71
8.2 Legal Sources .....	71
8.3 Publications of Organizations .....	73
8.4 Other Sources .....	74
8.5 Interviews .....	75

## Tables

Table 1: Elements of Access to Justice in Cases of Discrimination .....	21
Table 2: Laws Preventing and Prohibiting Discrimination .....	24
Table 3: Training Courses for Judges .....	52
Table 4: Courses on Anti-discrimination within the SEELS .....	55

## Abbreviations

AIRE	Centre for Legal Assistance regarding the Protection of Human Rights in Europe from London
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSO	Civil society organization
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
Equinet	European Network of Equality Bodies
EU	European Union
FRA	European Union Agency for Fundamental Rights
GO	Governmental organization
HELP	European Program for Human Rights Education for Legal Professionals
NGO	Non-governmental organization
OSCE	Organization for Security and Co-operation in Europe
SEE	South Eastern Europe
SEELS	South East European Law School Network
UN	United Nations

## Executive Summary

This **synthesis report** was drafted within the project “Legal Protection against Discrimination in South East Europe (SEE)”, and it is based on individual reports from seven project countries covering the period of 2010 to 2015: **Albania, Bosnia and Herzegovina, Croatia, Kosovo,\* Macedonia, Montenegro and Serbia**. The aim of the country reports was to identify good practices as well as challenges and systemic obstacles for **effective legal protection against discrimination in the countries of SEE**. The national reports as well as the synthesis report are inspired by a broad **concept of access to justice** at the structural, procedural and support level, which reflects the particular needs of victims of discrimination. The resources of victims of discrimination are often limited, so special procedures and support mechanisms strengthening their position are foreseen within the legal and institutional framework preventing and prohibiting discrimination in SEE.

The synthesis report focuses on the **regional level** by identifying commonalities and differences in the legal and institutional framework and in the actual institutional set-up of the project countries, on pinpointing common gaps and challenges for an effective protection against discrimination as well as good practice examples which promote access to justice. The focus of the study is on the legal and institutional framework established by the Race Equality Directive (2000/43/EU) and the Framework Directive for Equal Treatment in Employment and Occupation (2000/78/EU). The bodies for the promotion of equal treatment as provided for in Article 13 of the Race Equality Directive labelled as **equality bodies** have been established in all the project countries by the respective specialized laws preventing and prohibiting discrimination.

This synthesis report looks into the **framework conditions and factors promoting and inhibiting access to justice for victims of discrimination in SEE**. The legal and institutional set-up is in place and operational, it complies largely with European and other international standards in the area of protecting and prohibiting discrimination. The country studies show that the solid legal basis has to still be brought to life to its full extent, so that the equality bodies and all the other stakeholders within the system of preventing and protecting against discrimination are able to effectively support victims of discrimination, to develop and implement strategies preventing discrimination and to support the development of a culture of rights, which is conducive to supporting victims of discrimination.

It is essential that the **specialized laws preventing and prohibiting discrimination** are further aligned with EU and international standards, but that the experiences of practitioners implementing these laws are taken into account when amending these laws for the purpose of improving their effectiveness in protecting victims of current and future discrimination. The current provisions on free legal aid in SEE do not provide for equal access to justice for victims of discrimination, as the eligibility criteria are rather strict and not explicitly reach out to victims of discrimination. The protection mechanisms against discrimination recognized by the specialized laws are superior to those established in laws containing general anti-discrimination provisions. Therefore, the specialized laws should always be referred to in order to guarantee a victim the most effective protection against discrimination.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

The study identifies as **key stakeholders** equality bodies, ombud institutions promoting human rights and CSOs/NGOs. As **supporting, facilitating and/or monitoring structures** the following ones are highlighted: Parliaments, ministries or government offices responsible for human rights, law enforcement such as the police and courts, institutions training judges, lawyers and police officials as well as law faculties educating future legal practitioners, and governmental bodies at the national, provincial and local level implementing special policies and measures preventing and prohibiting discrimination, but also policies and measures that should mainstream the prevention of discrimination and the promotion of equality.

**Equality bodies** are the **central players** in the system promoting the prevention of and the protection against discrimination. They need to do their work in an independent, reliable and competent way, so that potential complainants, courts and other relevant stakeholders can develop trust into them. Their capacities for supporting victims of discrimination and their powers preventing future discrimination need further strengthening.

The central role of the equality bodies within the **system of preventing and protecting against discrimination** can be seen in their attempts to establish diverse kinds of cooperation with differing aims and purposes with a broad range of stakeholders. First and foremost they cooperate with NGOs/CSOs in organizing and implementing awareness raising activities and to a lesser extent on individual complaints. NGOs/CSOs are more active in initiating strategic litigation, the results of which can feed into and can facilitate the work of the equality bodies. The cooperation with the ombud institutions can entail work on individual complaints, but also raise awareness for the impact of discriminatory incidents on groups especially susceptible to discrimination. Trade unions have cooperated with equality bodies in raising awareness for discrimination in employment and in developing handbooks on legal provisions and protection mechanisms. So far trade unions have not been identified as organizations promoting access to justice by encouraging employees to take discrimination cases either to court or to the equality body.

The **institutional set up** of the system preventing and protecting against discrimination consists of a **multitude of stakeholders**, which can contribute to **increasing the effectiveness of the system of preventing and protecting against discrimination** by more systematically exchanging information and experiences as well as identifying gaps and challenges and by making use of their resources in a more strategic and synergetic way. This more systematic cooperation of a multitude of stakeholders could result in the establishment of a monitoring mechanism, as most of these stakeholders currently collect data on issues of discrimination.

The **judicial system** is key as a **gatekeeper for access to justice** and has to absorb concepts and procedural provisions special to cases of discrimination. The body of case law in SEE has not substantially developed yet and harmonization of court practice is quite challenging as most of the relevant judgments are not accessible, neither for judges nor for other legal practitioners. Further improvement of judgments on discrimination cases can also be achieved by enhancing the capacities of equality bodies to effectively participate in court proceedings. They can increase their visibility among judges and work on their credibility by delivering good quality support to complainants and to the courts in the form of strong and well-reasoned decisions and opinions as well as tangible and effective recommendations.

The national reports have identified **certain professional groups** (such as judges, police officials, public officials, etc.), whose **competences have to be further advanced** for the purpose of **making protection against discrimination more effective**. The synthesis report shows that the capacity building needs especially of judges and other (future) legal practitioners, like law students, are very similar in SEE, which encourages a regional approach in developing and delivering such educational and training activities.

Supporting the development of a **culture of rights** enhances access to justice for victims of discrimination as it raises awareness for prejudices and stereotypes and is conducive to reporting cases of discrimination, to preventing future discrimination and to promoting a more equal society despite its diversity. Fostering a culture of rights requires a commitment by state authorities and especially by ministries responsible for education, as they determine the structural level such as curricula, textbooks and standards for teacher education influencing how principles like non-discrimination and equality are integrated into education. However, there are many other stakeholders like equality bodies, NGOs/CSOs, ombud institutions, etc. doing valuable work in promoting a culture of rights, which could be invited to enhance the coordination of their activities together with relevant state bodies in order to pave the way for more inclusive and equal societies in SEE.





# 1. Introduction

This synthesis report was drafted within the project “Legal Protection against Discrimination in South East Europe (SEE)”<sup>1</sup> and it is based on individual reports from seven project countries covering the period of 2010 to 2015: **Albania, Bosnia and Herzegovina, Croatia, Kosovo,\* Macedonia, Montenegro and Serbia.**<sup>2</sup> The aim of the national reports was to identify good practices as well as challenges and systemic obstacles for effective legal protection against discrimination in the countries of SEE. The authors developed their national reports based on guidelines drafted by the Ludwig Boltzmann Institute of Human Rights. The guidelines took major challenges identified by relevant stakeholders in the area of preventing and prohibiting discrimination in all the project countries into account. The guidelines were discussed with the researchers at a meeting in Belgrade in December 2015 and refined according to their input.

The guidelines for the national reports are inspired by a broad concept of access to justice. The concept has been adapted to the context of discrimination cases and reflects “elements of particular relevance to victims of discrimination”<sup>3</sup> (see Table 1).

Table 1: Elements of Access to Justice in Cases of Discrimination<sup>4</sup>

<b>Structures</b>	Complaint mechanisms and legislation
	Geographical distance
	Collective dimensions
<b>Procedures</b>	Fairness
	Timely resolution
	Effectiveness
	Legal advice and assistance
<b>Support</b>	(Other forms of support) <sup>5</sup>
	Awareness of rights
	A fundamental rights culture
	Accommodation of diversity <sup>6</sup>

<sup>1</sup> The Project was implemented and funded by the Open Regional Fund for South East Europe – Legal Reform of the *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>2</sup> A. Mandro Balili/F. Kola Tafaj (2016) Study “Legal Protection against Discrimination in Albania”; M. Čolaković/I. Grubešić/F. Idžaković/M. Izmirlija/Z. Meškić (2016) Study “Legal Protection against Discrimination in Bosnia and Herzegovina”; N. Bodiraga-Vukobrat/M. Vinković/A. Petričušić (2016) Study “Legal Protection against Discrimination in Croatia”; N. Osmani/V. Morina Tafaj (2016) Study “Legal Protection against Discrimination in Kosovo”; M. Tsatsa Nikolovska/A. Georgievski/E. Mihajlova (2016) Study “Legal Protection against Discrimination in Macedonia”; I. Jelić/S. Armenko (2016) Study “Legal Protection against Discrimination in Montenegro” and I. Krstić Davinić (2016) Study “Legal Protection against Discrimination in Serbia”.

<sup>3</sup> FRA (2012) Access to justice in cases of discrimination in the EU – Steps to further equality, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> (04.07.2016), p. 17.

<sup>4</sup> Source: FRA (2012) Access to justice in cases of discrimination in the EU – Steps to further equality, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> (04.07.2016), p. 17.

<sup>5</sup> “Other forms of support” have been put into brackets, as this is the only element that is not covered in this report.

<sup>6</sup> Accommodation of diversity entails adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-

These elements include support for legal advice and assistance on the individual level of a case. Besides that support for victims of discrimination can also be promoted through raising awareness for rights, through developing a culture of rights and through accommodating structures and procedures to the diversity among those discriminated against (e.g. varying language skills or disabilities). Effective access to justice must “reduce the stigma of individual complainants and increase the effectiveness of complaints”<sup>7</sup> by providing for easily accessible complaints mechanisms, by allowing for collective complaints and redress and by guaranteeing timely resolution of a case. Fairness in procedures is achieved through equality of arms, which “reflects the resources at the disposal of the complainant and the defendant”<sup>8</sup>. As these resources are often more limited on the side of the complainant – special procedures and support mechanisms strengthening the position of the complainant are foreseen.

The synthesis study focuses on the regional level by identifying commonalities and differences in the legal and institutional framework and in the actual institutional set-up of the project countries, on pinpointing common gaps and challenges for an effective protection against discrimination as well as good practice examples promoting access to justice. The focus of the study is on the legal and institutional framework established by the Race Equality Directive (2000/43/EU)<sup>9</sup> and the Framework Directive for Equal Treatment in Employment and Occupation (2000/78/EU).<sup>10</sup>

The study perceives bodies for the promotion of equal treatment as provided for in Article 13 of the Race Equality Directive, as the central institutions preventing and prohibiting discrimination. These institutions are labelled equality bodies, no matter whether they are stand-alone institutions or integrated as separate departments into ombud institutions. Equality bodies in all the project countries have been established by the respective specialized laws preventing and prohibiting discrimination. The synthesis report does not cover criminal proceedings, but only administrative proceedings in front of the equality bodies and civil procedures before the respective courts. The equality bodies of the project countries were established between 2008 and 2015, so the equality bodies and the systems preventing and protecting against discrimination are in different phases of development.

The synthesis report first looks into the legal framework determining access to justice in discrimination cases (section 2). Legal provisions stipulate the prohibited grounds and forms of discrimination, the scope, the mechanisms for complaining and for redress, and measures

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ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from a particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviours of people) of groups that experience inequality. See: A. Terlouw, B. Liegl, K. Wladasch, N. Crowley (2011) Access to justice – a sociological study on cases of discrimination in the EU – FRA D/SE/10/05. Final Report. Human European Consultancy in co-operation with the Ludwig Boltzmann Institute of Human Rights, Utrecht and Vienna (unpublished).

<sup>7</sup> FRA (2012) Access to justice in cases of discrimination in the EU – Steps to further equality, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> (04.07.2016), p. 17.

<sup>8</sup> FRA (2012) Access to justice in cases of discrimination in the EU – Steps to further equality, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> (04.07.2016), p. 8.

<sup>9</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML> (07.07.2016).

<sup>10</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>, (07.07.2016).

aiming at achieving equality of arms such as special procedures and support mechanisms in the form of free legal aid. The following section (section 3) explores the competences and potentials of various stakeholders within the system of preventing and protecting against discrimination for supporting individuals in gaining access to justice and achieving effective enforcement of the right to non-discrimination. It specifically focuses on equality bodies, which are the key players in the system of preventing and protecting against discrimination. Furthermore, the section analyses to what extent and in which way the various stakeholders cooperate with the aim of improving the effectiveness of the overall system preventing and protecting against discrimination. The ensuing section (section 4) assesses the role of courts in guaranteeing effective access to justice for complainants by looking into the application of special rules of procedure as well as into the possibilities of equality bodies and other legal entities for strengthening the position of the complainant during the proceedings involving discrimination cases. The synthesis report also looks into the possibilities for judges and law students (section 5), which are potential future legal practitioners, to further develop their competences on the legal and institutional framework preventing and prohibiting discrimination and on various aspects intrinsic to discrimination cases. The next section (section 6) analyses which stakeholders implement what kind of activities aiming at developing a culture of rights, which is conducive to reporting cases of discrimination, to preventing future discrimination and to promoting a more equal society despite its diversity and identifies the gaps that need to be filled. The synthesis report ends with conclusions and recommendations (section 7).

## 2. Legal Framework Determining Access to Justice in Discrimination Cases

This section focuses on the legislation determining access to justice for individuals who have experienced discrimination. Legal provisions define dimensions within all three main elements of access to justice in discrimination cases (see Table 1). They provide for structures – e.g. complaints mechanisms, for procedures, which are to be timely, fair and effective, and for support, which encompasses legal advice and assistance, raising awareness of rights and preventing discrimination. The legal provisions described below establish the framework for the actual support of current victims of discrimination, for preventing future discrimination and for improving future support for victims of discrimination.

### 2.1 Constitutional and Specialized Legal Provisions Preventing and Prohibiting Discrimination

All the project countries have put into force constitutional provisions on prohibition of discrimination, thus specialized laws on preventing and prohibiting discrimination were adopted between 2008 and 2015. The most recently adopted one is the Law on the Protection from Discrimination<sup>11</sup> by the legislator of **Kosovo**.<sup>\*</sup> Some of the legislators have opted for defining purposes of the law that go beyond protection and prevention of discrimination by explicitly referring to equality or equality of opportunities (e.g. **Albania** and **Montenegro**).

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<sup>11</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/Law No. 05/L-021 on the Protection from Discrimination, 28 May 2015.

<sup>\*</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

All the specialized laws preventing and prohibiting discrimination establish bodies for the promotion of equal treatment (equality bodies) responsible for achieving the purposes specified in the respective legal acts (see section 3). All these institutions cover a much wider range of grounds and areas than specified by the Race Equality Directive, which in Article 13 specifies that “Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”. All of the equality bodies – as also provided for in Article 13(2)

- provide independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conduct independent surveys concerning discrimination, and
- publish independent reports and make recommendations on any issue relating to such discrimination.

Table 2: Laws Preventing and Prohibiting Discrimination

Grounds	Scope	Forms of discrimination
<b>Albania:</b> Law on Protection from Discrimination (2010) <sup>12</sup>		
gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, disability, affiliation with a particular group or for any other reason (Art 1)	advertisements and announcements (Art. 8), right to vote (Art. 9), employment (Art. 12-16), education (Art. 17-19), goods and services (incl. health, social services, housing, educational institutions, banking, leisure facilities, transport, services of free professions) (Art. 20-21)	direct discrimination, indirect discrimination, discrimination because of association (assumed and associative discrimination), harassment, denial of a reasonable accommodation, victimization, instruction to discriminate (Art. 3) Not specified by law: multiple discrimination
<b>Bosnia and Herzegovina:</b> Law on Prohibition of Discrimination (2009) <sup>13</sup>		
race, skin color, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance (Art 2)	all fields but specifically employment, work and working conditions, education, science and sports, social protection, health protection, trainings, judiciary and administration, housing; public information and the media, membership in professional organizations, goods and services designated to public and public places, performing entrepreneurship, participation in cultural and	direct discrimination, indirect discrimination (Art. 3), harassment, sexual harassment, mobbing, segregation, instruction to discriminate, assistance to others in discrimination, incitement to discriminate (Art 4), reasonable accommodation (Art. 5), victimization (Art. 18) Not specified by law: discrimination by association and multiple discrimination

<sup>12</sup> Albania/Law No. 10221 on Protection from Discrimination /04.02.2010.

<sup>13</sup> Bosnia and Herzegovina/Law on Prohibition of Discrimination, Official Gazette of B&H, 59/09.

	art creations, equal participation of all citizens in public life, families, rights of a child (Art. 6)	
<b>Croatia:</b> Anti-Discrimination Act (2008) <sup>14</sup>		
race, ethnic affiliation or color, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity and expression, sexual orientation, discrimination on the ground of association, discrimination based on assumed characteristic or assumed affiliation to a specific group (Art. 1)	especially in the following areas: work and working conditions, access to self-employment and occupation (incl. selection criteria, recruiting and promotion conditions), access to all kinds of vocation guidance, vocational training, professional improvement and retraining, education, science and sports, social security (incl. social welfare, pension, health and employment insurance), health protection, judiciary and administration, housing, information of the public and media, access to goods and services and their provision, membership and activities in trade unions, civil society organizations, political parties or any other organizations, and access to and participation in cultural and artistic creation (Art. 8)	direct and indirect discrimination (Art. 2), harassment and sexual harassment (Art. 3), failure to make reasonable accommodation (Art. 4), instruction to discriminate (Art. 4), segregation (Art. 5), victimization (Art. 7), more severe forms of discrimination (e.g. multiple, repeated, continued discrimination) (Art. 6)
<b>Kosovo*:</b> Law on the Protection from Discrimination (1915) <sup>15</sup>		
nationality or in relation to any community, social origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds (Art. 1)	all areas of life, especially related to conditions for access to employment, self-employment and occupation, access to all types and levels of vocational guidance, vocational training, advanced vocational training and re-qualifications, conditions of employment and working conditions, membership and involvement in organizations of workers or employers or any organization whose members exercise a particular profession, social	direct discrimination, indirect discrimination, harassment, incitement to discrimination, victimization, segregation, discrimination based on association, failure of a reasonable adaptation/accommodation for persons with disabilities, discrimination based on perception, multiple discrimination (Art. 4), severe forms of discrimination (more than one ground, committed more than once, has lasted for a long period of time or had harmful consequences especially for the victim) (Art. 5)

<sup>14</sup> Croatia/Anti-Discrimination Act, Official Gazette 85/2008.

<sup>15</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/Law No. 05/L-021 on Protection from Discrimination, 28 May 2015.

	protection, social advantages and social amenities, education, access to housing, which is available to the public, and the access to other forms of property, access to and supply of goods and services which are available to the public, fair and equal treatment in court proceedings and all other authorities administering justice, access and participation in science, sports, art, services and cultural activities, personal insurance (Art. 2)	
<b>Macedonia:</b> Law on Prevention of and Protection against Discrimination (2010) <sup>16</sup>		
sex, race, color, gender, belonging to a vulnerable group, ethnic origin, language, nationality, social background, religion or religious beliefs, other types of beliefs, education, political affiliation, personal or social status, mental and physical impediment, age, family or marital status, property status, health condition or any other basis anticipated by a law or ratified international agreement (Art. 3)	work and labor relations, education, science and sport, social security, including the field of social protection, pension and disability insurance, health insurance and health protection, judiciary and administration, housing, public informing and media, access to goods and services, participating and acting in syndicate, political parties, associations of citizens and foundations or any other organizations based upon participation, culture and other areas determined by law (Art. 4)	direct discrimination, indirect discrimination (Art. 6), harassment and humiliating, sexual harassment treatment (Art. 7), victimization (Art. 10), discrimination of persons with mental and physical impediment treatment (Art. 8), invoking and stimulating discrimination treatment (Art. 9), discrimination in the provision of goods and services (Art. 11) and severe forms of discrimination (multiple, repeated, prolonged discrimination or discrimination severely striking the discriminated person with its consequences) (Art. 12) Not specified by law: assumed and associative discrimination, reasonable accommodation for persons with disabilities
<b>Montenegro:</b> Law on Prohibition of Discrimination (2010) <sup>17</sup>		
race, color of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age,	use of facilities/buildings and areas in public use (Art. 10), goods and service delivery (Art. 11), education and vocational training (Art. 15), labor (Art. 16), discrimination based on health conditions (Art. 12), based on age (Art. 13), based on gender identity and sexual	direct discrimination, indirect discrimination (Art. 2), inciting, helping, giving instructions as well as announced intent to discriminate specific person or group of persons (Art. 2), harassment and sexual harassment, victimization (Art. 4), segregation (Art. 9) and hate speech (Art. 9a), sever forms of discrimination (multiple, repeated,

<sup>16</sup> Macedonia/ Law on Prevention of and Protection against Discrimination, adopted on April 13, 2010, Official Gazette of the Republic of Macedonia, 50/2010...31/2016.

<sup>17</sup> Montenegro/Law on Prohibition of Discrimination, Official Gazette of Montenegro, 46/10 and 18/14.

material status, marital or family status, membership in a group or assumed membership in a group, political party or other organization as well as other personal characteristics (Art. 2)	orientation (Art. 19), political discrimination (Art. 14), racial discrimination and discrimination based on religion and belief (Art. 17), discrimination of persons with disability (Art. 18)	extended discrimination, dissemination through public media or in public places, particularly grave consequences for discriminated person, group of persons or their property) (Art. 20) Not specified by law: assumed and associative discrimination, reasonable accommodation for persons with disabilities
<b>Serbia:</b> Law on Prohibition of Discrimination (2009) <sup>18</sup>		
race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics (Art. 2)	all areas of life, following are specified: in the course of proceedings conducted before public administration organs (Art. 15), sphere of labor (Art. 16), provision of public services and in the use of premises and spaces (Art. 17), sphere of education and professional training (Art. 19), prohibition of religious discrimination (Art. 18), discrimination on the grounds of gender (Art. 20), on the grounds of sexual orientation (Art. 21), on the grounds of age (Art. 23), on the grounds of political party or trade union membership (Art. 25), on the grounds of health (Art. 27), discrimination of children (Art. 22), discrimination against national minorities (Art. 24), discrimination of disabled persons (Art. 26)	direct discrimination (Art. 6), indirect discrimination (Art. 7), violation of the principle of equal rights and obligations (Art. 8), instruction to discriminate and victimization (Art. 9), association for the purpose of discriminating (Art. 10), hate speech (Art. 11), harassment and humiliating treatment (Art. 12), severe forms of discrimination <sup>19</sup> (e.g. advocating discrimination through public organs, multiple or intersecting, repeated, extended discrimination, discrimination that results in severe consequences for the individual discriminated against, other persons or property) (Art. 13), members of their families or persons close to them (Art. 2) Not specified by law: reasonable accommodation for persons with disabilities

The specialized laws preventing and prohibiting discrimination include most of the times open lists of protected grounds (except for **Croatia**) and a broad range of areas, in which discrimination is prohibited. The constitutional provisions on prohibiting discrimination usually explicitly identify fewer protected grounds than the specialized laws. In **Albania, Bosnia and Herzegovina, Croatia and Kosovo\*** the Constitutions list grounds not included in the specialized laws. This is also to some extent true for **Serbia**, although the Constitution protects any ground, but then highlights particular grounds. Grounds typically only specified

<sup>18</sup> Serbia/ Law on Prohibition of Discrimination, Official Gazette of the Republic of Serbia, 22/2009.

<sup>19</sup> This article also includes the following as severe forms of discrimination: causing and inciting inequality, hatred and enmity on the grounds of national, racial or religious affiliation, language, political opinions, gender, gender identity, sexual orientation or disability; advocating or exercising discrimination on the part of state organs or in the course of proceedings conducted before state organs; advocating discrimination through public organs; slavery, trafficking in human beings, apartheid, genocide, ethnic cleansing, as well as advocating any of the above.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.



in the Constitutions, but not in the specialized laws, include birth, property, economic conditions and characteristics related to national minorities.

Ground and scope wise, these laws go way beyond the Race Equality Directive (2000/43/EU) and the Framework Directive for Equal Treatment in Employment and Occupation (2000/78/EU). There are two exceptions – the Law on Prohibition of Discrimination of **Bosnia and Herzegovina**, as it does not explicitly include age and disability as protected grounds<sup>20</sup> as well as the Law on Prevention of and Protection against Discrimination of **Macedonia**, which does not overtly include sexual orientation as a protected ground,<sup>21</sup> although both laws provide for an open list of grounds.

Many of the specialized laws in the project countries define grounds of discrimination that have not been specified by the respective EU directives, but have been established through case law – such as discrimination based on association<sup>22</sup> or discrimination based on assumed characteristics or assumed affiliation to a specific group.<sup>23</sup> Although these grounds could be assumed to be covered by most of the project countries' open lists of grounds,<sup>24</sup> the respective legislators have explicitly defined them as grounds or sometimes forms of discrimination.

The specialized laws in all project countries contain definitions of the following prohibited forms of discrimination – direct and indirect discrimination, harassment and instruction to discrimination,<sup>25</sup> as well as of victimization.<sup>26</sup> Reasonable accommodation for persons with disabilities as provided for in Article 5 of the Employment Equality Directive is not foreseen in the specialized laws preventing and prohibiting discrimination of **Macedonia**,

<sup>20</sup> European Commission (2015) Commission Staff Working Document: Bosnia and Herzegovina: 2015 Report, COM (2015) 611 final, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_bosnia\\_and\\_herzegovina.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf) (26.06.2016), p. 24.

<sup>21</sup> European Commission (2015) Commission Staff Working Document: Macedonia: 2015 Report, COM (2015) 611 final, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_the\\_former\\_yugoslav\\_republic\\_of\\_macedonia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf) (26.06.2016), p. 59.

<sup>22</sup> Established as a ground of discrimination by the European Court of Justice, see: ECJ/Judgment of the Court (Grand Chamber) of 17 July 2008, *S. Coleman v Attridge Law and Steve Law* (2008/C 223/08), available at: [http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AAJ.C\\_.2008.223.01.0006.01.ENG](http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AAJ.C_.2008.223.01.0006.01.ENG) (26.06.2016).

<sup>23</sup> European Commission (2014) Report from the Commission to the European Parliament and the Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') (COM/2014/02 final), available at: <http://eur-lex.europa.eu/legal-content/ga/TXT/?uri=CELEX:52014DC0002> (26.06.2016), p. 10.

<sup>24</sup> For more background information on assumed characteristics, see: L. Vickers (2006) Religion and Belief Discrimination in Employment – the EU Law, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, Luxembourg, available at: <http://ec.europa.eu/social/BlobServlet?docId=1689&langId=en> (26.06.016), p. 12.

<sup>25</sup> Articles 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive'), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML> (07.07.2016) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>, (07.07.2016).

<sup>26</sup> Article 9 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and Article 11 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive').

**Montenegro and Serbia.** Legislators in all project countries – except for **Albania** and **Bosnia and Herzegovina** – have explicitly defined severe forms of discrimination, specifications which were not included in the respective EU directives.

Quite a broad range of occurrences of discrimination are listed under the label of severe forms of discrimination: multiple/intersecting discrimination, repeated discrimination, discrimination lasting for a long period of time, discrimination with grave consequences for the discriminated person, group of persons or their property and dissemination of discrimination through public media or in public places. The legislator of **Serbia** included additional discriminatory behaviours as severe discrimination (Art. 13 Law on Prohibition of Discrimination): causing and inciting inequality, hatred and enmity on characteristics related to ethnic origin and race, gender, gender identity and sexual orientation, disability, religion and belief, advocating or exercising discrimination on the part of state organs or in the course of proceedings conducted before state organs and slavery, trafficking in human beings, apartheid, genocide, ethnic cleansing, as well as advocating for any of these atrocities. When discrimination can be classified as severe, equality bodies and courts should take this into account when formulating their recommendations or respectively determining the amount of compensation.

Affirmative or special measures, which aim at protecting and promoting the rights of individuals and groups who are in an unequal position, are either defined as non-discriminatory or listed as exceptions to discrimination as by the legislators of **Bosnia and Herzegovina** and **Croatia**. The Constitutions of **Kosovo**,\* **Montenegro** and **Serbia** also explicitly mention such measures as instruments for promoting equality. Almost all legislators – except for **Serbia** and **Macedonia** – defined these measures as temporary, i.e. they have to be terminated when the goal of the measure established has been achieved. The Law on Prevention of and Protection against Discrimination<sup>27</sup> of **Macedonia** explicitly lists for which vulnerable groups and in which specific areas affirmative measures can be introduced (Art. 15).

In many aspects the specialized laws preventing and prohibiting discrimination go beyond the minimum standards specified by the EU directives. However, the European Union Progress Reports on some of the project countries have identified room for improvement. For **Montenegro** the sanctions were seen as too low and therefore not dissuasive enough,<sup>28</sup> for **Serbia** the European Commission pointed at the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the obligation to provide reasonable accommodation for employees with disabilities.<sup>29</sup> The authors of the report on

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>27</sup> Macedonia/ Law on Prevention of and Protection against Discrimination, adopted on April 13, 2010, Official Gazette of the Republic of Macedonia, 50/2010...31/2016.

<sup>28</sup> European Commission (2015) Commission Staff Working Document: Montenegro: 2015 Report, COM (2015) 611 final, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/-/2015/20151110\\_report\\_montenegro.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/-/2015/20151110_report_montenegro.pdf) (26.06.2016), p. 46.

<sup>29</sup> European Commission (2013) Commission Staff Working Document: Serbia 2013 Progress Report, COM(2013) 700 final, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/sr\\_rapport\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/sr_rapport_2013.pdf) (07.07.2016), pp. 36, 45; European Commission (2014) Serbia 2014 Progress Report, COM(2014)700 final, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20140108-serbia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf) (07.07.2016), p. 44, 54; European Commission (2015) Commission Staff Working Document: Serbia: 2015 Report, COM (2015) 211 final, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf) (07.07.2016), p. 56.

**Bosnia and Herzegovina** highlighted that the definition of the shifting of the burden of proof was not in line with the respective EU directives.<sup>30</sup>

## 2.2 Other Legal Provisions Prohibiting Discrimination

A broad range of laws have been identified in some of the project countries (e.g. **Albania**, **Montenegro** and **Serbia**), which contain non-discrimination provisions on top of those of the specialized laws preventing and prohibiting discrimination. These provisions further specify the overall tone set in the Constitutions and raise awareness for the right to non-discrimination in many areas of everyday life. Among these laws are e.g. laws protecting the rights of persons with disabilities, promoting gender equality, protecting the rights of children, protecting the rights of national minorities, family law, labour law, laws in the areas of social services, education, consumer protection, healthcare, media and sports, laws on civil servants and the police as well as criminal codes.

The existence of a broad range of different laws containing anti-discrimination provisions might sometimes make it more difficult for law enforcement institutions to apply the adequate legal provisions due to a lack in clear procedural rules. Sometimes neither of the legal provisions might be applied due to a negative conflict of competences among relevant stakeholders. Furthermore, the provisions of the more general laws might not be harmonized with the provisions of the specialized laws preventing and prohibiting discrimination, which stipulate superior protection mechanisms for victims of discrimination (e.g. shift of the burden of proof, protection against victimization). These varying levels of protection negatively influence access to justice, as they make structures and procedures less effective.

## 2.3 Free Legal Aid

Free legal aid could play an important role in guaranteeing access to justice for potential victims of discrimination, as they very often belong to socially marginalized and therefore economically deprived groups. All the project countries, except for **Serbia**, have adopted special laws on free legal aid. The legal provisions do neither explicitly exclude victims of discrimination from legal aid nor do they specifically recognize victims of discrimination as potential beneficiaries. The criteria for gaining access to legal aid seem to be very limiting (e.g. having no property, being insolvent, being a beneficiary of social benefits) and not promoting access for victims of discrimination. Some of the legal requirements such as the submission of a large number of documents or being a beneficiary of social benefits can result in indirect discrimination as some of the vulnerable groups – such as Roma – are less likely to fulfil these requirements due to not being registered and therefore not gaining access to the necessary documents, which also form the basis for applying for social benefits.

Not only the criteria for gaining access to free legal aid, but also the structures established for providing legal aid determine access to justice for victims of discrimination. The State Commission for Legal Aid in **Albania** plays a central role, as it sets and reviews the legal aid standards, concludes service agreements with lawyers, legal offices and NGOs providing legal aid, takes care of the professional training of lawyers providing legal aid and determines the cases in which legal aid is provided. When free legal aid is offered by state bodies, like in **Bosnia and Herzegovina**, these institutions might face a conflict of interests when representing a complainant, who alleges discrimination by a state body.

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<sup>30</sup> M. Čolaković/I. Grubešić/F. Idžaković/M. Izmirlija/Z. Meškić (2016) Study "Legal Protection against Discrimination in Bosnia and Herzegovina", section 4.5.

There are no official statistics available on how many victims of discrimination have gained access to free legal aid as stipulated by the laws on free legal aid. So far no victims of discrimination seem to have gained access to free legal aid in order to be able to take their cases to court. The implementation gap of the laws providing for legal aid when it comes to victims of discrimination is in most of the project countries filled by NGOs and in some also by law clinics. They offer legal counselling, legal assistance and legal aid, which is in case of NGOs mostly donor funded. In some countries, e.g. **Albania** and **Bosnia and Herzegovina**, independent bodies, GOs and NGOs have started formalizing their cooperation on providing for free legal aid by signing memoranda of understanding aiming at improving institutional coordination.

## 2.4 Interim Analysis

The specialized laws preventing and prohibiting discrimination in all the project countries establish bodies supporting victims of discrimination and doing awareness raising work. They cover a much broader scope and many more grounds than specified in EU directives 2000/43/EC and 2000/78/EC. However, **Bosnia and Herzegovina** and **Macedonia** lack some of the grounds specified in directive 2000/78/EC – age and disability respectively sexual orientation. They are implicitly covered, as the specialized laws in both countries provide for an open list of grounds, however when not explicitly mentioned, the grounds will not be covered in strategic documents promoting equality and preventing discrimination. Many of the grounds listed in the laws are contained in international human rights documents and also in the Constitutions of the project countries. The question is, whether the listing of different grounds at different hierarchical levels of the legal system influences the level of protection. Furthermore, there is a lack in case law defining some of the grounds, which are currently not well defined and understood in the context of discrimination cases.

The specialized laws already build on the case law that has established forms and grounds of discrimination not explicitly defined in the respective EU directives and integrate various forms of severe discrimination. Still there are some areas in some of the countries, in which further harmonization with the respective EU directives is necessary – e.g. indirect discrimination, reasonable accommodation, shifting of the burden of proof. Beyond these aspects that still need to be harmonized, the experiences of practitioners implementing the specialized laws is of great importance and value when amending these laws, in order to make legal provisions even more effective in protecting victims of current and future discrimination.

The legal provisions set a frame for supporting individual victims of discrimination in gaining equal access to the structures and procedures and for increasing the effectiveness of a complaint of an individual. The current legal provisions on free legal aid in the project countries do not provide for equal access in regard to court proceedings, as the eligibility criteria are rather strict and not explicitly reaching out to victims of discrimination. The protection mechanisms recognized by the specialized laws are superior to those established in laws containing general anti-discrimination provisions. Although it raises awareness for the right to non-discrimination, when many laws prohibit discrimination, the specialized laws should always be referred to in order to guarantee a victim the most effective protection against discrimination.

### 3. Stakeholders Putting Prevention and Protection of Discrimination into Practice

The legal set-up of the institutional framework for combating discrimination as well as the practical implementation are key for guaranteeing access to justice for individuals that have experienced discrimination, but also for developing policies and measures targeting the structural levels of discrimination with the aim of promoting equality and preventing future discrimination. The institutional set-up of the system preventing and protecting against discrimination consists of a multitude of stakeholders, which to varying extents promote and support different elements of access to justice at the levels of structure, procedure and support (see Table 1). At the centre of the system are the equality bodies, which are established by the specialized laws preventing and prohibiting discrimination and which can be “high potential actors in terms of combating discrimination and promoting equal opportunities”.<sup>31</sup> This potential rests with their possibilities to

- “empower and assist individual people who experience discrimination;
- enhance organisational performance in the public and private sectors through investment in effective equality and non-discrimination systems;
- enhance policy and legislation through the inclusion of an appropriate equality and non-discrimination perspective;
- stimulate a wider framework of institutions to engage in promoting equality and combating discrimination;
- influence public attitudes towards a greater commitment to equality and non-discrimination”.<sup>32</sup>

Some of these potentials can only be achieved in cooperation with other stakeholders, most of which are also pointed out in the specialized laws. Among them are the legislators and the executive bodies responsible for developing respectively implementing and monitoring the implementation of anti-discrimination legislation and policies, which should be informed by the experience and expertise of the equality bodies. On top of that, these state institutions also have an obligation to pro-actively promote equality and non-discrimination which include the development of a culture of rights within the general population. People should be aware of discriminations and inequalities so that they understand equality legislation, know about mechanisms of redress and are supportive of individuals exercising their rights, i.e. the right to non-discrimination.<sup>33</sup>

Other key stakeholders are NGOs/CSOs, who are valuable partners in empowering and assisting individuals who have experienced discrimination as well as in promoting equality and preventing discrimination and in influencing the public attitudes with the aim of increasing awareness for discrimination issues. Their support of individuals who have

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<sup>31</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch, K. Yesilkagit (2010) Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC: Synthesis Report, Utrecht and Vienna, available at: <http://ec.europa.eu/social/BlobServlet?docId=6454&langId=en> (26.06.2016), p. 177.

<sup>32</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch, K. Yesilkagit (2010) Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC: Synthesis Report, Utrecht and Vienna, available at: <http://ec.europa.eu/social/BlobServlet?docId=6454&langId=en> (26.06.2016), p. 45.

<sup>33</sup> A. Terlouw, B. Liegl, K. Wladasch, N. Crowley (2011) Access to justice – a sociological study on cases of discrimination in the EU – FRA D/SE/10/05. Final Report. Human European Consultancy in co-operation with the Ludwig Boltzmann Institute of Human Rights, Utrecht and Vienna (unpublished).

experienced discrimination is reflected in the different options the specialized laws prescribe for supporting complainants in court. Most of the mandates of equality bodies defined in the respective specialized laws include some kind of cooperation with NGOs/CSOs. Stakeholders that are mentioned in the specialized laws preventing and prohibiting discrimination to varying degrees, are e.g. lawyers, trade unions and inspectors<sup>34</sup> and the police.

The following section looks into the mandates, competences and activities of the above mentioned stakeholders as well as into their potentials for cooperation and for taking on a role in the overall system of preventing and protecting against discrimination.

### 3.1 Equality Bodies

In all the project countries equality bodies play an essential role in promoting equal treatment of all, which includes awareness raising and developing preventive measures against discrimination, and in handling individual cases of discrimination. By dealing with these individual cases equality bodies support victims of discrimination in gaining access to justice. Equality bodies can contribute to rectifying the situation by putting an end to the discriminatory behaviour or situation, to gaining access to compensation for both material and immaterial damages and to preventing similar discrimination in the future by issuing recommendations going beyond the individual case aiming at structural, legal or organizational changes.

#### 3.1.1 Types of Equality Bodies

There are two different types of equality bodies – the stand alone equality bodies that have been newly established for the purpose of promoting equality and combating discrimination, these can be found in **Albania, Macedonia and Serbia**, and the equality bodies that are integrated into existing institutions, namely ombud institutions like in **Bosnia and Herzegovina, Croatia, Kosovo\*** and **Montenegro**. In **Croatia**, the Ombudsman is the central body in charge of combating discrimination. The institution is part of a quite complex system of independent institutions offering services to victims of discrimination. In addition to the Ombudsman, there is the Ombudsperson for Gender Equality, who is responsible for complaints on the grounds of gender, sexual orientation, marital or family status, gender identity and expression, the Ombudsperson for Persons with Disabilities, who deals with cases of discrimination on the ground of disability and in certain cases state of health and the Ombudsperson for Children, who covers discrimination affecting children. In some of the project countries – **Bosnia and Herzegovina, Croatia, Kosovo\*** and **Serbia** – regional offices facilitate access for citizens not living in the capital.

The ombud institutions of **Bosnia and Herzegovina** and **Croatia** are accredited National Human Rights Institutions of A status, which means that they comply with the standards set by the Paris Principles<sup>35</sup> and with Article 13 of the Race Equality Directive specifying that

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<sup>34</sup> They are explicitly mentioned in the Law on Prohibition of Discrimination of **Montenegro**: Inspection control with respect to discrimination in the field of labor and employment, occupational safety, health care, education, building and construction, traffic, tourism and other fields, shall be performed by inspections competent for those fields, in accordance with the law (Art. 32).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* Ibid.

<sup>35</sup> UN/Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> (05.07.2016).

equality bodies should be able to implement their tasks independently.<sup>36</sup> The specialized laws of **Albania** and **Serbia** establish qualification criteria for the respective Commissioner, list incompatibilities and provide safeguards against arbitrary dismissal, as do the laws on the ombud institutions of **Kosovo\*** and **Montenegro**. The specialized law of **Macedonia** is silent about functions incompatible with the function of a Commissioner.

### 3.1.2 Competences of Equality Bodies

The specialized laws on preventing and prohibiting discrimination equip the equality bodies with a set of quite powerful instruments for supporting victims of discrimination in getting their situation rectified. The laws also provide for various means on how equality bodies can target both public institutions and private organizations to recommend quick remedies against discrimination as well as strategies on how to prevent future discrimination. Last but not least, the laws also pave the way for cooperation of the equality bodies with a broad range of key stakeholders in the system of preventing and protecting against discrimination.

All the equality bodies can receive and investigate complaints, proceedings which are guided by administrative procedure rules,<sup>37</sup> and inform complainants about their right to protection from discrimination and the legal means available. Submitting a complaint and getting support from an equality body is free of charge and therefore more easily accessible than court proceedings.

Equality bodies in all project countries – except for the Commission for Protection against Discrimination of **Macedonia** – are legally allowed to offer mediation/(re-)conciliation procedures. Although the Law on Prevention of and Protection against Discrimination does not provide for mediation, the Commission of **Macedonia** has solved five<sup>38</sup> cases via mediation. Such procedures can only be recommended and carried out with the parties' consent. In some countries the specialized laws preventing and prohibiting discrimination refer to general legal provisions on mediation, which gives guidance to the equality bodies on how to implement mediation proceedings. In **Bosnia and Herzegovina**, the provisions of the Law on Prohibition of Discrimination and the Law on the Mediation Procedure<sup>39</sup> are not in line with each other,<sup>40</sup> and the Institution of the Human Rights Ombudsman is not recognized as a potential mediator. The Commissioner for Protection of Equality in **Serbia** established a mediation model based on the concept of restorative justice, as the cases revolve around emotional or other injury inflicted by one party onto the other. The Commissioner established a pool of mediators, which have been specifically trained and fulfil certain quality and incompatibility criteria (i.e. they cannot be staff members of the

<sup>36</sup> See also principle 5 of CoE/ECRI General Policy Recommendation N°2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level, adopted by ECRI on 13 June 1997, available at: [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N2/Recommendation\\_2\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N2/Recommendation_2_en.asp) (05.07.2016).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>37</sup> For Croatia and Macedonia it was explicitly mentioned that the principle of the shift of the burden of proof also applies to administrative proceedings, i.e. to procedures before equality bodies.

<sup>38</sup> Macedonia/Source: Commission for Protection against Discrimination, March 2016.

<sup>39</sup> Bosnia and Herzegovina/Law on Mediation Procedure, Official Gazette 37/04.

<sup>40</sup> Bosnia and Herzegovina/Interview with the representative of B&H Ombudsperson.

Commissioner). The mediators must not be morally neutral towards discrimination, but must quite clearly show that it is morally unacceptable.<sup>41</sup>

When mediation fails or is not accepted by either of the two parties and the complaint falls within the mandate of the equality body, then the complaint is investigated and information and documents are requested from the party against which the complaint has been filed. Some equality bodies (**Croatia** and **Kosovo**\*) can impose administrative sanctions, when respondents do not provide the information and/or documents requested within a given period of time.

When the complaint has been thoroughly investigated and an equality body establishes discrimination, it issues recommendations aiming at rectifying the situation of the complainant and sometimes preventing similar forms of discrimination in the future. Although the recommendations are not legally binding, quite a few of the equality bodies have the possibility of putting pressure on the person/organization that has been addressed by the recommendation. The Institution of the Human Rights Ombudsman of **Bosnia and Herzegovina** can initiate misdemeanour proceedings; the Commissioner of Protection against Discrimination of **Albania** can impose administrative sanctions in such cases. The Commission for Protection against Discrimination of **Macedonia** can start a procedure in front of a competent body for determining its responsibility. The Commissioner for Protection of Equality of **Serbia** can issue a warning and if this warning is not acted upon, the Commissioner can inform the public.

None of the equality bodies in the project countries has so far established a comprehensive and systematic follow-up procedure to the recommendations issued. A systematic assessment of recommendations could result in establishing which recommendations work in which contexts so that future recommendations can be systematically informed by lessons learnt. Following up on recommendations is easier, when they are tangible, enforceable and workable as stressed by the Commission for Protection against Discrimination of **Macedonia**<sup>42</sup> and the Protector of Human Rights and Freedoms of **Montenegro**.<sup>43</sup> In **Kosovo**,\* the Ombudsperson Institution has intensified the coordination of the implementation of its recommendations with state institutions, including the police.<sup>44</sup> As a result of these efforts, the level of implementation has increased by 50% during the second half of 2015 compared to 2014.<sup>45</sup>

Almost all equality bodies are explicitly obliged by the specialized laws preventing and prohibiting discrimination to collect and analyse data – either case related and/or pertaining

<sup>41</sup> Commissioner for the Protection of Equality, Regular Annual Report for 2015, Belgrade, 15 March 2016, available at: [http://www.ravnopravnost.gov.rs/jdownloads/files/regular\\_annual\\_report\\_of\\_the\\_cpe\\_2014\\_spojeno.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/regular_annual_report_of_the_cpe_2014_spojeno.pdf) (07.07.2016), p. 73.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>42</sup> M. Tsatsa Nikolovska/A. Georgievski/E. Mihajlova (2016) Study "Legal Protection against Discrimination Macedonia", section 4.7.

<sup>43</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 4.7.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>44</sup> This improvement especially within the police might also be connected to the issuance of Instruction No. 00/2015, which obliges police units to cooperate and support the Ombudsperson Institution in performing its duties (see: N. Osmani/V. Morina Tafaj (2016) Study "Legal Protection against Discrimination in Kosovo", section 2.2.4).

<sup>45</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/OI Media Statement, December 30<sup>th</sup> 2015.



to discrimination in general. These data are an important basis for displaying evidence in decisions/opinions as well as in court cases, for doing awareness raising activities, answering questions especially posed by media and for drafting annual reports.

All the equality bodies submit their annual reports to Parliament, which discusses the reports and can decide on resolutions based on issues identified in these reports. In **Serbia**, the Annual Report of the Commissioner for Protection of Equality is discussed by the Committee on Human and Minority Rights and Gender Equality of the National Assembly. The Committee drafts conclusions containing the most important general recommendations listed in the Annual Report. After the conclusions have been adopted by the National Assembly, the general recommendations selected become part of the responsibility of the National Assembly.

Equality bodies can take a pro-active role by launching *ex officio* investigations (an instrument increasingly used by equality bodies in e.g. **Bosnia and Herzegovina**, **Croatia** and **Montenegro**) and specialized reports as well as issuing recommendations of a more general nature. By selecting and prioritizing topics the equality bodies can have quite an influence on agenda setting when it comes to the development of policies and measures preventing discrimination. This is also true for those equality bodies that can comment on and even more so for those that can initiate legal amendments (e.g. **Kosovo**,\* **Macedonia**, **Serbia**).

### *3.1.3 Cooperation of Equality Bodies with Relevant Stakeholders in the National Context*

The specialized laws in all project countries provide for the possibility of equality bodies to cooperate with stakeholders who promote anti-discrimination or human rights. The provisions are formulated very generally like in the Law on the Protector of Human Rights and Freedoms of **Montenegro**,<sup>46</sup> which allows for cooperation with organizations and institutions dealing with human rights and freedoms, like in the Law on Protection from Discrimination of **Kosovo**,<sup>\*47</sup> which supports cooperation with social partners, NGOs that deal with the promotion and protection of human rights or like in the Law on Protection from Discrimination of **Albania**,<sup>48</sup> which allows for the Commissioner of Protection against Discrimination to hold a regular dialog with social groups including NGOs in connection with issues related to discrimination. Other legal provisions focus on establishing cooperation with bodies ensuring equality and protection of human rights at the local self-government level (**Macedonia**<sup>49</sup> and **Serbia**) and provincial level (**Serbia**<sup>50</sup>).

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>46</sup> Montenegro/Article 21 of the Law on the Protector of Human Rights and Freedoms, Official Gazette of Montenegro”, 42/11 and 32/14.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>47</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/ Article 9 of the Law No. 05/L-021 on Protection from Discrimination, 28 May 2015.

<sup>48</sup> Albania/ Article 32 of the Law No. 10221 on Protection from Discrimination /04.02.2010.

<sup>49</sup> Macedonia/Article 24 of the Law on Prevention of and Protection against Discrimination, Official Gazette, 50/2010.

<sup>50</sup> Serbia/Article 33 of the Law on Prohibition of Discrimination, Official Gazette of the Republic of Serbia, 22/2009.

The specialized laws of **Bosnia and Herzegovina**<sup>51</sup> and **Croatia**<sup>52</sup> stipulate cooperation of the respective equality bodies with relevant NGOs<sup>53</sup> in a very specific context – namely when drafting regular reports, opinions and recommendations on issues concerning discrimination. The competences of the equality body of **Kosovo**<sup>\*54</sup> include providing advice, support and guidance to the public and private sector, NGOs and social partners on good practices and effective ways of combating discrimination and promoting equality. The legal framework points to some of the relevant stakeholders, with whom equality bodies should cooperate. The legal provisions remain silent about what the cooperation with these stakeholders should look like.

Equality bodies in **Albania**, **Croatia**, **Kosovo**,\* **Macedonia** and **Serbia** have formalized their cooperation with some of the NGOs/CSOs. The Commissioner for Protection against Discrimination in **Albania** has signed collaboration agreements and the focus of cooperation is on jointly organizing and participating in activities such as trainings, round tables, conferences, seminars and continuous consultations as well as participating in EU Twinning projects. The Commissioner has also signed collaboration agreements with state institutions and local government bodies. The Commissioner, the state bodies and NGOs/CSOs jointly work on awareness raising, monitoring cases of discrimination and the implementation of the Law on Protection from Discrimination. In some cases, the information NGOs/CSOs sent to the Commissioner formed the basis for initiating *ex officio* investigations.

Prior to the opening of local offices, the Ombudsman in **Croatia** has implemented a project, in which NGOs in different regions of the country were selected to become contact points. These contact points were trained on how to file a complaint with the Ombudsman. Furthermore, NGOs are invited each year to contribute to the Annual Report in order to include their assessment on occurrences of discrimination.

The Commissioner for Protection of Equality in **Serbia** has established various forms of cooperation with NGOs – such as participation in events and manifestations, partnerships in projects and inclusion of representatives of civil society organizations in working groups. In August 2012, a public call was issued with the aim of granting funds to NGOs for the purpose of implementing situation testing. A total of 23 NGOs was selected and each appointed two representatives who participated in training. Due to the situation testing performed by NGOs, the Commissioner for Protection of Equality initiated court proceedings.

The Institution of the Human Rights Ombudsman in **Bosnia and Herzegovina** established a platform for cooperating with CSOs and developed guidelines and criteria for this cooperation. CSOs can get support from the Ombudsman in individual discrimination cases

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<sup>51</sup> Bosnia and Herzegovina/Article 7 of the Law on Prohibition of Discrimination, Official Gazette of B&H, 59/09.

<sup>52</sup> Croatia/Article 15 of the Anti-Discrimination Act, Official Gazette 85/2008.

<sup>53</sup> Croatia/Article 15 of the Anti-Discrimination Act, Official Gazette 85/2008 also includes social partners and churches and religious organizations entered in the Register of Religious Congregations of the Republic of Croatia on the basis of the Act on the Legal Position of Religious Congregations, and the National Minorities Council.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>54</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/ Article 9 of the Law No. 05/L-021 on Protection from Discrimination, 28 May 2015.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

and the cooperation with the Ombudsman can strengthen their role in procedures for protection against discrimination.<sup>55</sup> In **Montenegro**, the Protector for Human Rights and Freedoms established cooperation with NGOs focusing on the protection of the rights of marginalized groups such as LGBTI persons, persons with disabilities and members of ethnic minorities. CSOs forward cases of discrimination to the Protector.

Equality bodies cooperate with NGOs/CSOs in a broad range of activities such as awareness raising, increasing the visibility of the equality bodies, submitting complaints, gaining relevant information on individual cases and structural discrimination as well as collecting evidence. Input from NGOs has so far e.g. resulted in initiating court cases or *ex officio* investigations.

### 3.1.4 Membership in the European Network of Equality Bodies

Almost all the equality bodies – except for the ones in **Bosnia and Herzegovina** and **Kosovo**<sup>\*</sup> – are members of Equinet, the European Network of Equality Bodies. This network supports and enables the work of equality bodies by promoting a continuous exchange of information and sharing of data and expertise, by regularly offering trainings and seminars to staff and experts within equality bodies, by promoting continuous collaboration, exchange and research within working groups structured around thematic areas of relevance to equality bodies (e.g. equality law in practice, communication strategies and practices and policy formation) and by sharing perspectives on relevant themes and policy developments relating to equality and non-discrimination at European level.

Equinet supports equality bodies to be independent and effective as valuable catalysts for more equal societies.<sup>56</sup> Equinet is an opportunity for equality bodies to exchange experiences and practices and to use the pool of equality bodies as resource to learn from each other and further develop strategies of how to overcome obstacles faced in their daily work. Maybe there are some aspects of the work of the equality bodies in the project countries, which are not fully covered by Equinet, such as the greater number of prohibited grounds and the much larger scope of the specialized laws, which might make the establishment of a SEE Network of Equality Bodies worthwhile.

### 3.2 Ombud Institutions

The role of ombud institutions within the system of preventing and protecting against discrimination depends on whether stand-alone equality bodies have been established or the function of the equality body has been integrated into the ombud institution responsible for protecting human rights and freedoms. Stand-alone equality bodies operate in **Albania**, **Macedonia** and **Serbia** and for these equality bodies the ombud institutions are important potential cooperation partners. However, only the specialized law of **Macedonia** explicitly stipulates cooperation between the Commission for Protection against Discrimination and the Public Attorney on certain cases of discrimination.<sup>57</sup>

The People's Advocate of **Albania** pays particular attention to reviewing complaints from individuals belonging to vulnerable groups, who are most at risk of discrimination by acts,

<sup>55</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika, p. 51.

<sup>\*</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>56</sup> For further information see: <http://www.equineteurope.org> (10.07.2016).

<sup>57</sup> Macedonia/Article 33 of the Law on Prevention of and Protection against discrimination, Official Gazette, 50/2010.

actions or omissions of the organs of central and local administration or any other body vested with public authority. The People's Advocate forwards complaints related to discrimination to the Commissioner for Protection against Discrimination. Interactions between the People's Advocate, the Commissioner and intermediaries (see section 3.5) have been very effective in identifying cases of discrimination, raising awareness and improving situations.

Amendment XI to the Constitution of **Macedonia** stipulates that the Public Attorney shall pay "particular attention to safeguarding the principles of non-discrimination and equitable representation of communities in state bodies, bodies of the units of local self-government and public institutions and services".<sup>58</sup> The Public Attorney and the Commission for Protection against Discrimination have not formalized their cooperation, they have regular meetings in order to avoid the overlapping of proceedings, as some complainants submit complaints to both institutions.<sup>59</sup>

The Protector of Citizens of **Serbia** particularly focuses on the protection of the rights of national minorities, of persons with disabilities and of persons susceptible to gender discrimination. The Protector of Citizens and the Commissioner for Protection of Equality try to join forces in protecting the rights of groups especially vulnerable to discrimination. The two institutions also jointly organize seminars with NGOs. The annual reports of the Commissioner for Protection of Equality depict the most important activities of the Protector of Citizens in relation to certain vulnerable groups, mention relevant reports as well as research activities.

The equality bodies integrated into ombud institutions might nevertheless also face issues of cooperation with the other departments/sections of their institution. Awareness for discrimination might be an issue in those departments not directly responsible for discrimination cases and discrimination might remain undetected in some cases. Furthermore, the units responsible for discrimination might have to establish slightly different procedures and develop new forms of cooperation as they are also responsible for the private sector.

In **Croatia**, the central equality body faces challenges regarding internal cooperation as it is integrated into the Office of the Ombudsman, but also in external issues of cooperation, especially when discrimination cases involve more than one ground, which are covered by different specialized ombud institutions. One area of cooperation of all the ombud institutions is keeping records of court cases related to discrimination and of discrimination grounds for conducting proceedings, as the specialized ombud institutions have to annually submit their records and statistical data on court cases related to discrimination to the Ombudsman, so that the numbers can be published in the Annual Report of the Ombudsman.<sup>60</sup>

Cooperation between equality bodies and ombud institutions seems to be rather ad hoc especially in cases when discriminatory actions have an impact on the rights of certain groups susceptible to discrimination and for the purpose of awareness raising. Regular meetings are used to exchange information on complaints, as some complainants might submit their cases to more than one institution. The specialized laws do not give much

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<sup>58</sup> Montenegro/Constitution of the Republic of Montenegro, Amendment XI; Official Gazette of Montenegro, 91/2001.

<sup>59</sup> Macedonia/Source: Interview with the President of the Commission in the period 2011-2015, Mr. Dusko Minovski (12.03.2016).

<sup>60</sup> Croatia/Article 14 of the Anti-Discrimination Act, Official Gazette 85/2008.

guidance on the purpose and form of cooperation between the various independent institutions promoting human rights and equality.

### 3.3 Public Bodies

Ministries or Government Offices who are responsible for promoting equality and combating discrimination are often obliged to monitor the implementation of the respective specialized laws preventing and prohibiting discrimination (e.g. Ministry of Human Rights and Refugees of **Bosnia and Herzegovina**, Office for Human and Minority Rights of **Serbia**). Some of these institutions – e.g. the Office for Human and National Minority Rights of **Croatia** and the Office for Good Governance of **Kosovo**<sup>\*</sup> – are responsible for monitoring the implementation of the recommendations of the equality bodies.

These institutions are quite often responsible of informing the Prime Minister and the Government about measures preventing and combating discrimination (e.g. **Bosnia and Herzegovina**, **Kosovo**<sup>\*</sup>). In some countries governments are also obliged to inform Parliament about discrimination cases and to propose measures for combating discrimination (e.g. **Bosnia and Herzegovina**, **Kosovo**<sup>\*</sup>). Experience gained and data collected by equality bodies should be taken into account, when information is passed on to the executive and legislative branches of government. The Institution of the Human Rights Ombudsman in **Bosnia and Herzegovina** raised an important issue influencing the cooperation of independent with executive bodies, namely that executive bodies would not always accept that the Ombudsman is an independent institution. Cooperation with other levels of government was assessed as dependent on the institution or its head.<sup>61</sup>

Furthermore, these Ministries and Government Offices are quite often authorized to collect data on discrimination, e.g. the Ministry for Human Rights and Refugees of **Bosnia and Herzegovina** is obliged to establish and maintain a central database of cases of discrimination, however, this database has not been established yet.

The Ministry for Human and Minority Rights of **Montenegro**, is together with a broad range of other institutions responsible for preventing future discrimination. The Ministry mainly focuses on organizing trainings and seminars, round tables, on publishing brochures and on cooperating with domestic and international organizations. The Ministry organizes events promoting equality together with NGOs and engages experts from NGOs and academia to train different target groups, mainly public officials.

The Office for Good Governance within the Office of the Prime Minister of **Kosovo**<sup>\*</sup> is responsible for coordinating the work of governmental institutions. Within this context a Special Advisory and Coordination Group for the rights of the LGBT Community<sup>62</sup> was established. The group consists of representatives of ministries, NGOs, independent institutions, the police and the judiciary and is therefore a good example of how key

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<sup>\*</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>\*</sup> Ibid.

<sup>61</sup> Bosnia and Herzegovina/Interview with the representative of B&H Ombudsperson.

<sup>\*</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>62</sup> The capacities of this group were supported and strengthened in the framework of the EU Twinning Project “Fight against Homophobia and Transphobia” (also known as “normally different” (see: <http://normallydifferent.com/> (10.07.2016))), which was implemented between 2013 and 2015 by the Office for Good Governance, the Ludwig Boltzmann Institute of Human Rights (Austria) and the National Institute for Health and Welfare of Finland.

stakeholders can regularly cooperate with each other. The Group is chaired by the Head of the Office for Good Governance and co-chaired by a representative of an NGO, the co-chair rotates every six months. The activities of the Group have so far focused on defining the priorities and necessary measures to be taken to improve the situation of LGBT communities, on sharing data, information, reports and documents relevant in the field of protection and promotion of the rights of LGBT communities and on the provision of advice to the central and local levels of governance related to the implementation of policies, programs and other measures referring to the rights of the LGBT communities.

Another aspect of the work of these Ministries and Offices is the development of strategies and action plans for promoting equality and combating discrimination, which they usually do together with other stakeholders. The Office for Human and Minority Rights of **Serbia** is responsible for monitoring the implementation of the Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination (2014-2018), which requires cooperation with all the implementing bodies of the action plan.

On top of the public bodies focusing on the promotion of human and minority rights, some of the national reports mentioned other public bodies for which the specialized laws stipulate special obligations. In **Kosovo**,\* all ministries and municipalities have to establish Human Rights Units or assign officials for the task of coordinating and reporting on the implementation of the Law on Protection from Discrimination. In **Albania**, the Council of Ministers as well as the Ministry of Social Welfare and Youth, Ministry of Internal Affairs, Ministry of Education and Sports, Ministry of Justice, and Ministry of Health are obliged to raise awareness and to implement positive measures combating discrimination in their area of responsibility or in the institution they lead.

Additional stakeholders that might contribute to promoting equality and non-discrimination and might be potential cooperation partners are institutions responsible for training civil servants, commissions for consumer protection and commissioners responsible for data protection and access to information. In **Serbia**, the Social Inclusion and Poverty Reduction Unit (SIPRU) is mandated to strengthen the capacities of all public administration bodies in developing and implementing social inclusion policies based on good practices in Europe. The Unit lead the development of the Gender Equality Index for Serbia<sup>63</sup> in cooperation with the European Institute for Gender Equality.

### 3.4 Police

The police can take on different roles in the system of preventing discrimination: support victims of discrimination when filing a report on a discriminatory incident with the police, report cases of discrimination to competent bodies (e.g. **Croatia**), implement training activities<sup>64</sup> (e.g. **Montenegro**) and participate in the development of strategic documents combating discrimination (e.g. **Montenegro, Serbia**). Furthermore, they can be the target of recommendations issued by equality bodies (e.g. **Kosovo**,\* **Serbia**) or ombud institutions

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>63</sup> See: <http://socijalnoukljucivanje.gov.rs/en/serbia-gender-equality-index-launched/> (10.07.2016).

<sup>64</sup> The reports on Croatia, Montenegro and Serbia looked into the curricula of the respective Police Academies, none of which offer separate courses on discrimination, but integrate the issue in some of their (elective) courses.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

(e.g. **Macedonia**)<sup>65</sup> and of training activities implemented by equality bodies (e.g. **Albania, Serbia**), ministries (e.g. the Ministry for Labour and Social Policy of **Macedonia**)<sup>66</sup> or NGOs/CSOs (e.g. **Serbia**).

### 3.5 Intermediaries

Intermediaries are organizations or persons functioning as intermediary between victims of discrimination and securing access to justice by providing information on rights and how to submit a complaint or a claim, by providing legal advice and assistance and by building a positive disposition to equality and the right to non-discrimination. The national reports have identified NGOs/CSOs, lawyers and trade unions as potential intermediaries.

#### 3.5.1 NGOs and CSOs

NGOs and CSOs are intermediaries with the most relevant capacities and skills in identifying cases of discrimination, in providing legal counselling as well as legal aid and in implementing awareness raising activities (among them trainings for a broad range of target groups).

NGOs/CSOs offer counselling and legal assistance to victims of discrimination to varying extents in the project countries. In **Bosnia and Herzegovina**, CSOs primarily gather information on discrimination cases and assist victims in gaining access to legal protection through their outreach work with vulnerable groups.<sup>67</sup> In **Croatia**, NGOs are deemed especially important for promoting the protection of rights of LGBTI persons. They offer legal and psychological counselling as well as systematic support in promoting the rights of LGBTI persons, they monitor violence and sensitize the general public. CSOs in **Serbia** try to identify and react to cases of systematic violations of the right to non-discrimination, to inconsistent practices in conducting judicial and administrative proceedings, to inefficiencies in processing applications, and to inadequate legal frameworks. In **Kosovo**,\* only few CSOs provide counselling and free legal assistance to victims of discrimination. There is a need to strengthen the capacities of these CSOs and to promote networking.

NGOs/CSOs involve themselves in strategic litigation. Strategic litigation requires in depth knowledge of (the weaknesses of) relevant legal provisions and court practice in the area of discrimination. Strategic litigation demands the development of criteria in order to select adequate cases. Once a case is selected, facts and evidence have to be prepared well and good support of the complainant(s) has to be guaranteed. NGOs like *CLARD* in **Kosovo**\* and *Vaša prava* in **Bosnia and Herzegovina** have established criteria for selecting cases for strategic litigation. *Vaša prava* has elicited the first judgment on a collective lawsuit

<sup>65</sup> The extent to which recommendations targeting the Ministries of Interior are implemented differs in the region, for Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence) (see: N. Osmani/V. Morina Tafaj (2016) Study "Legal Protection against Discrimination in Kosovo", section 2.2.4) and Serbia (see: I. Krstić Davinić (2016) Study "Legal Protection against Discrimination in Serbia", section 2.3.4) the ration of implementation was appreciated, in Macedonia the Public Attorney saw room for improvement (see: M. Tsatsa Nikolovska/A. Georgievski/E. Mihajlova (2016) Study "Legal Protection against Discrimination in Macedonia", section 2.2.4).

<sup>66</sup> Macedonia/From the interview with the Head of the Department for equal opportunities within the Ministry of Labor and Social Policy (10.02.2016).

<sup>67</sup> Bosnia and Herzegovina/Interview with the representative of CSO *Vaša prava*.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* Ibid.

establishing segregation in schools. The NGO was careful with selecting evidence, which was based on readily available reports by international organizations, concluding observations of bodies that monitor the implementation of human rights treaties and testimony by only a handful of witnesses. The judgment had an effect on quite a large number of people, nevertheless the NGO was able to keep the costs related to court fees, obtaining public documents or witnesses low.<sup>68</sup> The NGO has created a fund for covering the costs of lost lawsuits with the support of the Open Society Bosnia and Herzegovina. In **Macedonia** and **Serbia**, NGOs are involved in strategic litigation and provide evidence for discrimination by using situation testing.

Awareness raising activities are another area, in which NGOs/CSOs are very active. In **Albania**, the Commissioner of Protection against Discrimination has together with NGOs drafted manuals and guidelines on domestic and international legal provisions, on forms and causes of discrimination and on ways how to defend the right to non-discrimination.<sup>69</sup> In **Serbia**, NGOs provide trainings on anti-discrimination for judges and the police (with a special focus on LGBTI rights), publish reports and handbooks. In **Bosnia and Herzegovina**, four CSOs (supported by USAID and the Open Society Fund) established a coalition called “Equality for all”, which promotes an active role of CSOs and citizens in preventing and combating discrimination.

### 3.5.2 Lawyers

Only in few national reports lawyers were mentioned as possible intermediaries. Much room for improvement was identified. There are only few lawyers specializing in cases of discrimination (e.g. **Bosnia and Herzegovina** and **Serbia**). Bar exams in **Albania** include questions on non-discrimination standards and the Academy for Judges and Public Prosecutors of **Macedonia** includes lawyers in its training programs on discrimination. Nevertheless, there is still a need to further increase the competence of lawyers, especially in identifying discrimination, in referring to the specialized laws preventing and prohibiting discrimination when initiating a lawsuit and in making use of the various aims that can be achieved by a lawsuit in the context of discrimination.

### 3.5.3 Trade Unions

Trade unions, which seem to be rather weak in the project countries, have not been described as very active in the context of discrimination cases, they seem to lack knowledge on the relevant legal provisions and they do not seem to be too well prepared for identifying discrimination. Furthermore, workers do not see trade unions as institutions that can help protect them from discrimination.

In some countries trade unions, equality bodies and CSOs have joined forces in combating discrimination. In **Albania**, the Commissioner of Protection against Discrimination has concluded agreements with some trade unions for the purpose of uniting their efforts in combating discrimination. In **Bosnia and Herzegovina**, there are examples of cooperation of

<sup>68</sup> Bosnia and Herzegovina/B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika, p.50.

<sup>69</sup> Switzerland Cooperation Office in Albania, Albanian Helsinki Community, Commissioner for Protection from Discrimination (2013) “*Protection from Discrimination, Training Manual*”, Tirana, available at: <http://kmd.al/skedaret/1443437435-Manuali%20i%20Trajnimit.pdf> (24.02.2016); Albanian Disability Rights Foundation and Civil Rights Defenders (2011) *Minority protection*, Tirana, available at: [http://www.adrf.org.al/images/guida\\_diskriminimi.pdf](http://www.adrf.org.al/images/guida_diskriminimi.pdf) (27.03.2016), V. Meçaj/ A. Anastasi/A. Mandro (2011) ‘To understand and apply the anti discrimination law’, available at: [http://www.qagal.org/WEB/publikime/Manuali\\_per%20mbrojtjen nga diskriminimi.pdf](http://www.qagal.org/WEB/publikime/Manuali_per%20mbrojtjen nga diskriminimi.pdf) (27.03.2016).



certain unions with some local CSOs who provide free legal aid to victims of discrimination.<sup>70</sup>

In **Serbia**, the Teachers' Union, which was later on supported by other unions, sent letters to public authorities opposing Article 20 of the Law on the Maximum Number of Employees in the Public Sector, which provided that all women aged 60 years and 6 months working in the sectors of education, health and public administration, had to retire, although the regular age of retirement for women was 65. The letters provoked the Commissioner for the Protection of Equality and the Protector of Citizens to challenge the constitutionality of this provision, which finally resulted in the Constitutional Court revoking the discriminatory Article 20.<sup>71</sup>

Other areas of activities include awareness raising for discrimination in employment. In **Croatia**, the Tourism and Services Trade Union and a number of other trade unions focused on organizing educational activities targeting associations of young people in order to successfully fight against discrimination on the labour market. Within the framework of an EU funded project, the associations *Kontra* and *Iskorak* in cooperation with the Independent Trade Union of Croatia have developed a guide called "Together for LGBT Equality in the Workplace" strengthening the capacity of trade unions, employers and local authorities to promote equality and combat discrimination against LGBT people in the workplace, including practical information on legal sources, institutions and a way to enjoy institutional protection. Furthermore, a manual for trade unionists entitled "Invisible workers – how to protect LGBT individuals in the workplace" was published.<sup>72</sup>

The Commissioner for Protection against Discrimination in **Albania** focused on fighting discrimination in employment together with e.g. trade unions, chambers of commerce and industry, inspectors of labour and vocational training centres. This cooperation focused on organizing campaigns to increase public awareness, on organizing meetings and participating in jointly organized conferences. Similar efforts were undertaken by the Commissioner for Protection against Discrimination in **Macedonia**. They focused on eliminating discrimination in job announcements and in labour relations by organizing regular meetings with social partners, workers' organizations, chambers of commerce and associations of employers at the local level.

### 3.6 Interim Analysis

Equality bodies, ombud institutions, parliaments, ministries/government offices responsible for promoting the protection of human rights, police forces, NGOs/CSOs, lawyers and trade unions have been identified as the most common and important stakeholders within the system promoting the prevention of and protection against discrimination. Equality bodies should have the potential of becoming the key players in this system. They have to be perceived as credible, expert and independent institutions, ideally complying with the Paris Principles.

The specialized laws preventing and prohibiting discrimination provide most of the equality bodies with a broad spectrum of quite powerful tools, which have to be strategically used. In the context of scarce resources the individual elements of the rather broad mandates have to be prioritized and balanced in accordance with strategically established aims. The capacities of the equality bodies supporting victims of discrimination have to be further strengthened,

<sup>70</sup> Bosnia and Herzegovina/Interview with the representative of a trade union.

<sup>71</sup> Serbia/Trade struggle contributes to ending discrimination against female public servants, 20 October 2015, available at: [www.ei-ie.org/en/news/news\\_details/3763](http://www.ei-ie.org/en/news/news_details/3763) (31.03.2016).

<sup>72</sup> N. Bodiraga-Vukobrat/M. Vinković/A. Petričušić (2016) Study "Legal Protection against Discrimination in Croatia", section 2.3.3.

among them their capacities for resolving complaints via mediation. Furthermore, their powers for preventing future discrimination should be enhanced. In this context, the quality of recommendations should be further improved, so that both respondents to individual cases and the targets of more general recommendations can easily understand what needs to be done and become even more ready to implement the recommendations.

The central role of equality bodies within the system of preventing and protecting against discrimination can be seen in their attempts to establish diverse kinds of cooperation with differing aims and purposes with a broad range of stakeholders. The positioning and the distance of equality bodies to other stakeholders within the system is partially determined by the type of equality body – stand-alone versus special department integrated into the ombud institution promoting the protection of human rights. First and foremost the equality bodies cooperate with NGOs/CSOs in organizing and implementing awareness raising activities and to a lesser extent on individual complaints. NGOs/CSOs are more active in initiating strategic litigation, the results of which can feed into and can facilitate the work of equality bodies. The cooperation with ombud institutions can entail work on individual complaints, but also raising awareness for the impact of discriminatory incidents on groups especially susceptible to discrimination. Trade unions have cooperated with equality bodies in raising awareness for discrimination in employment and in developing handbooks on legal provisions and protection mechanisms. So far trade unions have not been identified as organizations promoting access to justice by encouraging employees to take discrimination cases either to court or to the equality body.

The police are sometimes the target of recommendations issued by equality bodies, which seem to be followed to different extents in the project countries. Police forces themselves have aimed at changing their organizational culture by increasing the diversity within the police forces. This is seen as a measure supporting the reflection of stereotypes and prejudices and creating more awareness for discrimination. However, increasing diversity among the police force has to be accompanied by measures that establish and create a welcoming environment for these new members of the police force. Community policing helps in developing strategies on how to interact with members of vulnerable groups and how to establish closer ties with these groups (e.g. LGBTI, Roma, Egyptians, etc.).

Parliaments in all project countries discuss the annual reports submitted by equality bodies. They make the work and the achievements of equality bodies visible, and they can promote and monitor recommendations issued by equality bodies.

The relationship of equality bodies to the Prime Ministers, Governments and executive bodies as well as the police is a more distant one. This is related to equality bodies being independent institutions, but at the same time equality bodies can be a very useful source of experience and information when it comes to identifying cases, trends and challenges in the area of preventing and prohibiting discrimination as well as to devising policies and measures promoting equality.

Almost all stakeholders either collect or are obliged to collect data related to discrimination. NGOs/CSOs, equality bodies, the police, trade unions and inspectorates can generate data on individual complaints, NGOs/CSOs and equality bodies draft special reports reflecting on certain aspects of discriminatory structures, courts and Ministries of Justice can generate statistics on courts cases (see section 4) and ministries/government offices responsible for protecting human rights compile state reports on the implementation of various UN conventions prohibiting discrimination and on the implementation of action plans promoting equality and preventing discrimination. Currently stakeholders are individually collecting data as partly stipulated by the specialized laws preventing and prohibiting discrimination. This data could be the starting point for establishing a monitoring system. However, not all

the obligatory data is currently collected and further gaps might be identified, when all relevant stakeholders are willing to exchange information and their experiences as regards data collection so that an effective monitoring system can be established.

The specialized laws preventing and prohibiting discrimination assign roles and tasks to most of the above mentioned stakeholders, however they do not specify in which form and to what extent all these stakeholders could and should cooperate. This lack of specifications opens the space for many different forms, durations and intensities of cooperation – e.g. continuous or frequent cooperation, ad-hoc cooperation, formalised cooperation by way of memoranda of understanding or cooperation agreements. As all these stakeholders are part of a system, initial phases of trial and error could and should result in a more strategic approach towards coordination and cooperation of stakeholders for the purpose of supporting the development of a culture of rights and achieving equality for all.

## 4. The Role of the Courts in Combating Discrimination

Courts play an essential role in guaranteeing access to justice for individuals who claim that they have been discriminated. At the structural level of access to justice (see Table 1) they are responsible for fair procedures and timely resolution of cases, as well as for establishing effective remedies should discrimination be established in a case. Furthermore, courts are also responsible to accommodate for diversity with regard to disabilities and language skills.

Fair procedures in cases of discrimination encompass special procedural elements, which strengthen the position of the victim of discrimination. Among them are the shifting of the burden of proof, the protection against victimization and the possibility of establishing non-material compensation. The special roles of equality bodies and organizations, associations or legal entities who are either dealing with the protection of human rights or whose scope of activities includes protection from discrimination or who have a legitimate interest in supporting and representing a person or a group of persons in a discrimination case during court proceedings can also strengthen the position of the victim of discrimination. These special roles include equality bodies being able to act as friends of the court (*amicus curiae*), equality bodies and other organizations being able to initiate court proceedings, to initiate group actions (see the collective dimensions of the structural elements of access to justice in Table 1) and to act as interveners. These procedural elements are specific to discrimination cases and still need to be promoted among judges.

This section analyses the numbers of judgments issued in discrimination cases, identifies factors determining the quality of judgments, assesses the capacities of courts especially as regards the special procedural elements, considers the role of equality bodies and relevant organizations in the proceedings and looks into the educational activities related to the issue of discrimination offered by institutions responsible for the initial and the continuous training of future and practicing judges.

### 4.1 Quantity and Quality of Judgments in Cases of Discrimination

The number of court cases referring to the specialized laws on preventing and prohibiting discrimination is rather low and does not compare well with the number of complaints submitted to equality bodies. Among the factors negatively influencing the readiness of taking cases to court are the low level of public confidence in courts, the insufficient access to free legal aid, the fear of further victimization and the fear of having to cover the costs for the procedure and the costs of the respondent in case of non-success.

For **Albania**, **Kosovo**,\* **Macedonia** and **Serbia** there is no official data on the number of discrimination claims filed with courts available. For **Croatia** and **Montenegro** these statistics are available through the respective equality bodies. For **Bosnia and Herzegovina** the statistics were obtained via the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

In **Croatia** and **Montenegro** judicial bodies are obliged to keep separate records on discrimination cases. However, both equality bodies are of the opinion that statistical data is not adequate for learning more about the practices of the courts, which could inform and increase the quality of the equality bodies' work on cases. The Office of the Ombudsman of **Croatia** managed to establish an agreement with the Ministry of Justice to forward all judgments related to discrimination to the institution. In **Albania**, the Law on Protection from Discrimination obliges courts to inform the Commissioner of Protection against Discrimination about all discrimination claims and the final judgment. However, the Commissioner was discontent with the practice of the courts not always complying with this provision.<sup>73</sup>

The following factors have been identified as negatively influencing the quality of judgments in discrimination cases: Judgments of lower instance courts hardly ever refer to the ECHR and the case law of the ECtHR, exceptions in this regard are the Constitutional Courts (e.g. **Kosovo**,\* **Serbia**). Court proceedings are assessed as taking too long, although the respective specialized laws preventing and prohibiting discrimination provide for urgent proceedings in cases of discrimination. Judges were seen to lack understanding of concepts that are very specific to discrimination cases such as unequal treatment, comparator, protected ground, legitimate aim, victimization, positive action, as well as the intention to discriminate not being an element of discrimination.<sup>74</sup> The non-adequate application of the shifting of the burden of proof was identified in all project countries as a major obstacle for guaranteeing access to justice for victims of discrimination. Furthermore, judges lack understanding of the consequences of discrimination for the victim, which can negatively affect the determination of non-material compensation. Judges do not always make use of the specialized laws preventing and prohibiting discrimination as other laws also contain provisions prohibiting discrimination, but contain certain procedural provisions that are less favourable in comparison to the specialized laws.

Another quality issue is the harmonization of court practices in cases of discrimination, which is impeded by the non-availability of comprehensive and easily accessible data basis on court cases in all the project countries. In some countries (e.g. **Kosovo**\*) judgments of higher courts, namely the Constitutional Court, are published. However, the majority of discrimination cases are decided on by lower instance courts. In **Montenegro**, final judgments are anonymised and published on the website of the court that issued the judgment. Even when final judgments would be or are available, it could still be challenging to identify them as judgments related to discrimination, as they are not labelled as such.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>73</sup> A. Mandro Balili/F. Kola Tafaj (2016) Study "Legal Protection against Discrimination in Albania", section 3.1.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>74</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-ln-final> (30.03.2016).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

Judges interviewed in **Montenegro** suggested that a separate checkbox could be introduced for labelling these cases.<sup>75</sup>

A systematic dissemination of judgments could also contribute to harmonizing court practices. However, judges do not seem to be systematically informed about judgments related to discrimination. In **Bosnia and Herzegovina**, judges can access cases through an electronic case management system. Furthermore, cases are discussed in trainings targeting judges, however these are usually limited to relevant interpretation of certain legal provisions by higher courts. In **Macedonia**, judgments are shared during regular meetings of departments, when they are forwarded to a second instance court, they can be published on a quarterly basis if deemed relevant. In **Montenegro**, judges interviewed pointed<sup>76</sup> out that bulletins containing both domestic and international court practice are disseminated to all courts by the Centre in the Judiciary and Public Prosecution Office. This is done in cooperation with the Centre for Legal Assistance regarding the Protection of Human Rights in Europe from London (AIRE) and the Council of Europe. These bulletins contain annotated summaries of the latest decisions of the ECtHR.

## 4.2 Capacities of Courts in Combating Discrimination

In all project countries discrimination cases are randomly assigned to judges, as is the practice with other civil law cases, in none of the countries judges specialize on discrimination cases.

Proceedings before courts can be initiated without exhausting administrative procedures of the equality bodies in all project countries. Lawsuits on discrimination are subject to the same regime as any other civil lawsuit.

Lawsuits can be filed having different aims in mind: the plaintiff can seek the establishment of discrimination, the prohibition of discrimination, the elimination of discrimination and its effects, the determination of damages for the harm caused by discrimination and/or in some countries of the publication of the decision establishing discrimination (e.g. **Croatia**). Mediation is also possible in civil proceedings and can be offered in discrimination cases taken to court.

### 4.2.1 Burden of Proof

The burden of proof is regulated by civil procedure codes and the specialized laws preventing and prohibiting discrimination, which provide for the shifting of the burden of proof in cases of discrimination. These provisions are occasionally seen as being in conflict with each other. Judges are sometimes of the opinion that the shifting of the burden of proof undermines their impartiality (e.g. **Serbia**<sup>77</sup>). Another reason for not applying the shift of the burden of proof is lack of knowledge about the concept and when and how to apply it (e.g. **Bosnia and Herzegovina**,<sup>78</sup> **Macedonia**<sup>79</sup> and **Serbia**<sup>80</sup>).

The Commissioner of Protection against Discrimination of **Albania** saw the shift of the burden of proof adequately applied by the courts. Still the Commissioner always tries to

<sup>75</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 3.2.

<sup>76</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 3.3.

<sup>77</sup> I. Krstić Davinić (2016) Study "Legal Protection against Discrimination in Serbia", section 3.1.

<sup>78</sup> M. Čolaković/I. Grubešić/F. Idžaković/M. Izmirlija/Z. Meškić (2016) Study "Legal Protection against Discrimination in Bosnia and Herzegovina", section 3.1.

<sup>79</sup> M. Tsatsa Nikolovska/A. Georgievski/E. Mihajlova (2016) Study "Legal Protection against Discrimination in Macedonia", section 3.2.

<sup>80</sup> I. Krstić Davinić (2016) Study "Legal Protection against Discrimination in Serbia", section 3.1.

bring this provision to the attention of the court, when providing a written opinion to the court or when involved in proceedings.<sup>81</sup>

#### 4.2.2 Statistical Data as Evidence

Only the specialized law in **Bosnia and Herzegovina** explicitly provides for the usage of statistical data, however no obstacles for making use of statistical data were identified in any of the other project countries. For **Albania**, **Kosovo\*** and **Montenegro** it was stated that there is no common practice in using statistical data in court cases. Judges in **Montenegro** were of the opinion that they did not have enough experience to deal with statistical evidence.<sup>82</sup>

In almost all countries situation testing is allowed as an instrument of generating evidence. In **Montenegro**, the Law on Prohibition of Discrimination explicitly allows for situation testing (Art. 30 (3)). In **Serbia**, the Supreme Court filled the legal gap by confirming that situation testing represents evidence admitted by courts.<sup>83</sup> In **Bosnia and Herzegovina**, **Croatia** and **Macedonia** there are no legal provisions on situation testing, but this is not seen as an obstacle. In **Macedonia** cases have already been taken to court based on the evidence generated by situation testing. In **Kosovo\***, situation testing is explicitly prohibited by the Penal Code and Procedural Code, it is treated as unauthorized recording/filming of a certain situation.

There is a lack in relevant statistical data for evidencing discrimination in all the project countries.

#### 4.2.3 Protection against Victimization

Protection against victimization can be taken care of by imposing temporary measures, which are specified in civil procedure codes. Such measures are usually issued on request of the complainant, meaning that either the legal representative or the complainant him-/herself has to know about such a possibility. The specialized laws preventing and prohibiting discrimination do not oblige courts to take measures against victimization. CSOs interviewed in **Bosnia and Herzegovina**<sup>84</sup> stated that no judge has ever issued a temporary protection measure for the purpose of preventing victimization; some of the judges interviewed in **Montenegro**<sup>85</sup> struggled with the concept of victimization.

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<sup>81</sup> A. Mandro Balili/F. Kola Tafaj (2016) Study "Legal Protection against Discrimination in Albania", section 3.1.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>82</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 3.1.

<sup>83</sup> This was based on another, the "*Club Acapulco*" case decided in 2007. Here, the Fourth Municipal court sentenced a security agent of a night club "Acapulco" in Belgrade to 2 years of imprisonment because he banned 3 Roma from entering the club due to their ethnic origin. After this event, NGO "Humanitarian Law Center" made a survey on 25 July 2003 which confirmed that the security agents were directly discriminating against the Roma population based on their ethnic origin. Serbia/ IV Municipal court, No. III K – 1432/04, Judgment of 19 April 2007.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>84</sup> M. Čolaković/I. Grubešić/F. Idžaković/M. Izmirlija/Z. Meškić (2016) Study "Legal Protection against Discrimination in Bosnia and Herzegovina", section 6.1.

<sup>85</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 3.1.

#### 4.2.4 Determining Damages

All the specialized laws preventing and prohibiting discrimination in the project countries provide for material and non-material compensation of damages. Courts have so far not been able to develop a practice especially on determining the amounts of non-material compensation.

The Anti-discrimination Act in **Croatia** does not provide any rules on compensation, therefore the general rules of the Civil Obligations Act and its tort provisions are to be applied. When deciding on the amount of an equitable pecuniary compensation, the court shall take into account the degree and duration of the physical and mental distress and fear caused by the violation, the objective of this compensation and the fact that it should not encourage expectations that are not compatible with its nature and social purpose. The provision makes no difference between private or public employment and fields outside employment.

In **Serbia**, the principles of the Law on Contract and Torts are applied for determining the type of damage and the link between the discriminatory act and the damage. However, the average amount in the current jurisprudence cannot be deemed appropriate in comparison to the amount of compensation in some other areas. This particularly applies to compensation of non-pecuniary damages.<sup>86</sup>

#### 4.2.5 Easy Accessibility

In some of the project countries there are legal provisions in place that oblige courts to guarantee easy access to their premises. For **Albania, Bosnia and Montenegro** it was stated that some of the courts have developed an infrastructure to make access for people with reduced mobility easier, if they were party to a trial, the trial would take place on the ground floor of the court building, parking would be provided for as well as customized access to the court. According to the Law on Civil Procedure of **Bosnia and Herzegovina** persons with disabilities do not have the right to be exempted from paying interpreter fees on the ground of their disability, but only on the ground of their unfavourable economic status (Art. 400).<sup>87</sup> As for accommodating for diversity during the court proceedings with regard to the use of minority languages and sign language or other devices for persons with visual and/or hearing impairments only one example was mentioned: The Commissioner of Protection against Discrimination of **Albania** has handled a case in which such accommodation had been denied to the complainant.

### 4.3 Role of Equality Bodies and Other Organizations with a Legitimate Interest

Equality bodies in all project countries can involve themselves in court proceedings to varying degrees. The criteria for determining what kind of organizations can engage themselves in court proceedings vary in their strictness: The Law on the Protection from Discrimination of **Kosovo**,<sup>\*</sup> does not contain any qualification criteria for associations, organizations or other legal entities, in **Montenegro** and **Serbia** the specialized laws identify organizations who are dealing with the protection of human rights, in **Bosnia and Herzegovina, Croatia and Macedonia**, the specialized laws cover organizations whose scope of activities includes protection from discrimination and in **Albania** the Law on

<sup>86</sup> I. Krstić Davinić (2016) Study "Legal Protection against Discrimination in Serbia", section 4.6.

<sup>87</sup> Bosnia and Herzegovina/ Law on Civil Procedure, Official Gazette of FB&H, 53/03, 73/05, 19/06, 98/15.

<sup>\*</sup> This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

Protection from Discrimination stipulates organizations who have a legitimate interest in supporting and representing a person or a group of persons in a discrimination case during court proceedings.

In the majority of project countries, both equality bodies as well as organizations fulfilling the criteria specified above can initiate court proceedings with the consent of the complainant. Criteria for strategic litigation have been established by the Protector for Human Rights and Freedoms of **Montenegro**, who focuses on cases of members of vulnerable groups, and the Commissioner for Protection of Equality in **Serbia**, who aims at improving access to justice and encouraging other victims of discrimination to initiate lawsuits. The Commissioner of Protection against Discrimination of **Albania** refrains from strategic litigation, as the institution cannot select cases by itself.

The Commissioner of Protection against Discrimination of **Albania** can also represent complainants in court, as can organizations in e.g. **Albania**, **Croatia** and **Kosovo**.\*

A quite powerful instrument for equality bodies in three of the project countries (**Albania**, **Kosovo**\* and **Macedonia**) is *amicus curiae*, i.e. courts can ask equality bodies to provide a written opinion on the respective case. It can also be used as an opportunity to remind the court of the principle of the shifting of the burden of proof. In the cases, in which the court invited the Commissioner of Protection against Discrimination of **Albania** to submit a written opinion, the court has endorsed his/her opinion and it became part of the judgment.

In four project countries, the equality body can become an intervener (**Albania**, **Bosnia and Herzegovina**, **Croatia** and **Montenegro**), which gives the equality body the opportunity to point to the consequences of discrimination affecting the rights of non-parties in a case. In **Montenegro**, the Protector of Human Rights and Freedoms can act as intervener and in those cases the judges have so far upheld the opinion of the Protector and have adequately applied European provisions and case law as suggested by the intervener.

Group actions, in which claims are presented in the general interest of a group, seeking justice beyond the individual case, are possible in almost all countries, except for **Albania**. **Croatia**, **Bosnia and Herzegovina**, **Macedonia** and **Serbia** make class action in discrimination cases possible. So far class actions have only been implemented in **Croatia** and **Macedonia**. The first cases of class action in Croatia were filed against representatives of football clubs accused of homophobic statements.<sup>88</sup> *Vaša prava*, an NGO in **Bosnia and Herzegovina**, is one of the first CSOs that has successfully represented victims of discrimination in court proceedings and has successfully filed several class actions for the protection against discrimination.

Other possibilities of equality bodies involving themselves in court proceedings is testifying as witnesses. On top of that, judges can make use of decisions/opinions and recommendations of equality bodies as evidence in support of their reasoning. Opinions and recommendations of the Institution of the Human Rights Ombudsman in **Bosnia and Herzegovina** can only be submitted by the claimant and are then treated like any other

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* Ibid.

<sup>88</sup> M. Juričić (ed.) (2013) *Pink Megaphone From Anti-Discrimination Act to the Constitutional Ban on Same-Sex a Report of Zagreb Pride on the Human Rights of LGBTIQ Persons in Croatia 2010-2013*, Zagreb: Zagreb Pride <http://www.zagreb-pride.net/new/wp-content/uploads/2015/02/report2014.pdf> (30.03.2016), p. 32. See also L. Kušan (2013) 'Croatia - Decision on homophobic statements', available at: <http://www.equalitylaw.eu/downloads/1548-hr-5-croatian-new-case-law-on-homophobic-statements> (30.03.2016).



evidence. In **Macedonia**, judges can use opinions and recommendations issued by the Commission for Protection against Discrimination as evidence or supportive reasoning when developing the legal reasoning for their decisions.<sup>89</sup>

In **Serbia**, judges do not feel bound by the opinion of the Commissioner for Protection of Equality. Although it is not compulsory for courts to follow the Commissioner's opinions, deviating judgments have to be well reasoned. In **Montenegro**, not all of the judges interviewed were of the opinion that the Protector of Human Rights and Freedoms should be actively involved in discrimination cases.<sup>90</sup>

#### 4.4 Anti-Discrimination within Educational Programs of Judicial Training Academies

The educational programs for judges are divided into initial and continuous training programs. The first category targets future judges, the second one practicing judges. Future judges get the opportunity to participate in courses related to the issue of discrimination in **Albania, Bosnia and Herzegovina, Macedonia and Serbia**. Courses for practicing judges are offered in all of the project countries. Among the lecturers and trainers are judges, university professors, representatives of equality bodies and CSOs/NGOs, sometimes experts from international organizations.

Table 3: Training Courses for Judges

Country	Educational institution	Number of training events	Number of judges participating
<b>Albania</b>	School of Magistrates	38 two day training activities	More than 540
<b>Bosnia and Herzegovina</b>	Judicial and Prosecutorial Training Centres of the Federation of Bosnia and Herzegovina and of the Republic of Srpska	No data provided	1,754
<b>Croatia</b>	Judicial Academy	18 round tables, workshops	202
<b>Kosovo*</b>	Kosovo Judicial Institute	5	No data provided
<b>Macedonia</b>	Academy for Judges and Public Prosecutors	No data provided	434
<b>Montenegro</b>	Centre for Training in the Judiciary and Public Prosecution Office	11 two-day and 4 one-day seminars	310
<b>Serbia</b>	Judicial Academy	21 seminars	No data provided

The courses offered range from European anti-discrimination law, protection against discrimination, the specialized domestic laws sometimes in combination with international standards or sometimes with a focus on specific grounds/groups to labour law and discrimination. The lack of domestic case law can be overcome by working with practical cases from the European level – ECtHR and CJEU. In **Macedonia**, particular attention is paid to offering courses focusing on specific aspects of discrimination – such as forms, grounds, procedural aspects (e.g. shifting of the burden of proof) as well as relevant international case law. A need for such specialized trainings was also identified by a representative of the Judicial and Prosecutorial Training Centre of the Federation of **Bosnia**

<sup>89</sup> Guidelines on the shifting the burden of proof and role of the Commission for protection against discrimination, OSCE Mission to Skopje, 2013, Authors: Poposka, Mihajloski, Georgievski.

<sup>90</sup> I. Jelić/S. Armenko (2016) Study "Legal Protection against Discrimination in Montenegro", section 3.1.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

**and Herzegovina.**<sup>91</sup> Trainings on gender identity and sexual orientation were offered in **Croatia, Bosnia and Herzegovina** and **Macedonia**. In most of the project countries – e.g. **Albania, Kosovo,\* Macedonia, Montenegro** and **Serbia** – some of the courses offered are implemented with support of international organizations, primarily the OSCE representations in the respective countries.

In **Macedonia** and **Serbia**, training of trainer programs with a focus on anti-discrimination are offered to judges. In **Montenegro**, an e-learning course on anti-discrimination was offered supported by the HELP program<sup>92</sup> of the Council of Europe.

Sometimes the judicial training institutions involve themselves in the training of other target groups than judges. The Academy for Judges and Public Prosecutors, the Commission for Protection against Discrimination and other public institutions in **Macedonia** trained more than 900 hundred state officials on the basic principles of equal treatment and non-discrimination policy between 2012 and 2014. The project,<sup>93</sup> which was supported by the British Embassy and British Council, aimed at preventing discriminatory behaviour especially of those officials directly working with citizens.

The School of Magistrates of **Albania** has published practical guides with a focus on gender discrimination, the Judicial Academy of **Croatia** has disseminated handbooks providing basic guidelines to judges on anti-discrimination legislation and case law and the former Commissioner for Protection of Equality of **Serbia** has published a handbook on civil protection against discrimination targeting judges.<sup>94</sup> The Academy for Judges and Public Prosecutors of **Macedonia** offers e.g. compilations of relevant case law, a court manual on preventing and protecting against discrimination, guidelines on the role of the Commission for Protection against Discrimination in court proceedings, on protected grounds and reasonable accommodation, which are easily accessible via their online library.

#### 4.5 Interim Analysis

This chapter dealt with the role of courts in guaranteeing access to justice for victims of discrimination as well as with the options equality bodies and other organizations, associations and legal entities have in supporting claimants in initiating court proceedings or in supporting them during court proceedings. The overall number of court cases based on the specialized laws preventing and prohibiting discrimination are rather low, especially in comparison to the number of complaints submitted to equality bodies.

The aim of increasing the number of court cases as well as enhancing the quality of judgments depends on further improving the competences of judges as well as lawyers, improving the visibility of equality bodies among judges and strengthening their capacities to participate in court proceedings as well as making judgments on discrimination cases available to equality bodies, legal practitioners but also the general public.

<sup>91</sup> M. Čolaković/I. Grubešić/F. Idžaković/M. Izmirlija/Z. Meškić (2016) Study "Legal Protection against Discrimination in Bosnia and Herzegovina", section 3.3.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>92</sup> For more information on HELP see: <http://www.coe.int/de/web/help/home?desktop=true> (10.07.2016).

<sup>93</sup> Strengthening the capacities of the Ministry for Labor and Social Affairs towards implementation of the National Strategy for equality and non-discrimination, <http://www.britishcouncil.mk/programmes/society/equality> (10.07.2016).

<sup>94</sup> N. Petrovic (ed.), Court Civil Protection from Discrimination, Commissioner for Protection of Equality, Judicial Academy, OSCE, Belgrade 2012, available at: <http://www.ravnopravnost.gov.rs/en/books/court-civil-protection-from-discrimination> (07.07.2016).

The competences of judges could be further improved by developing specialized trainings focusing on concepts (e.g. victimization, non-pecuniary compensation) and rules of procedure (e.g. shifting of the burden of proof, protection against victimization) specific to discrimination cases. Trainings on discrimination targeting judges work best when the concepts and rules of procedures are tackled via working on actual case law. Currently, there is not much case law available within the individual project countries. This could be overcome by a regional approach to collecting case law and basing the development of a training manual on case law from various countries. Specialized trainings could also attempt tackling the scepticism of judges towards some of the concepts and rules specific to discrimination cases as well as towards the role of equality bodies in court proceedings and heightening their understanding of the consequences of discrimination for individual victims as well as for other potential victims not represented in a specific court case.

The capacities of equality bodies to effectively participate in court proceedings should be strengthened. Equality bodies should increase their visibility among judges and work on their credibility by delivering good quality support to complainants as well as to the courts in the form of strong and well-reasoned decisions and opinions as well as tangible and effective recommendations.

The lack of harmonization of court practice should be overcome by establishing data bases, in which judgments on discrimination cases can be easily retrieved, by disseminating summaries of relevant case law from the ECtHR, the CJEU and national courts to judges and by alerting judges to relevant publications on the role of the justice system in improving access to justice for victims of discrimination.

## 5. The Role of Universities in Combating Discrimination

Universities and especially law faculties can offer mandatory and elective courses promoting the support to persons or groups of persons susceptible to discrimination (see Table 1) by raising the students' awareness of rights, by giving students the opportunity to understand the importance of developing a culture of rights and by making university services and courses easily accessible for all students. Furthermore, universities themselves can establish structures (e.g. statutes or codes of ethics prohibiting discrimination and establishing complaints mechanisms) as well procedures guaranteeing fair, timely and effective resolution of a complaint on discrimination. This section focuses on law faculties at universities, which are members of the South East European Law School Network (SEELS).<sup>95</sup>

### 5.1 Courses on Anti-discrimination within the SEELS

Table 4 shows that separate courses on the issue of discrimination are rather rare, but that nearly all of the legal faculties in the project countries have integrated elements of anti-discrimination issues into their regular courses at Bachelor, Master and PhD levels. Legal clinics, either integrating or specifically working on the issue of discrimination, have been established at law faculties in **Albania, Bosnia and Herzegovina, Croatia and Serbia**. In Zagreb, the legal clinic has established a special group on elimination of discrimination and protection of minorities, who cooperates with the Ombudsman and the Gender Equality Ombudsperson. In Belgrade, there is a legal clinic focusing on anti-discrimination, which is taught by professors, practitioners and CSOs and includes a training event on combating stereotypes and prejudices. The law faculties in Sarajevo, Mostar and Zenica have

<sup>95</sup> See: <http://www.seelawschool.org> (10.07.2016).

established law clinics in cooperation with CSOs, in which students learn how to protect victims of discrimination by way of working on case studies.

Table 4: Courses on Anti-discrimination within the SEELS

University	Integrated						Separate						Legal clinic (+ moot court)
	BA		MA		PhD		BA		MA		PhD		
	E	M	E	M	E	M	E	M	E	M	E	M	
Department of Public Law of the Faculty of Law, Tirana University	Almost all law courses						X					X	X
Faculty of Law, University of Mostar	X	X	X	X									(X)
Law Faculty in Sarajevo	X	X	X	X	X	X							(X)
Faculty of Law in Zenica	X	X	X	X					X				(X)
Faculty of Law in Zagreb			X	X									X
Faculty of Law in Rijeka	X	X	X	X	X	X							
Faculty of Law in Osijek	X	X	X	X	X	X							
Faculty of Law in Split	X	X											
Faculty of Law at the University of Pristina	X	X											
Faculty of Law at the University of Skopje			X	X						X			( )
Faculty of Law at the University of Montenegro	X	X	X	X	X	X			X				X
Faculty of Law, University of Belgrade	X	X	X	X	X	X	X		X*)				(X)
Faculty of Law, University of Niš	X	X	X	X	X	X							
Faculty of Law, University of Kragujevac													

\*) Scheduled for 2017

Law faculties in **Bosnia and Herzegovina** participate in a Moot Court on European Human Rights, they also involve practitioners in teaching and the Faculty of Law at the University of Mostar organizes field visits to the regional office of the Institution of the Human Rights Ombudsman, social welfare centres and courts and allows for students to do their internship in the judiciary, but also in other relevant institutions. The Law Faculty in Belgrade participates in the annual Moot Court organized by the Commissioner for Protection of Equality.

## 5.2 Legal and Structural Frameworks for Combating Discrimination at Universities

Almost all of the South East European Law School Network (SEELS) members (except for those in **Albania** and **Serbia**) have established statutes and codes of ethics prohibiting discrimination as well as complaints mechanisms responsible for taking in and processing complaints – University Senates, Deans, Courts of Honour or the Students' Ombudsman.

All three universities in **Bosnia and Herzegovina** have established statutes<sup>96</sup> and codes of ethics<sup>97</sup> prohibiting discrimination and providing for mechanisms of redress. For Sarajevo<sup>98</sup> and Zenica<sup>99</sup> there are even laws on higher education prohibiting discrimination. The redress mechanism at the University of Sarajevo, provide for the Dean to decide on complaints on discrimination within 15 days.<sup>100</sup>

In **Croatia**, university statutes or ethical codes provide for the prohibition of discrimination.<sup>101</sup> The Ethical Codex of the University of Rijeka prescribes that each member of the university community should act in accordance with the principle of equality and justice and obliges the university to ensure conditions for the realization of the principle of equality and justice.<sup>102</sup>

University Senates are bodies which take care of complaints related to discrimination, however awareness for this function is low both among the teaching staff and among students.

The statute of the University of Pristina in **Kosovo**\* promotes equal opportunities for all without any discrimination on an open list of grounds.<sup>103</sup> The statute and the ethical code of the University of Skopje in **Macedonia** prohibit discrimination, a Students' Ombudsman can deal with complaints on discrimination. The statute of the University of **Montenegro** and its code of ethics contain provisions prohibiting all forms of discrimination, the Court of Honour would be competent for dealing with discrimination complaints. In **Serbia**, there are no legal documents providing for prohibition of discrimination, but the University Ombudsman could deal with cases of discrimination, this institution is however not very well known among teaching staff and students. None of these institutions competent for handling complaints on discrimination have so far received any reports on discrimination.

<sup>96</sup> Bosnia and Herzegovina/Art 10 (Equality and Prohibition of Discrimination) of Statute of the University of Sarajevo, available at: <http://unsa.ba/s/images/stories/A0/KonacniStatutUNSA.pdf> (08.02.2016) and Art 7(2), JU Univerzitet u Zenici, Statut Univerziteta u Zenici – prečišćeni tekst, <http://www.unze.ba/download/Statut%20precisceni%20%2009112012.pdf> (08.02.2016).

<sup>97</sup> Bosnia and Herzegovina/Art 7 (Principle of Equality and Righteousness) and Art 11 (Discrimination) of the Code of Ethics of the University of Sarajevo, available at: <http://unsa.ba/s/images/stories/AMOB/EK12.pdf> (08.02.2016) and Art 7, Art 11 and Art 12, JU Univerzitet u Zenici, Etički kodeks, available at: <http://www.unze.ba/download/ETICKI%20KODEKS%2011022013.pdf> (08.02.2016).

<sup>98</sup> Bosnia and Herzegovina/Art 7 (Equal Rights) of the Law on Higher Education of Sarajevo Canton, available at: <http://fpn.unsa.ba/bs/wp-content/uploads/2014/12/ZAKON-O-VISOKOM-OBRAZOVA> NJU-PRE%20C4%8CI%20C5%A0%20C4%86ENI-TEKST.pdf (08.02.2016).

<sup>99</sup> Bosnia and Herzegovina/Art 10, B&HZakon o visokom obrazovanju ZDK, „Službene novine ZDK“ br. 6/2009, 09/2013, 13/2013, 4/2015.

<sup>100</sup> Bosnia and Herzegovina/Art 47 and Art. 48 of Sarajevo Law Faculty Rulebook.

<sup>101</sup> Croatia/The Statute of the University of Zagreb – consolidated version (in Croatian), available at: [http://www.unizg.hr/fileadmin/rektorat/O\\_Sveucilistu/Dokumenti\\_javnost/Propisi/statut\\_2016.pdf](http://www.unizg.hr/fileadmin/rektorat/O_Sveucilistu/Dokumenti_javnost/Propisi/statut_2016.pdf) (30.03.2016). The Statute of the University of Osijek (in Croatian), available at: <http://www.unios.hr/uploads/50Statut13.pdf> (30.03.2016). Pravilnik o stegovnoj odgovornosti nastavnika i suradnika Sveučilišta Josipa Jurja Strossmayera u Osijeku (Rules on disciplinary responsibility of teachers and associates University of Osijek), available at: [http://www.unios.hr/-uploads/50pravilnik\\_2013-03-29.pdf](http://www.unios.hr/-uploads/50pravilnik_2013-03-29.pdf) (30.03.2016).

<sup>102</sup> Croatia/The Ethical Codex of the University of Rijeka (in Croatian), available at: [http://www.biotech.uniri.hr/files/Dokumenti/Eticki\\_kodeks\\_Sveucilista\\_u\\_Rijeci.pdf](http://www.biotech.uniri.hr/files/Dokumenti/Eticki_kodeks_Sveucilista_u_Rijeci.pdf) (30.03.2016). The Statute of the University of Rijeka (in Croatian), available at: [http://www.uniri.hr/files/staticki\\_dio/propisi\\_i\\_dokumenti/STATUT%20PROCISCENI%202008-%20final.pdf](http://www.uniri.hr/files/staticki_dio/propisi_i_dokumenti/STATUT%20PROCISCENI%202008-%20final.pdf) (30.03.2016).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>103</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence)/The Statute of the University of Pristina, available at <http://www.uni-pr.edu/Ballina.aspx> (30.03.2016).

Universities in **Bosnia and Herzegovina** and **Croatia** have implemented positive measures by establishing offices supporting students with disabilities. In **Bosnia and Herzegovina**, all three universities have in the framework of the TEMPUS project “Equal opportunities for students with special needs in higher education – EQOPP”<sup>104</sup> established an Office for Support to Students with Special Needs. These offices promote an inclusive educational environment and also provide individual support to students with special needs.<sup>105</sup> In **Croatia**, several universities have established offices for students with disabilities. Support services for students with disabilities are still in development and support for students with disabilities depends largely on NGOs that perform these services. The University of **Montenegro** has installed ramps and elevators and offers signs in Braille. The University Steering Board can decide on whether to exclude students of Roma background or with disabilities from tuition fees.

### 5.3 Awareness of Rights of University Staff and Students

The complaints mechanisms described above do not seem to be well known neither among university staff nor among students, as no complaints on discrimination have so far been filed.

In **Croatia**, a survey on occurrences of discrimination and inappropriate practices such as plagiarism and nepotism was conducted at the universities of Zagreb, Split, Rijeka and Osijek in 2011 and 2012.<sup>106</sup> Awareness for discrimination on the ground of gender seems to be a little bit higher than for discrimination on the ground of ethnic origin or sexual orientation both among university staff and students. Teaching staff was asked whether students during enrolment or during the course of their studies are alerted to illegal behaviours in the academic community and whether they are informed about where to turn to when exposed to illegal behaviours. The first question was more often answered in the affirmative than the second one.<sup>107</sup> Unfortunately there were no questions included on whether university staff or students would report cases of discrimination when experiencing discrimination themselves or when witnessing discriminatory behaviour.

### 5.4 Interim Analysis

Awareness raising for rights and activities supporting the development of a culture of rights should start in kindergarten and should be continued at the primary and secondary levels of education. Still, universities play an essential role in building on the previous work done in the educational system and in focusing their courses on those elements of discrimination that play a role in the respective discipline. Law faculties have a special obligation as they

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<sup>104</sup> Bosnia and Herzegovina/ “Students with special needs make a heterogeneous group that includes students with physical, hearing, visual impairment, with specific learning disabilities, mental impairment, students with speech-language disorders, chronically ill students, students belonging to vulnerable groups such as ethnic minority, academically disadvantaged students and students with low socio-economic status, students who experienced trauma, violence, etc.” For more on EQOPP: <http://www.sus.ba/eqopp/> (01.02.2016).

<sup>105</sup> Bosnia and Herzegovina/For detailed competencies of the Office, see: [http://www.unze.ba/ba/o\\_uredu\\_zapodrsku.htm](http://www.unze.ba/ba/o_uredu_zapodrsku.htm) and [http://unsa.ba/s/index.php?option=com\\_content&task=blog-category&id=190&Itemid=396](http://unsa.ba/s/index.php?option=com_content&task=blog-category&id=190&Itemid=396) (09.02.2016).

<sup>106</sup> Croatia/Project website of the project ‘Uspostava pravnog okvira za suzbijanje pojava diskriminacije i korupcije s ciljem unapređenja akademskog integriteta’ (Improving the Capacity of the University System to Create a Framework for Preventing Discrimination and Corruption aimed at improving Academic Integrity), available at: <http://e-disco.ufzg.hr/> (30.03.2016).

<sup>107</sup> Croatia/Results of survey on employees’ and students’ perception on illegal behaviours at universities, available at: <http://e-disco.ufzg.hr/index.php/istrzivanje> (30.03.2016).

educate many of the future legal practitioners that might work for equality bodies, ombud institutions, NGOs/CSOs or within the judicial system.

So far about half of the law faculties, which are members of SEELS, have tried to integrate the issue of discrimination into both mandatory as well as elective courses at all three levels of tertiary education. About one third of the faculties have established separate courses on discrimination issues mostly at master level. Such courses give more room to acquire theoretic and practical knowledge on the specificities of discrimination cases, on the overall system preventing and protecting against discrimination as well as on the role of relevant stakeholders within the system and on the importance of data collection for both evidencing discrimination and monitoring the social developments in the area of discrimination.

The introduction of new courses is more challenging, as they have to be assessed and approved by decision making bodies that have to be convinced of the academic value of such courses. So the introduction of new courses in this context might involve awareness raising for the importance of the concepts and special characteristics of discrimination cases, for the value of workshops on the refutation of stereotypes and prejudices in order to be able to understand the consequences of discrimination and about how to develop research in this area. On top of that not all the academic staff might have acquired the necessary competences and soft skills to teach such courses.

One way forward in offering students an opportunity to both gain theoretical and practical knowledge in the area of discrimination are legal clinics, which have been successfully operating at almost half of the faculties that are members of SEELS. They give students the opportunity to reach out to the stakeholders, which are part of the system preventing and protecting against discrimination as well as to victims of discrimination belonging to various vulnerable groups.

Although universities in almost all the project countries have established statutes or codes of ethics prohibiting discrimination as well as complaints handling mechanisms, universities seem to be mirroring the general lack of awareness of discrimination. In **Croatia**, four universities conducted surveys among university staff and students, which covered discrimination as one aspect of illegal behaviour in the academic community (together with corruption, nepotism and plagiarism). Future research projects could focus on the development and implementation of similar surveys at universities in the project countries and could think about dissemination strategies raising the awareness of university staff and students for both discrimination and the availability of mechanisms of redress.

## **6. Developing a Culture of Rights**

When a culture of rights within the context of preventing and combating discrimination has been successfully developed, the general population will be aware of inequalities and discrimination and will be ready and well equipped to be supportive of individuals and groups vulnerable to discrimination and of legal and institutional mechanisms preventing and prohibiting discrimination. Such a culture is aware of prejudices and stereotypes and conducive to reporting cases of discrimination, to preventing future discrimination and to promoting a more equal society despite its diversity. So, it plays an essential role in guaranteeing access to justice for individuals and groups susceptible to discrimination.

All of the specialized laws preventing and prohibiting discrimination in the project countries oblige equality bodies to do awareness raising among the general public but also among institutions and organizations that are targets of their recommendations or that promote human rights and equality by way of different tools. These tools include elements of case

work (e.g. informing complainants about their rights and remedies available, targeting recommendations at persons/organizations against whom a complaint has been submitted) and work that goes beyond individual cases and aims at different target groups, such as:

- raising awareness among and informing the general public about equality and non-discrimination and about occurrences of discrimination,
- conducting surveys on attitudes and the awareness of discrimination among the general population and among the most important professional groups,
- conducting awareness raising trainings and educational activities supporting the implementation of the specialized laws preventing and prohibiting discrimination,
- entering into dialogs with a broad range of stakeholders such as NGOs/CSOs, social partners, regional and local government units, etc.,
- starting *ex officio* investigations and publishing specialized reports,
- suggesting or commenting on legal amendments raising awareness among law drafters and the legislator.

Developing a culture of rights demands the support not only of equality bodies, but a broad range of other stakeholders such as governments and relevant ministries (e.g. Ministry/Government Office for Human Rights, Ministry of Justice, Ministry of Education, Ministry of Social Affairs and Labour) as well as NGOs/CSOs. Governments and ministries develop policies and measures preventing and combating discrimination, which could include awareness raising campaigns, the devising and implementation of affirmative measures as well as the drafting, implementing and monitoring of strategic documents promoting equality, preventing discrimination and improving the rights of individuals and groups especially prone to discrimination.

This section explores what kind of instruments stakeholders within the system of preventing and protecting against discrimination have used so far and what they have achieved by implementing awareness raising activities and by devising measures aiming at preventing future discrimination. The section also identifies indicators helpful in assessing the levels of awareness of stakeholders, specific professional groups and the general public.

## 6.1 Achievements in Awareness Raising

Awareness raising activities are to a great extent implemented by NGOs/CSOs, equality bodies and ombud institutions. They fill the gap that is left by the states, who rarely are active in awareness raising. Only the Ministry for Human and Minority Rights of **Montenegro** has been described as continuously carrying out campaigns on the prohibition of discrimination and promoting anti-discriminatory behaviour and practices since 2011.<sup>108</sup>

Equality bodies and CSOs/NGOs are most active in awareness raising, quite often they engage themselves in jointly organized activities. Equality bodies use a broad range of awareness raising tools, which aim at different target groups: annual reports, specialized reports, meetings with institutions / organizations specialized in combating discrimination and with institutions / organizations targeted by recommendations, trainings / workshops for e.g. NGOs/CSOs, the police, judges and prosecutors, open days and field visits reaching out to especially vulnerable communities, awareness raising materials such as leaflets and brochures about the specialized laws preventing and prohibiting discrimination, about their mandates and competences, encouraging the submission of complaints, press releases as well as participation in TV and radio

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<sup>108</sup> During 2015, TV spots, advertisements, flyers and billboards promoted the message “Respect diversity, reject discrimination, accept the human being” (see: I. Jelić/S. Armenko (2016) Study “Legal Protection against Discrimination in Montenegro”, section 6.2).



programs. CSOs/NGOs engage themselves in campaigns, protests, organizing trainings / workshops, round tables, conferences, publishing of policy documents and practical handbooks / guidelines, research and surveys, outreach work with vulnerable communities, marking human rights days by organizing events and doing media work.

The awareness raising activities either focus on certain professional groups, institutions / organizations promoting human rights, on vulnerable groups, on potential targets of recommendations when discrimination has been established in a case and to a lesser extent on the general public.

## 6.2 Assessing the Levels of Awareness

It is important to differentiate between various target groups, when looking at the levels of awareness for the fact that discrimination is prohibited by law, for the essence and consequences of discrimination and for the availability of mechanisms of redress:

- (1) public authorities and especially law enforcement institutions should act as role models and should therefore have an elevated level of awareness, which is also true for leaders of educational institutions and organizations and companies in the private sector,
- (2) relevant intermediaries in the field like NGOs/CSOs, lawyers, trade unions, etc.
- (3) members of groups especially vulnerable to discrimination (e.g. Roma, LGBTI people, etc.), and
- (4) the general public.

Quantitative and qualitative research in the project countries primarily covers the general public. Surveys conducted in **Bosnia and Herzegovina**,<sup>109</sup> **Croatia**,<sup>110</sup> **Macedonia**<sup>111</sup> and **Serbia**<sup>112</sup> show that awareness of the specialized laws preventing and prohibiting discrimination, of equality bodies and other redress mechanisms as well as of what discrimination encompasses is still not at an adequate level.

In **Serbia**, surveys were also conducted among representatives of legislative, executive and judicial authorities at the national, provincial and local level<sup>113</sup> and among the

<sup>109</sup> Fond otvoreno drustvo B&H (2011) Report on results of public opinion poll on perception and experience of discrimination.

<sup>110</sup> Ured za ljudska prava Vlade RH, Ured pučkog pravobranitelja i Centar za mirovne studije (2009), *Istraživanje o stavovima i razini svijesti o diskriminaciji i pojavnim oblicima diskriminacije*, available at: <http://www.antidiskriminacija.com/wp-content/uploads/2013/07/Istra%C5%BEivanje-o-stavovima-i-razini-svijesti-o-diskriminaciji-i-pojavnim-oblicima-diskriminacije.pdf> (30.03.2016); Ured pučkog pravobranitelja (2012) *Istraživanje o stavovima i razini svijesti o diskriminaciji i pojavnim oblicima diskriminacije*, available at: <http://www.antidiskriminacija.com/wp-content/uploads/2013/07/Istrazivanje-o-stavovima-i-razini-svijesti-o-diskriminaciji-i-pojavnim-oblicima-diskriminacije-2012.pdf> (30.03.2016); Centar za mirovne studije (2013) *Zastupljenost i indikatori diskriminacijskih i ksenofobičnih stavova u Republici Hrvatskoj*, available at: <http://www.antidiskriminacija.com/istra-zivanje-o-diskriminaciji/> (30.03.2016).

<sup>111</sup> Helsinki Committee for Human Rights of the Republic of Macedonia (2015) *Research of the Citizens' Understanding and Knowledge of Human Rights and Their Protection Mechanisms*, available at: [http://www.mhc.org.mk/system/uploads/redactor\\_assets/documents/903/Istrazivanje\\_Razbiranje\\_na\\_covekovi\\_prava\\_MK\\_EN\\_AL.pdf](http://www.mhc.org.mk/system/uploads/redactor_assets/documents/903/Istrazivanje_Razbiranje_na_covekovi_prava_MK_EN_AL.pdf) (30.03.2016).

<sup>112</sup> Commissioner for Protection of Equality, Regular Annual Report for 2012, Belgrade, March 2013, available at: <http://www.ravnopravnost.gov.rs/jdownloads/files/engleski-web.pdf> (07.07.2016), p. 30.

<sup>113</sup> Commissioner for Protection of Equality, Regular Annual Report for 2013, Belgrade, June 2014, available at: [http://www.ravnopravnost.gov.rs/jdownloads/files/redovan\\_izvestaj\\_2013\\_eng.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/redovan_izvestaj_2013_eng.pdf) (07.07.2016), p. 10.

police.<sup>114</sup> The representatives of public authorities showed very partial knowledge on anti-discrimination instruments, about 40 per cent did not recognize indirect discrimination in a given example. One third believed that representatives of public authorities do not treat all citizens equally, even half of the respondents thought that their colleagues would discriminate citizens. Two thirds of these were ready to react, however only 5 per cent were willing to report the incident. Almost 50 per cent of the respondents believed that the discriminated groups are themselves responsible for their position. More than 90 per cent of the police officials interviewed believed that all citizens deserved equal treatment, almost 50 per cent were not aware of what discrimination means. In 2015, another research was implemented by the Academy of Criminalistic and Police Studies, which showed that more than 50 per cent of the respondents among the police were not aware of the existence of the Commissioner for Protection of Equality and although the majority of respondents saw media, political parties, NGOs and the Government as responsible for the existence of discrimination and as most influential in combating it, they believed that the police had no role in combating discrimination and could not influence the existence of discrimination.

The levels of awareness among legal experts can be assessed by the frequency of NGOs/CSOs and lawyers referring to the specialized laws preventing and prohibiting discrimination.

In **Montenegro**, the Civic Alliance conducted research on discrimination in employment (gender, age) and identified discrimination in job advertisements, in the application process, at the work place, etc.<sup>115</sup>

In **Croatia**, Zagreb Pride conducted research among the LGBTIQ population, which showed that about one third of the respondents had experienced some form of discrimination.<sup>116</sup> They experienced discrimination when gaining access to goods and services (mostly food and beverage services or rental housing market), at school or university, during the application procedure for a job and at the work place. Discrimination often occurred in contact with public servants such as police and medical staff.

Another indicator for the level of awareness of discrimination is the number of cases reported to the equality bodies and the number of cases taken to court. The number of complaints submitted to the various equality bodies should not be compared to each other country by country, as the equality bodies differ in their set-up, mandates and competences and there are too many factors influencing the turnout of complaints that might be very different in the project countries. A trend can however be identified for those countries that have had equality bodies since 2010, namely that the numbers of complaints have significantly increased in **Albania** and **Serbia** and have increased in **Croatia** and **Bosnia and Herzegovina**, between 2012 and 2015 compared to 2010. A slight increase can also be witnessed in **Macedonia**, whose Commission for Protection against Discrimination was only established in 2011. The Ombudsperson Institution of **Kosovo**\* has only been responsible for

<sup>114</sup> Commissioner for Protection of Equality, Regular Annual Report for 2014, June 2015, Belgrade, available at: [http://www.ravnopravnost.gov.rs/jdownloads/files/regular\\_annual\\_report\\_of\\_the\\_cpe\\_2014\\_spojeno.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/regular_annual_report_of_the_cpe_2014_spojeno.pdf) (07.07.2016), p. 42.

<sup>115</sup> Civic Alliance (2015) *Survey on Discrimination on the Ground of Sex and Age in regard to Employment*, Skopje.

<sup>116</sup> Croatia/M. Juričić (ed.) (2013) *Pink Megaphone From Anti-Discrimination Act to the Constitutional Ban on Same-Sex a Report of Zagreb Pride on the Human Rights of LGBTIQ Persons in Croatia 2010-2013*, Zagreb: Zagreb Pride, available at: <http://www.zagreb-pride.net/new/wp-content/uploads/2015/02/report2014.pdf> (30.03.2016).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

implementing the Law on the Protection of Discrimination since 2015, so the numbers on discrimination cases prior to 2015 are related to other legal provisions prohibiting discrimination. The number of court cases was assessed as still being rather low and statistics are not easily accessible, as they are either only generated on demand or only provided to equality bodies.

The readiness of authorities, organizations and individuals to implement recommendations issued by an equality body is also an indicator of how well aware these systems are of what discrimination means and what its consequences are. At the same time the readiness to follow recommendations also depends on the reputation and image of the equality body, which is closely linked to the quality, transparency and trustworthiness of its work.<sup>117</sup> Both in **Macedonia** and in **Serbia**, equality bodies witnessed that the readiness to implement recommendations issued in response to individual complaints was much higher than that of the general recommendations aimed at combating structural discrimination.

### 6.3 Preventing Future Discrimination

Equality bodies have a range of tools available contributing to preventing future discrimination. They can issue recommendations based on individual complaints, which is a reactive approach, they can engage in pro-active activities by starting *ex officio* investigations and publishing special reports. When acting pro-actively the equality bodies can determine which forms and grounds of discrimination should be primarily dealt with at a certain point in time.

An obstacle that needs to be overcome to heighten the chances of preventing future discrimination is the lack in internal policies and structures capable of preventing discrimination, which is evident in a majority of both public and private sector organizations. Supporting the establishment of such structures can be done via recommendations issued by equality bodies aiming at structural and organizational changes, but also by developing and disseminating Codes of Good Practices for combating discrimination and promoting equality, which can be used as a reference point in cases of discrimination, as stipulated in the mandate of the Ombudsperson Institution by the Law on the Protection from Discrimination of **Kosovo**.\*

Equality bodies can recommend the drafting of new laws or the amending of existing laws, some equality bodies can initiate legal amendments (e.g. in **Kosovo**,\* **Macedonia** and **Serbia**). This is quite a powerful tool, as it contributes to raising awareness among law drafters and the legislator for identifying possibly negative effects of a newly drafted law on specifically vulnerable groups and for identifying legal provisions that have to be amended due to being discriminatory. Such provisions were pointed out in the report on **Albania**, which lists examples of laws that are based on discriminatory concepts, such as the Criminal Code, which degrades homosexual relationships or the Law on Social Services, which uses

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<sup>117</sup> In 2011, the Commissioner for Protection of Equality conducted a public awareness campaign titled “Trust in the Commissioner” with the aim of familiarizing the institution to the public. As part of the campaign, in many municipalities and cities in Serbia promotional activities were held with the support of the local self-governments and local NGOs (see: I. Krstić Davinić (2016) Study “Legal Protection against Discrimination in Serbia”, section 6.2).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* Ibid.

the concept of head of the family, which is in conflict with the principle of gender equality.<sup>118</sup>

Activities combating stereotypes and prejudices are primarily implemented by NGOs/CSOs and to some extent by equality bodies. These institutions seem to fill the gap left by state institutions. The Commissioner for Protection of Equality as well as some NGOs in **Serbia**, implement living libraries<sup>119</sup> which aim at reducing stereotypes and prejudices. The Commissioner of Protection against Discrimination of **Albania** engaged a girl with disabilities to draft a booklet on the Law on Protection from Discrimination targeting pre-university educational institutions. The report on **Macedonia** pointed at the crucial role of media as story telling is an important tool in the context of overcoming stereotypes and prejudices.

Affirmative action measures are another tool for preventing future discrimination. There was no systematic mapping of these measures within the project countries, so we cannot say anything about the extent to which they are implemented and contribute to promoting equality of especially marginalized groups. These measures are temporary in nature and have to be discontinued as soon as they have achieved their objectives. Monitoring mechanisms have to be established and have to rely on well-defined objectives and indicators, which can be operationalized and measured.

Strategic documents can also contribute to preventing future discrimination. Strategic documents usually focus on the prohibited grounds of discrimination explicitly listed in the specialized laws on preventing and prohibiting discrimination. So when these laws remain silent on grounds such as age and disability (**Bosnia and Herzegovina**) and sexual orientation (**Macedonia**) then these vulnerable groups will be omitted in national strategies and action plans.

**Serbia** is currently implementing the “Action Plan for the implementation of the Strategy of Prevention and Protection against Discrimination for the Period from 2014 to 2018”. The implementation of the action plan is monitored by the Council for Monitoring the Action Plan and the monitoring report is drafted by the Office for Human and Minority Rights. **Bosnia and Herzegovina, Croatia** as well as **Macedonia** have action plans that expired and are therefore currently developing new ones. **Montenegro** and **Albania** do not have an action plan in the area of preventing and prohibiting discrimination. Such action plans should encompass measures preventing future discrimination, should be developed in cooperation with stakeholders competent in the area of promoting equality and combating discrimination, should foresee objectives, activities and indicators suggesting an adequate level of development and should establish indicators adequately measuring the results of the activities.

#### 6.4 Interim Analysis

Especially equality bodies and NGOs/CSOs separately as well as jointly commit themselves to awareness raising among a broad range of stakeholders with the aim of increasing their visibility especially among persons/groups susceptible to discrimination and among public institutions and professional groups influencing the structures and procedures determining access to justice. They also aim at raising awareness among the general public. They fill a gap that has remained open due to state institutions not involving themselves in more comprehensive systematic awareness raising campaigns and campaigns combating

<sup>118</sup> A. Mandro Balili/F. Kola Tafaj (2016) Study “Legal Protection against Discrimination in Albania”, section 1.2.

<sup>119</sup> See: [http://www.coe.int/t/dg4/eycb/Programme/livinglibrary\\_en.asp](http://www.coe.int/t/dg4/eycb/Programme/livinglibrary_en.asp) (10.07.2016).

prejudices and stereotypes. As resources are scarce for government bodies, equality bodies and NGOs/CSOs, they should make efficient and synergistic use of resources for developing and implementing campaigns for which the purpose and the target groups have been well defined in advance.

The section has identified various indicators that can be used by equality bodies to determine whether they have been successful in raising awareness among various target groups for the specialized laws preventing and prohibiting discrimination (e.g. results of surveys), for their mandates and their services (e.g. number of cases reported, frequencies of referrals from other institutions/organizations) as well as for the necessity of developing policies and measures combating and preventing discrimination beyond the individual case (readiness of targeted institutions/organizations implementing recommendations providing for the development of internal policies and structures preventing discrimination).

Raising awareness is however only one element that promotes a culture of rights, and it has to be supplemented by working on the prevention of future discrimination and promoting principles valuing diversity within society and guaranteeing equality for all. This, much larger, task demands holding stakeholders, especially those determining educational, labour market and social policies, as well as ministries of justice accountable for developing policies and measures contributing to the development of a culture of rights. Equality bodies, NGOs/CSOs and other interested stakeholders could join forces in advocating for such policies.

## 7. Conclusions and Recommendations

This synthesis report has looked into the framework conditions and factors promoting and inhibiting access to justice for victims of discrimination in SEE. The legal and institutional set-up is in place and operational and to a large extent complies with European and other international standards in the area of protecting and prohibiting discrimination. The solid legal basis has to be brought to life to its full extent so that equality bodies and all the other stakeholders within the system of preventing and protecting against discrimination are able to effectively support victims of discrimination, to develop and implement strategies preventing discrimination and to support the development of a culture of rights, which is conducive to supporting victims of discrimination and to promoting principles, policies and measures aiming at a more equal and inclusive society.

The study has identified as key stakeholders equality bodies, ombud institutions promoting human rights and CSOs/NGOs as well as important supporting, facilitating and/or monitoring structures like

- Parliaments,
- Ministries or government offices responsible for human rights,
- law enforcement such as the police and courts,
- institutions training judges, lawyers and police officials as well as law faculties educating future legal practitioners, and
- governmental bodies at the national, provincial and local level implementing special policies and measures preventing and prohibiting discrimination, but also policies and measures that should mainstream the prevention of discrimination and the promotion of equality.

The following recommendations are based on the findings of the individual national reports, the conclusions drawn in the synthesis report and the results generated by working groups within the framework of the Regional Conference “Legal protection against discrimination in South East Europe”, which involved representatives of almost all the bodies, institutions and organizations identified above and took place in Budva from June 28<sup>th</sup> to 29<sup>th</sup>, 2016.

### 7.1 Legal Framework

Amendments to the legal framework should contribute to further aligning the legal provisions with the European and international standards on preventing and protecting discrimination, but should also be informed by the experiences and lessons learnt from those implementing the relevant laws. Amendments should aim at facilitating access to justice by way of strengthening the support to victims of discrimination, promoting a systematic cooperation of the stakeholders within the system of preventing and protecting against discrimination and enabling the development of a culture of rights. The following recommendations could contribute to achieving these aims:

- Ensure consultations with equality bodies and other relevant stakeholders implementing the specialized laws on preventing and prohibiting discrimination prior to amending these laws.
- Establish a working group including representatives of equality bodies and relevant legal practitioners when drafting legal amendments to the specialized laws on preventing and prohibiting discrimination.
- Discuss the draft amendments with a broad range of experts and stakeholders raising awareness for the purpose and aims of the law.

- Develop commentaries on the specialized laws preventing and prohibiting discrimination to raise awareness for the priority of the specialized laws over general legal provisions.
- Include victims of discrimination as beneficiaries into the legal provisions on free legal aid.

## 7.2 Equality Bodies

Equality bodies are the central players in the system promoting the prevention of and the protection against discrimination. They need to do their work in an independent, reliable and competent way, so that potential complainants, courts and other relevant stakeholders can develop trust into them. One important basis is the compliance of the legal provisions establishing equality bodies with the Paris Principles.<sup>120</sup> Beyond that equality bodies have to prove the achievements for victims of discrimination who desire “termination of discrimination, such as removal of barriers and re-instatement to position lost; recognition of discrimination and prevention of discrimination to protect others in the future”.<sup>121</sup> The following recommendations could contribute to achieving these aims:

- Strengthen the capacities of equality bodies to deliver their services to the citizens. Equality bodies should develop strategies for being close to citizens in geographical terms and for making tangible what services they offer and what can be achieved in cases of discrimination.
- Strengthen the capacities of equality bodies to support victims of discrimination. Equality bodies could assess the satisfaction of complainants with the complaints handling procedure and the outcome of the procedure. The results of such an assessment could shed more light on the fears complainants have, which might prevent them from reporting discrimination and on the obstacles they encounter when gaining access to justice.
- Strengthen the powers of equality bodies to prevent future discrimination. Further develop the quality of recommendations and include recommendations on how institutions/organizations can develop policies and mechanisms preventing discrimination.
- Strengthen the pro-active powers of equality bodies (such as *ex officio* investigations and special reports, informing the public about frequent and severe forms of discrimination), which aim at awareness raising and preventing future discrimination.
- Strengthen the data collection mechanisms of equality bodies both content wise and on the technical level, which is relevant for case work, for collecting evidence, for drafting annual reports and for informing media and the public.
- Develop structures for exchanging good practices and for developing the capacities of the equality bodies in SEE at the regional level.

<sup>120</sup> Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> (05.07.2016).

<sup>121</sup> FRA (2012) Access to justice in cases of discrimination in the EU – Steps to further equality, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> (04.07.2016), p. 45.

### 7.3 System Promoting the Prevention of and Protecting against Discrimination

The institutional set up of the system preventing and protecting against discrimination consists of a multitude of stakeholders, which to varying extents promote and support elements of access to justice at the levels of structure, procedure and support (see Table 1). The multitude of stakeholders could contribute to increasing the effectiveness of the system by exchanging information and experiences and by identifying gaps and challenges in a more systematic way and by making use of their resources in a more strategic and synergetic way. The implementation of the following recommendations could contribute to achieving these objectives:

- Strengthen the role/authority of equality bodies within the system.
- Establish regular coordination meetings with the aim of e.g. discussing trends, cases of discrimination and challenging issues.
- Implement awareness raising trainings so as to include more stakeholders in the system (e.g. public officials, educators, social welfare/health workers, inspectors, etc.). Establishing a pool of trainers with different professional backgrounds that can continuously implement such awareness raising trainings could support the sustainability of such measures.
- Establish legal provisions on the cooperation of relevant stakeholders, which are informed by the experiences gained on good and bad practices of cooperation.
- Strengthen the system of data collection and establish monitoring mechanisms guaranteeing the participation of a broad range of stakeholders, which are or should be involved in data collection.
- Reach out to government bodies at all levels of government which develop and implement policies that should mainstream the prevention of discrimination and promotion of equality taking the needs of e.g. asylum seekers, LGBTI persons, national minorities, persons with disabilities, women, the young and elderly into account.

### 7.4 Judicial System

The judicial system is key as a gatekeeper for access to justice and has to absorb concepts and procedural provisions special to cases of discrimination. The body of case law in SEE has not substantially developed yet and harmonization of court practice is quite challenging as most of the relevant judgments are not accessible, neither for judges nor for other legal practitioners. The following recommendations could contribute to improving access to justice when it comes to courts:

- Ensure easy access to courts for people wanting to file a discrimination claim, which includes overcoming physical, language and financial barriers.
- Develop a handbook on case law from the region and translate it into all relevant languages.
- Establish a data base, in which judgments related to discrimination are easily retrievable and accessible for judges, lawyers, equality bodies, NGOs and citizens.
- Strengthen the capacities of equality bodies to develop an effective role in court proceedings.
- Develop adequate tools to inform judges and other legal practitioners about case law from the ECtHR, the CJEU and national courts, about relevant publications, about comments on final judgments, etc. on a regular basis.



## 7.5 Strengthening Competences and Skills of Stakeholders

Prevention of and protection against discrimination are essential principles for the functioning of society. For the development of a culture of rights it is essential that everybody in SEE gets the opportunity to reflect on stereotypes and prejudices, to learn about the specialized laws and redress mechanisms and is empowered to identify discrimination. Supporting the development of such competences and skills should start in kindergarten and be continued at all levels of education. The national reports have identified certain professional groups, whose competences have to be further advanced for the purpose of making protection against discrimination more effective. The synthesis report shows that the capacity building needs of especially judges and other (future) legal practitioners are very similar in SEE, which encourages a regional approach in developing and delivering such educational and training activities:

- Ensure that education and training activities aim at supporting the development of a culture of rights and high integrity of legal professionals who respect diversity in order to provide for effective and efficient legal protection against discrimination.
- Ensure that the development of education and training activities is inspired by theory and practice, by relevant disciplines and by the expertise of relevant stakeholders.
- Ensure that the implementation of the education and training activities involves representatives of the respective professional group as well as representatives of equality bodies, NGOs/CSOs, lawyers, and academics.
- Strengthen the professional capacities of public officials at all government levels and police officers in a more systematic way.
- Increase the capacities of judges for conducting fair and effective proceedings taking the specificities of discrimination cases into account both via basic and continuous trainings. Consider developing courses focusing on elements specific to discrimination cases.
- Strengthen the professional capacities of lawyers and free legal aid providers.
- Introduce specialized courses as well as master programs on protection against discrimination in the SEE Law Faculties, look into the possibilities of establishing specialized summer schools for master and PhD studies and continue incorporating the issue in human rights courses.

## 7.6 Developing a Culture of Rights

Supporting the development of a culture of rights enhances access to justice for victims of discrimination as it raises awareness for prejudices and stereotypes and is conducive to reporting cases of discrimination, to preventing future discrimination and to promoting a more equal society despite its diversity. Fostering a culture of rights requires commitment by state authorities and especially by ministries responsible for education, as they determine the structural level such as curricula, textbooks and standards for teacher education influencing how principles like non-discrimination and equality are integrated into education. However, there are many other stakeholders like equality bodies, NGOs/CSOs, ombud institutions, etc. doing valuable work in promoting a culture of rights, which could be invited to enhance the coordination of their activities together with relevant state bodies. In order to effectively support the development of a culture of rights, the following recommendations should be considered:

- Oblige state institutions to implement comprehensive and systematic campaigns raising awareness of rights and protection mechanisms targeting rural and urban

areas as well as vulnerable groups. Ensure that capacities and expertise of NGOs/CSOs are integrated into the development and delivery of such campaigns.

- Support concrete measures to raise awareness and combat prejudices/stereotypes (e.g. living libraries, moot courts, etc.) to achieve sustainable societal change.
- Support the production and dissemination of easily accessible information encouraging individuals to report incidents of discrimination.
- Provide for structures so that the most important stakeholders (e.g. Ministry of Justice, Ministry of Education, Ministry of Social Affairs and Labour, equality bodies, civil society) can develop measures contributing to the development of a culture of rights.
- Develop strategies on how to effectively protect victims against discrimination.
- Provide for equality bodies to share the achievements in cases of discrimination with the public.
- Look into possibilities of developing and implementing surveys at the regional level not only on the awareness for specialized laws on preventing and prohibiting discrimination and respective redress mechanisms, but also on experiences of discrimination and the readiness of reporting discriminatory incidents.



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## **PART TWO**

### **National Reports on Legal Protection against Discrimination**



# **Legal Protection against Discrimination in Albania**

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# Table of Contents

<b>Executive Summary.....</b>	<b>83</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>85</b>
1.1 Overview of Constitutional and Legal Provisions.....	85
1.2. Assessment of the Legal Framework .....	88
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>92</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	92
2.2 Stakeholders Putting Combating Discrimination into Practice .....	95
2.2.1 <i>Equality Body/Bodies</i> .....	95
2.2.2 <i>Ombud Institution(s)</i> .....	98
2.2.3 <i>Intermediaries</i> .....	100
2.2.4 <i>Police</i> .....	101
2.2.5 <i>Other Relevant Stakeholders</i> .....	102
2.3 Mapping the Cooperation among Stakeholders .....	103
2.3.1 <i>Equality Body/Bodies</i> .....	103
2.3.2 <i>Ombud Institution(s)</i> .....	104
2.3.3 <i>Intermediaries</i> .....	105
2.3.4 <i>Police</i> .....	105
2.3.5 <i>Other Relevant Stakeholders</i> .....	106
<b>3. The Role of Courts in Combating Discrimination.....</b>	<b>106</b>
3.1 Capacities of Courts in Combating Discrimination.....	106
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	109
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	110
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>111</b>
4.1 Mediation .....	111
4.2 Evidencing Discrimination.....	111
4.3 Strategic Litigation.....	112
4.4 Class Action/Actio Popularis .....	112
4.5 Shifting of the Burden of Proof.....	113
4.6 Remedies.....	113
4.7 Follow-Up to Opinions and Recommendations .....	114
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>114</b>
5.1 Law Departments .....	114
5.2 Legal and Institutional Structures Combating Discrimination .....	115
<b>6. Developing a Culture of Rights .....</b>	<b>116</b>
6.1 Assessing the Levels of Awareness .....	116
6.2 Achievements in Awareness Raising .....	117
6.3 Preventing Future Discrimination .....	117
<b>7. References .....</b>	<b>119</b>

<b>Annexes .....</b>	<b>123</b>
Annex 1 – Glossary .....	123
Annex 2 – Template for Good Practice Examples .....	124
Annex 2.1 Albanian School of Magistrates – Courses on Anti-Discrimination (2010-2015) .....	125
Annex 3 – Statistics Equality Bodies/Ombud Institutions.....	132

## Executive Summary

Equality and non-discrimination, as one of the fundamental principles guaranteed and protected worldwide, are guaranteed by the Albanian Constitution as well. The Albanian Constitution expressly provides the right to equality before the law, prohibition of discrimination and that everyone is entitled to all the rights and freedoms without any discrimination.

The concepts related to discrimination are relatively new in Albania and has been especially developed after the approval of the Law no. 10221 dated on 04.02.2010 on Protection from Discrimination. Pursuant to this Law, it was established the institution of the Commissioner for Protection from Discrimination was established as an institution which exercises its authority independently and ensures efficient protection from discrimination and any kind of behavior that incites discrimination due to gender, race, color, ethnicity, language, identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, disability, affiliation with a particular group, or for any other reason.

This report aims to provide an overview of the situation of discrimination in Albania. It starts with an analysis of the legal framework pointing to the domestic legislation, as well as to the international acts that contain provisions on prohibition of all forms of discrimination in society, to which Albania is a party. The meaning of diversity and equality, the concept and forms of discrimination recognized in our country and the areas of prohibition are some of the main concepts discussed in this paper. It further describes the institutional framework and stakeholders identified and governed by our legislation as responsible for the protection, promotion, support and prevention of discrimination in society. Various stakeholders cooperate between them in the fight against the phenomenon of discrimination. This collaboration is mainly expressed in the form of agreements and memorandums of cooperation, participation in joint projects, roundtables, conferences, workshops, briefings, seminars, awareness campaigns, which affect the growth of the effectiveness of each stakeholder in addressing the issues of discrimination and most of all in combating it. The report also reflects the role of the courts and other judiciary stakeholders in the field of anti-discrimination as well as the contribution of CSOs, NGOs, law faculties and judicial training academies in assessing the level of awareness and developing a culture of rights in this field.

In its entirety the report reflects all the positive steps Albania has undertaken regarding the awareness level on discrimination issues and the increasing of the role of the stakeholders in the fight against it. But, despite all the positive achievements in this field, Albania still faces a high level of discrimination and a lot of challenges and deficiencies, as described in details in the following.





# 1. Legal Framework Prohibiting Discrimination

The Albanian Constitution (Article 11(6)) provides a hierarchical system of legal acts, which should be applied sequentially such as: Constitution; Ratified International Agreements; Laws and Normative Acts of the Council of Ministers.

## 1.1 Overview of Constitutional and Legal Provisions

- ❑ The Albanian Constitution (AC)<sup>1</sup> provides the principle of equality before the law and prohibits discrimination. As per the Article 18 of AC: “Everyone is equal before the law, and no one can be discriminated against on grounds such as gender, race, religion, ethnicity, language, political opinions, religious or philosophical beliefs, economic, educational, social status or ancestry”. All human rights and freedoms elaborated in AC are rights and freedoms guaranteed to all, without discrimination. Article 17 of the AC provides: “Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights”.
- ❑ International Conventions
  - International Conventions’ status: The Republic of Albania applies the international law that is binding upon it (Article 5 of AC). The ratified International agreements constitute part of the internal legal system after being published in the Official Journal. All ratified international agreements/conventions prevail over the national legislation such as laws and normative acts of the Council of Ministers (Article 116(1) of AC). “An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it” (Article 122(2) of AC). Ratified International agreements are directly implemented, except in the cases of impossible self-executing and if the implementation requires issuance of a specific law. Albania has ratified a series of International conventions which guarantee prevention and protection from discrimination. These acts have a significant impact in the Albanian legal system and our national politics. Generally, an approximation and harmonization process takes place after a convention is ratified or a new law is elaborated. This helps to bring coherence between the international standards and the national ones. By being a party to most of the relevant international conventions and regional human rights instruments, Albania is obliged to implement international standards and rules on the protection of human rights that prohibit discrimination.
  - Ratified international level instruments are the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, Law no. 7767/09.11.1993) and its Optional Protocol (Law no. 9052/17.4.2003); Convention on the elimination of all forms of Racial Discrimination (Law no.7768/09.11.1993); International Covenant on Civil and Political Rights (ICCPR, Law no. 7510/8.8.1991); International Covenant on Economic, Social and Cultural Rights (ICESCR Law no. 7511/8.8.1991); UN Convention on the Rights of the Child (CRC, Law no. 7531/11.12.1991); Convention on the rights of Persons with

<sup>1</sup> Albania/Official Gazette of Albania 8417/98 (21.10.1998).

Disabilities, law no. 108/15.11.2012; ILO Conventions, respectively no. 105; 111; 142; 181; 156; 183; Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment; Convention Relating to the status of Stateless Persons (Law no. 9057/24.04.2003); Convention against Discrimination in Education, Paris, 14 December 1960 (Date of entry into force in Albania: 1.3.1964); etc.

- Ratified international instruments of regional level are those of the Council of Europe (CoE) such as: European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, law no. 8137/31.07.1996, especially Article 14) and its Protocol 12, for a general prohibition of discrimination (Law no. 9264/29.07.2004); Framework Convention for the protection of national minorities, (Law no. 8496/03.06.1999); Convention on Preventing and Combating Violence against Women and Domestic Violence (Law no. 104/11.08.2012); CoE Convention for Protection of Children against Sexual Exploitation and Sexual Abuse (Law no. 10071/09.02.2009); “European Social Charter” (revised), (Law no. 8960/24.10.2002).

- ❑ EU accession: Albania has signed the Stabilization and Association Agreement (SAA, Law no. 9590/27.07.2006) with the EU. This is a successful step towards achieving the goal of becoming an EU member state. Prohibition of discrimination, as well as gender equality, is a fundamental right at the EU level and is a common value of the countries of European Union. Prohibition of discrimination is a necessary condition for EU Accession and is required to be fulfilled even by SAA as an objective in the field of the employment, education, fiscal, social cohesion, etc.<sup>2</sup>
- ❑ Laws: Albania has developed an adequate legal framework for addressing the human-rights protection as well as prohibiting discrimination. Albania has an updated legislation which generally reflects the European standards in gender equality, equal opportunities and anti discrimination. There are important laws, as well as specific articles in different laws that cover the antidiscrimination clause. This comprehensive legal framework creates better chances to develop *de jure* equality and non discrimination principles. The aim of the legal framework is to ensure a more effective protection against the equality infringements.
  - Law No. 10221/04.02.2010 on Protection from Discrimination<sup>3</sup> (here in after LPD) governs the implementation and observation of the principle of equality. It guarantees every person’s right to equality before the law; equality of opportunities to exercise rights, enjoy of freedoms and participate in public life and the right to effective protection against discrimination or any behavior inciting discrimination. The institution of the Commissioner for Protection from Discrimination (CPD) was established pursuant to this law.
  - Law No. 93/2014 on Inclusion of and Access for Persons with Disabilities aims to promote and protect the rights of persons with disabilities through the provision of assistance and support with the aim to ensure them full and effective participation in society on an equal footing with others. Non-discrimination and gender equality are the two main principles of this law.
  - Law no. 9970/24.07.2008 Gender equality in society (amended).

<sup>2</sup> As per illustration see Article 100(2) of SAA “Education and training”: “The Parties shall also cooperate with the aim of ensuring that access to all levels of education and training in Albania is free of discrimination on the grounds of gender, color, ethnic origin or religion”. Article 123: “Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights”.

<sup>3</sup> This Law is also adapted in Roma, Egyptian, Montenegrin and Aromanian languages.

- Apart the above explicit laws on antidiscrimination, there are several other laws which contain provisions with respect to antidiscrimination, such as Albanian Criminal Code (Law no. 7895/27.01.1995, amended); Criminal Procedural Code; Family Code (Law no. 9062/8.5.2003, amended); Civil Code (Law no. 7850/29.7.1994, amended); Civil Procedure Code (Law no. 811629.3.1996 amended); Labor Code (Law no. 7961/12.07.1995, amended); Law no. 108/2014 on State Police Law no. 44/2012 for Mental Health; Law no. 108/2013 on Foreigners; Law no. 9952/14.07.2008 on Prevention and Control of HIV/AIDS; Law no. 8485/12.5.1999, Code of Administrative Procedures of the Republic of Albania;<sup>4</sup> Law no. 9669/18.12.2006 on Measures against Violence in Family Relationships (amended); Law no. 8328/16.04.1998 on the Rights and Treatment of the Prisoners and Pre-detainees (amended); Law no. 10 019/29.12.2008 Electoral Code of the Republic of Albania (amended); Law no. 10347/4.11.2010 on Protection of Children Rights; Law no. 9902/17.4.2008 on Consumer Protection (amended); Law no. 10 039/22.12.2008 on Legal Aid(amended); Law no. 152/2013 on Civil Service (amended); Law no. 69/2012 on Pre-university education system in the Republic of Albania; Law no. 9355/10.05.2005 on Social Services; Law no. 8098/28.3.1996 on the Status of Blind People (amended); Law no. 8876/04.04.2002 on Reproductive Health (amended); Law no. 9695/19.03.2007 on Adoption Procedures and Albanian Adoption Committee, etc.
- Bylaws aim to make the implementation of the different laws from different structures and authorities more achievable, as well as coordinate the efforts between them, in addressing the issues of prohibition of discrimination. Albania has prepared and approved (a) by the Decision of the Council of Ministers (herein after DCM) no. 460/27.05.2015 “The first national Report on implementation of the Convention on the Rights of Persons with Disabilities”<sup>5</sup>; (b) by the DCM no. 9/06.01.2011 “The third Report of the Framework Convention “For the protection of national minorities”; (c) Guideline no. 13/17.12.2012 “Report on the Enforcement of Standards of Social Care Services for Victims of Domestic Violence, in Residential Centers, Public and Private”; (d) by the DCM no. 404/13.05.2015 “Report on the Approval of the National European Integration Plan 2015 - 2020”; (e) by the DCM no. 231/20.03.2013 “Report On Standards of Social Care Services for Children in Need, in Public and Private Day Cares Centers” one of the main standards of the service is equal treatment and antidiscrimination.
- Strategies and action plans were adopted, revised, and implemented in areas such as gender equality (here in after GE), health care, education, property rights, social protection, protection from discrimination, DV, trafficking, protection of special groups (DPs, Roma, etc.), National Strategy on gender equality and reduction of gender based violence and domestic violence 2011-2015 and National Action Plan for its implementation is approved by the Decision of the Council of Ministers no. 573/16.6.2011. Antidiscrimination is considered as one of the priorities in the Decision no. 330/28.05.2014 on the approval of the guidelines for 5 strategic priorities recommended by the European Commission, 2013;<sup>5</sup> Decision of the Council of Ministers no. 182/13.03.2012 on the approval of the Action Plan for Children, 2012-2015 where the issues of child protection against discrimination are not neglected; Decision of the Council of Ministers no. 204/21.03.2012 on the approval of the Basic document part of reports of states parties to the UN conventions for human rights etc.

<sup>4</sup> The new Code of Administrative Procedures, including amendments regarding non-discrimination, is approved by Law no. 44/2015 and will enter into force on May 28, 2016.

<sup>5</sup> Priority no. 5: Take effective measures to strengthen the protection of human rights, including the protection of Roma and anti-discrimination policies, as well as implement property rights.

- ❑ International actors played an important role providing their expertise in drafting different laws and sub legal acts. For example, the Ministry of Social Welfare and Youth has been assisted by UNDP in preparing the sub legal act for better implementation of the Law for Inclusion and Accessibility for Persons with Disabilities (no. 93/2014). OSCE played an important role in preparing the law and sub legal acts on gender equality, etc., and the list is not exhaustive.

## 1.2. Assessment of the Legal Framework

- ❑ Forms of discrimination recognized by LPD  
The areas covered by LPD are (a) employment (Article 12-16), (b) education (Article 17-19) and (c) goods and services (Article 20-21). The forms of discrimination recognized by LPD (Article 3) are: Direct discrimination; Indirect discrimination;<sup>6</sup> Discrimination because of association; Harassment; Denial of a reasonable accommodation; Victimization; Instruction to discriminate.
- ❑ LPD and “multiple discrimination”  
Multiple discrimination is not literally defined by LPD. In reality, this type of discrimination (against one person on the basis of more than one ground) is very familiar in our country. There are a lot of cases of individuals who experience discrimination for more than one of the protective grounds. An obvious example would be the case of discrimination against women with disabilities, older women, LGBT women, Roma and Egyptian women etc. They encounter discrimination due to age, gender, race and gender or race and economic status etc.<sup>7</sup>
- ❑ Protected grounds/areas where discrimination is prohibited  
LPD regulates the implementation of and respect for the principle of equality in connection with gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, disability, affiliation with a particular group or for any other reason. As shown, the Law does not limit the circle of grounds for discrimination. They are numbered as part of an open list, leaving space to any other possible reason for discrimination.
- ❑ Assumed and associative discrimination in LPD  
The definition of discrimination recognizes assumed and associative discrimination as forms of discrimination under the concept of “discrimination because of association” (Article 3(4) of LPD). Based on the definition provided by the Law, “discrimination because of association” is that form of discrimination that occurs when there is a

<sup>6</sup> In 2015 before the CPD was submitted a complaint by both, a local NGO named “Embroiderers” with seat in Korça and the European Centre for Roma Rights in Albania. Based on the complaint, was alleged that at one of 9-years school in Korça, for several years, children registered belong only to Roma and Egyptian communities. Through a Council of Ministers Decisions, nutritional quotes and scholarships has been provided only for Roma and Egyptian children registered in that school. In this case, CPD found indirect discrimination because of race and ethnicity of Roma and Egyptian children by the Ministry of Education and the Regional Education Directorate Korçe. CPD forced them to take measures in order to change the ratio of children belonging to these communities to avoid isolating or segregation. Pursuant to the recommendation of the CPD, the Regional Directorate and the Ministry made all the efforts to change the situation and report it to CPD.

<sup>7</sup> CPD (2014) *Annual Report 2014*, p. 28, available at: <http://www.al.undp.org/content/dam/albania/docs/misc/Raporti%20Vjetor%20KMD.pdf> (02.03.2016).

distinction, limitation or preference, because of association with persons who belong to the groups that possess protected characteristics. This concept includes also assumed discrimination defined as discrimination based on a supposition of such an association.

❑ Exceptions to the prohibition of discrimination

There are some exceptions which include: justified different treatment (Article 6(1) of LPD); the nature of professional activities (Article 6(2) of LPD); positive actions (Article 11 of LPD) as for example the case of providing a special protection to women during their pregnancy and childbirth<sup>8</sup> that is considered a particular measure and does not constitute discrimination. In principle, it is prohibited to discriminate in relation to exercise of freedom of conscience and religion, especially when related with their expression individually or collectively, in public or private life, through cult, education, practices or the performance of rituals. An exception should be proportionate to the situation that has dictated the need for discrimination (Article 17 of AC). In any case, the permission of discrimination because of the exercise of the freedom of conscience and religion cannot violate the core of the rights and freedoms and in no case may it exceed the restrictions provided in the European Convention for Human Rights (Article 10 of LPD). As the Albanian Constitution provides: “exceptions can be permitted only when a reasonable and objective justification exists” (Article 18(2) of the Constitution). However, permission for discrimination on grounds defined by law may be imposed for a public interest or for the protection of the rights of others.

❑ Legal provisions preventing the effective implementation of the prohibition of discrimination

- Level of compatibility/harmonization of the Albanian legal framework with international standards: although there is a good legal framework in place and good progress is made during the recent years, the problem of compatibility with international standards, harmonization between existing laws, improvement of some segments of the legislation and better implementation/enforcement of the legislation still remains the biggest challenge for Albania. There is still a place for the legislation to comply with these obligations in line with international standards.<sup>9</sup> LPD is a good example of compatibility with the *Acquis communautaire*. As the main antidiscrimination act in the Albanian legal framework, this law which governs the implementation of the principle of equality and defines the grounds on which a person can be discriminated against directly or indirectly, is drafted in accordance with the EU directives.<sup>10</sup> As mentioned above, Article 1 of the Law provides a broader and opened list of protected grounds such as: gender, race, color, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy,

<sup>8</sup> Law no. 9970, dated on 24.07.2008 on Gender Equality in Society, Article 9, par. 1.

<sup>9</sup> EC (2015) *Albanian EU Progress Report*, Brussels, 10.11.2015, available at:

[http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_albania.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_albania.pdf) (29.03.2016) the draft of Justice System Reform Strategy foresees a lot of interventions in this direction, available at: [http://www.eurallius.eu/images/Justice-Reform/Strategy-on-Justice-System-Reform\\_24-07-2015.pdf](http://www.eurallius.eu/images/Justice-Reform/Strategy-on-Justice-System-Reform_24-07-2015.pdf) (07.03.2016).

<sup>10</sup> Council Directive 2004/43/EC (29.06.2000) Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin; Council Directive 2000/78/EC (27.11.2000) Establishing a General Framework for Equal Treatment in Employment and Occupation; Council Directive 2004/113/EC (13.12.2004) Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services; Directive of the European Parliament and of the Council 2006/54/EC (05.07.2006) The Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast).

parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, restricted ability, affiliation with a particular group or for any other reason. The law does not limit the protected grounds, which constitutes a positive aspect that provides necessary space to any further development of policies against discrimination. According to Article 3 of the Law, discrimination is defined as “every distinction, exclusion, limitation or preference of any cause mentioned...that has as a purpose or consequence the hindering or making impossible the exercise, in the same manner as with others, of the fundamental rights and freedoms recognized by the Constitution of the Republic of Albania, with international acts ratified by the Republic of Albania as well as with the laws in force.”

- Official translation of the International Conventions has been a problem for a long period of time which seems to be improved, but not definitely resolved. The quality of the existing translations is still a concern. In practice, the professionals consider reading the original version of the text (the English one preferably) as the best and undisputed solution. A draft law on international agreements<sup>11</sup> is prepared and an issue addressed in this draft law is that of certified translation. Thus, the new draft law seems to stress more on the issue of certified translation than the actual Law no. 8371/9.7.1998 for the Conclusion of Treaties and International Agreements.

- Limited level of knowledge, implementation and reference of international conventions and other international instruments by different actors such as: public officials, judges, prosecutors, police, lawyers etc., seems to be a problem that tends to have a very slow improvement. From the monitoring report prepared by the Center for Legal Civic Initiative,<sup>12</sup> it results that the reference to the international standards and to the jurisprudence of ECHR is used in very few court decisions. The report reflects the same conclusion regarding the implementation of the Law on Protection Against Discrimination and the Law on Gender Equality in Society. The fourth periodic report for CEDAW Convention, 2014 provides as an illustration only a single court decision<sup>13</sup> in the issue of how courts have referred the Convention in the reasoning of their decisions.

- Limited level of knowledge and awareness on international standards as well as limited access to them by the individuals who are discriminated against. As a result of this, standards and rules included in these documents are not properly implemented by the individuals, state actors and NGOs.

- Cases of non adequate terminology used in the legislation: According to the “Annual Report 2014” of the Commissioner for Protection from Discrimination (here in after CPD), despite the numerous positive legal initiatives and recent amendments of the Albanian legal framework, in the context of fighting the discrimination, there are still a number of legal acts that prevent the effective implementation of the prohibition of

<sup>11</sup> Available at: <http://www.parlament.al/projektligj/projektligj-per-marreveshjet-nderkombetare-ne-republiken-e-shqiperise/> (03.02.2016).

<sup>12</sup> CLCI (2013) *Report on knowledge and implementation of the gender equality standards in court decisions*, Tirana, December 2013. The analysis is focused on court decisions given by Tirana, Durres and Vlore District Courts. Regarding the District Court of Tirana from the total of 618 court decisions during the year 2011 and 474 monitored decisions for 2012, only in few of them there are cited the international conventions standards, available at: [http://www.qag-al.org/ang/html/2014/raporti\\_english.pdf](http://www.qag-al.org/ang/html/2014/raporti_english.pdf) (27.03.2016).

<sup>13</sup> CEDAW/C/ALB/4, November 24, 2014, paragraph 3 or Decision of the Council of Ministers no. 806/26.11.2014 on the Approval of the Fourth Periodic “*On the approval of the fourth periodic national report on the application of the Convention “On the elimination of all forms of Discriminations against Women”*”, available at: [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ALB/CEDAW\\_C\\_ALB\\_4\\_7078\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ALB/CEDAW_C_ALB_4_7078_E.pdf) (23.03.2016).

discrimination. For example: (a) the Albanian Criminal Code reflects the need for reformulation of some terms such as “homosexual relation” used in its Articles 100-107. This expression is considered by CPD as negative and pre-judgmental connotation. For this purpose CPD has recommended the removal of this term from the provisions of the Criminal Code;<sup>14</sup> (b) Law no. 9355/2005 on Social Services contains provisions that create preferences based on gender and age. CPD has found that the definition “head of family” in Article 4(10) of this Law, conflicts with the principle of gender equality. CPD with the requisition no. 971/10.11.2014 has submitted recommendations to the Minister of Social Welfare and Youth to make amendments in the Law on Social Services;<sup>15</sup> (c) the CPD has expressed the need for some amendments to the legal provision that provide the burden of proof in cases related to discrimination. In these cases, according to the Law on Protection from Discrimination the burden of proof is distributed, unlike the general principle provided in Article 12 of the Code of Civil Procedure.<sup>16</sup> With regards to this latest recommendation of CPD there are different opinions between the professionals.

- Fine penalty in Criminal Code (CC) and discrimination due to solvency. One of the penalties provided for by the CC is also the imposing of fines (Article 34 amended). The CC does not offer any guidance under which the court could decide whether to impose these fines or not. Meanwhile, if the court cannot determine with sufficient certainty the defendant’s wealth, there is a risk that inaccuracies for determining the framework of such sentences, increase in number. Based on the principle that imprisonment sentences should be considered as the last alternative, the Article 53(1)(a) of the CC foresees the replacement of imprisonment sentence with payment of a fine to the state. But, the legislator has not foreseen the possibility of extending the payment deadline or the possibility to pay in installments. Accordingly, the fact that the majority of convicted persons cannot financially afford to pay these fines, leads to discrimination due to solvency.
- Methodology of determining the sentence in the Criminal Code can lead to unequal treatment of individuals in criminal proceeding. The criteria laid down in the CC are not sufficient to achieve a comprehensive assessment of the type and measure of punishment, leaving too much room for discretion of the court. This issue is even more evident considering that in many criminal code provisions there is a large margin between the minimum and the maximum sentence. Also, the lack of methods for determining criminal punishment significantly increases the possibilities for unfair interference and corruption in court, and the risk of unequal treatment of individuals in criminal proceedings.<sup>17</sup>
- Lack of appropriate sanctions in Albanian legal framework. The last amendments of the Electoral Code foresees sanctions for political parties that do not meet the requirement, that 30% of the election list and one of the first three names on this election list should belong to each gender. According to the People’s Advocate the foreseen sanctions resulted soft and yet women are underrepresented. For this purpose the PA recommends necessary amendments in the Electoral Code in order to ensure gender equality (i.e. 50%) to complete the composition of the Assembly of the Republic of

<sup>14</sup> CPD (2014) *Annual Report 2014*, p. 94, par. 4, available at: <http://www.al.undp.org/content/dam/albania/docs/misc/Raporti%20Vjetor%20KMD.pdf> (02.03.2016).

<sup>15</sup> CPD (2014) *Annual Report 2014*, p. 68, par. 6, available at: <http://www.al.undp.org/content/dam/albania/docs/misc/Raporti%20Vjetor%20KMD.pdf> (02.03.2016).

<sup>16</sup> Article 12 “the party which claims a right has the obligation to prove, in conformity with the law, the 4 facts on which it supports its claim”.

<sup>17</sup> “Analytical Report of the justice Reform in Albania”, dated 27. 11. 2014, available at: <http://www.euralius.eu/images/pdf/Analysis-of-the-Justice-System-in-Albania.pdf> (23.03.2016).



Albania, with a view to the upcoming elections in the Parliament to have a number of no less than 70 woman out of 140 MPs.<sup>18</sup>

- LPD requires a special proxy by the victim of discrimination to the CPD in case that CPD considers initiation of judicial procedure. Article 32 provides: “An organization with legitimate interest or CPD can present a lawsuit on the behalf of a person or group of persons, with the condition that CPD or the organization is provided with a proxy or a declaration before the court from the person or group of persons affected by the discrimination”. The proxy is required also in case the claim is presented to CPD not by the victim of discrimination *in persona*. Best practices should be considered in order to simplify/facilitate the initiation of the processes without the need of a special proxy.

## 2. Institutional Framework for Combating Discrimination

The government system in the Republic of Albania is based on the principle of separation and balancing of legislative, executive and judicial powers. They all provide their contribution in the fight against discrimination.

### 2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination

Legislative power:

- The Assembly is the holder of the legislative power and its functions are provided for by the AC. Regarding to its role in the field of prohibition of discrimination, the Assembly approved laws, ratified important international conventions and issued specific resolutions.<sup>19</sup> Different Parliamentary Commissions such as: Legal Issue Commission; Public Administration and Human Rights Commission; European Integration Commission; Education and Public Information Means Commission; Labour commission; Health and Social Issues Commission and the sub commission of Human Rights and that of Juvenile, Gender Equality and against Domestic Violence; have played a considerable role. Article 23 of LPD foresees that CPD is elected by a majority of all the members of the Assembly. Candidates for Commissioner are proposed to the Assembly by a group of deputies. Prior to the exercise of its function the Commissioner takes an oath before the Assembly. The Commissioner submits a report at least once a year before the Assembly’s Commissions (Article 26 of LPD). The CPD reports include an analysis about the implementation of the LPD in general, as well as the performance of the CPD and its office.

Executive power:

- Council of Ministers and Ministry of Social Welfare and Youth, Ministry of Internal Affairs, Ministry of Education and Sports, Ministry of Justice, Ministry of Health, etc., play an important role in LPD implementation. They are responsible for taking positive measures to combat discrimination in relation to the area they cover or the institution they lead. Article 14 of LPD provides the obligation of these bodies in raising of the

<sup>18</sup> People’s Advocate, “*Recommendation for taking the initiative to improve Electoral Code of the Republic of Albania with the purpose of equal gender representation and access*”, No.201500100/2, available at: <http://www.avokatipopullit.gov.al/sites/default/files/ctools/css/12032015.pdf>, (26.1.2016).

<sup>19</sup> Resolution no. 1/25.03.2013 on Evaluation of the Activity of CPD; Resolution on Protection of Rights and Freedoms of Persons Belonging to the LGBT Community, approved on 7.5.2015. Resolution no. 1/26.11.2013, on Protection and Respect of Children Rights in Albania; Resolution no. 1/21.05.2015 on Evaluation of the Activity of CPD for 2014.

awareness and establishing special and temporary policies/measures, in order to encourage equality. Article 18 of LPD provides the liability of the Council of Ministers and the Minister of Education for taking positive measures in order to fight the discrimination in connection with the right to education. The Council of Ministers is charged with issuing subordinate legal acts in implementation of LPD.

- ❑ Commissioner of Protection against Discrimination (CPD) is the equality body responsible for providing effective protection against discrimination and any form of conduct that incites discrimination, regulated by LPD (Article 21-33). CPD has been in place since 2010 and is a public legal person elected for a mandate of 5 (five) years, with the right to be re-elected only once. CPD can be defined as a promotional and quasi tribunal type at the same time, because despite the competence to encourage the principle of equality and non-discrimination, CPD also examines complaints from persons and groups of persons who claim that they have been discriminated against and takes decisions regarding these complaints. CPD prepares recommendations, takes decisions, imposes sanctions, with their consent represents complainants before the court in civil proceedings, provides surveys, prepares annual reports, and enters into collaboration agreements with various state bodies and non-profit organizations.<sup>20</sup> CPD examines the complaints by individuals, groups of persons and organizations with a legitimate interest to act with the consent of individuals/groups of individuals claiming that discrimination has occurred. It can also launch *ex officio* investigations. Cases when courts request a written opinion by the CPD, or the attendance in court as a third party, are increasing. The CPD participated in 18 civil judicial processes in 2014, compared to only six in 2013. Also the number of cases handled by the CPD has increased. However, a higher level of outreach and proactive approach is required.
- ❑ Other important bodies:
  - National Council on Gender Equality (NCGE) is an advisory body responsible for issues of gender equality with a mandate of 4 (four) years with the right of re-election. Its composition, function and role are foreseen by Gender Equality Law (here in after GEL) (Article 11-13).
  - National Council on Disability is a consultative body with a 4 (four) year mandate responsible for determining the direction of state policies to ensure accessibility and inclusion of people with disabilities in all areas.<sup>21</sup> It has a good representation of persons with disabilities and their representative organizations among its members.
  - National Council for Child Protection, as the Law No.10 347/4.11.2010 on the protection of child rights, Article 32-34 provide, is a consultative body with a 4 (four) year mandate, that coordinates national policies to guarantee the rights and protection of children in all fields, recommends the services and programs that are specifically targeted to children and their families, especially those who need emergency protection etc.
  - State Agency for Protection of Children Rights (SAPCR) aims to monitor the implementation of the Law no. 10 347 dated 4.11.2010 "on Protection of Children's Rights, as well as to guarantee, in cooperation with other responsible state authorities and non-profit organizations operating in the field of children's rights, the effective implementation of the protection of rights of children, and provide care to them. SAPCR is a legal entity under the ministry that coordinates the work of the child protection issues, financed from the state budget funds and donors. The Agency is

<sup>20</sup> All the information is public in Albanian and English at official website: <http://www.kmd.al> (24.02.2016).

<sup>21</sup> Law No. 93/2014 on Inclusion of and Access for Persons with Disabilities, Articles 12, 13.

managed and represented by the Chairman, who is appointed by the Prime Minister on the proposal of the Minister who coordinates the work of child protection issues, after completion of a process of open competition.<sup>22</sup>

- Coordination Council and Commission for Consumers Protection<sup>23</sup> is a competent body in the field of consumer protection with a 5 (five) year mandate. This body considers consumer discrimination because of gender, race, religion, nationality, political beliefs, age, physical and mental features of its sales centers as aggressive commercial practice (Article 17(1)(b), Article 17(2) of Law on Consumer Protection).
- State Commission for Legal Aid (here in after SCLA) is a collegial state body composed of 5 members and has the status of public legal entity. It has a 4 (four) year mandate with the right to be renewed only once for the subsequent mandate (Article 6(3) of the Law no. 10039/22.12.2008 on Legal Aid). The Commission is a part time body, except for the Chairman who is appointed for a full time term. Some of the SCLA functions (Article 10) consist of: Implementation of the state policy on the provision of Legal Aid; Concludes service agreements with lawyers, legal offices and NGO's that will provide legal aid services; Sets up and reviewing the legal aid standards and taking care of the professional trainings for legal aid lawyers; Defining the criteria based on which the quality of the provided legal aid services will be assessed; Recording the data of persons who benefit legal aid and publishes every year a statistical bulletin on them; Determining the priorities for cases over which legal aid shall be provided and coordinating the legal aid system considering the limitations imposed by the available financial means and sources. Regarding access to justice, the performance of the SCLA needs to be enhanced in order to face the pressing needs of a considerable number of vulnerable citizens. Free legal aid continues to be provided mainly by NGOs with donor funding.<sup>24</sup>

#### ❑ Free Legal Aid

EU progress Report for 2015 underlines that the persons with disabilities still face difficulties in accessing the legal aid and that the legal provisions on the inclusion of children with disabilities are not effectively implemented.<sup>25</sup> It has created an unclear situation in practice regarding the competence of the prosecution and courts to appoint lawyers in criminal cases and on the other hand the functioning of the legal aid scheme through the duties of SCLA. This conclusion is a result of the non-implementation of the scheme suggested by the Law no. 10 049/22.12.2008, on Legal Aid.<sup>26</sup> There are shortcomings in the functioning of the legal aid system and the legal provisions which foresee the establishment of regional offices for legal aid are not implemented. Judicial fees and procedures hinder the access to the judicial system of citizens who have no financial means to pay accordingly. The legislation is unclear in regards to (a) the provision of free of charge legal aid by the SCLA; (b) the manner of application for funds and their planning by SCLA; and also (c) lack of information on the provision of legal aid. Also SCLA requires a large number of documents that the applicants in most of the

<sup>22</sup> Available at: <http://femijet.gov.al/al/organizimi>.

<sup>23</sup> Law no.9902/17.4.2008 on Consumer Protection, Articles 50 and 52.

<sup>24</sup> One example is TLAS. During the period 2011-2012 TLAS has offered court representation for 592 cases.

<sup>25</sup> EC (2016) EU progress Report for 2015, Brussels, 10.11.2015, p. 48, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_albania.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_albania.pdf) (29.03.2016).

<sup>26</sup> "Analytical Report of the justice Reform in Albania", 27.11.2014, p.313, available at: <http://www.euralius.eu/images/pdf/Analysis-of-the-Justice-System-in-Albania.pdf> (23.03.2016).

cases are not able to submit.<sup>27</sup> Consequently, the legal aid is mainly provided by NGOs<sup>28</sup> and few discrimination cases were submitted to the court.<sup>29</sup>

The grant of the legal aid by the state is based on the principle of equality of rights for all individuals who benefit from the legal aid. The Law on Legal Aid is also applicable in the discrimination cases. Persons affected by discrimination are entitled to receive free legal aid in the form of consulting or representation in court proceedings or representation before the state administrative bodies. Taking into consideration the situation of discrimination in Albania, the CPD and SCLA have signed a memorandum for collaboration in order to guarantee free legal aid to victims of discrimination. We cannot say that the criteria for gaining access of free legal aid are easy reachable for the victims of discrimination. This is because the law does not only bind granting free legal aid to the insolvency of persons or involvement in social protection programs, but also provides a lot of selective filters like the relative value of the complaint, the legitimacy of the merit of the case, the *prima facie* success of the case, the complexity and possibility of the complainant to be self-represented (Article 15) which prolong the proceedings and reduce the number of cases of gaining free legal aid.

There are no statistics of victims of discrimination that have received free legal aid. CPD in some cases has addressed victims to the competent institution for free legal aid, but only being a victim of discrimination is not sufficient to meet the criteria of law for obtaining legal aid.

## 2.2 Stakeholders Putting Combating Discrimination into Practice

- ❑ LPD provides different ways for the examination of the discrimination cases. Firstly, through an administrative procedure followed by the CPD or other institutions provided for in a law; Secondly, through a civil lawsuit submitted to the civil court. It is important to notice that failure to fulfill the administrative appeal is not an obstacle to file a suit to the court;<sup>30</sup> Thirdly, through criminal charges.

### 2.2.1 Equality Body/Bodies

- ❑ Commissioner for Protection against Discrimination is the main equality body in the field of the protection against discrimination. CPD is independent in the exercise of its duties and is subject only to the Constitution and Law. CPD is supported by an Office

<sup>27</sup> Based on the Report for Legal Aid in Albania drafted by TLAS, during 2011 SCLA rejected 27 requests for legal aid (14 criminal cases and 13 civil cases) due to shortcomings in their documentation, p. 14, available at: <http://www.tlas.org.al/sq/studime>, (16.02.2016).

<sup>28</sup> One example is TLAS organization that during the period 2011-2012 has offered court representation for 592 cases.

<sup>29</sup> ECRI Report for Albania (fifth monitoring cycle), approved on March 19, 2015, published on June 9, 2015, p. 15, available in Albanian at: <https://www.coe.int/t/dghl/monitoring/ecri/country-by-country/albania/ALB-CbC-V-2015-18-ALB.pdf>, (20.02.2016).

<sup>30</sup> According to the CPD there would be a positive step for the victims of discrimination if the law would have provided the administrative appeal before the CPD as mandatory, based on the argument that CPD not only administers and takes a decision on the case but also conducts a full investigation, makes public hearings, creating a complete file and without any cost for the victim. Thus the victim of discrimination would have a complete file in case he/she addresses the court, saving money and time for collecting documents.

with a staff of 21 persons.<sup>31</sup> The office has its personnel and the necessary equipment to support the commissioner in fulfilling the duties assigned by the law that consists of: *the Advisor, a Secretary/Protocol Specialist, the Department of Legal Procedural Issues and Foreign Relations, Department of Investigation, the Sector for Public Relations and the Directory of Support Services.*<sup>32</sup>

- ❑ The CPD role in combating discrimination consists of:
  - Examining complaints from persons or groups of persons who claim that they have been discriminated against and organizations that have a lawful interest to act in the name and with the written consent of individuals or groups of individuals who claim discrimination.
  - Investigating and imposing administrative sanctions, performing administrative investigations after credible information about violation; imposing administrative sanctions.
  - Awareness raising through encouraging the principle of equality and non-discrimination, especially by sensitizing and informing about those issues, also including the offering of written information among other things about the law, in the Albanian language, in the languages of minorities, as well as in formats usable by persons with a disability; addressing public opinion directly about any kind of issue related to discrimination; holding a regular dialogue in connection with issues of discrimination with the respective social groups, including NGO's; informing about protection from discrimination and the legal means available; educational activities that aid in the implementation of the law.
  - Monitoring the implementation of the LPD and taking polls in connection with discrimination.
  - Publishing reports.
  - Delivering recommendations for new laws or law amendments.
  - Representing a complainant in the court with the plaintiff's approval.
- ❑ The way how the cases of discrimination are handled by CPD
 

A person/a group of persons or an organization with legitimate interests, represented by a special proxy<sup>33</sup> may submit a complaint for discrimination before CPD. They may submit the complaint in writing or in exceptional cases orally. In the latest case, the complaint should be recorded through a minute (Article 33 of LPD). The complaint can be submitted directly to CPD headquarter in Tirana, (by mail, email) or via municipalities in different cities. The complaint must contain: the complainant's name, address, the subject who is claimed to have committed the discrimination or an explanation about the impossibility of identifying him; an explanation of discrimination; the measures requested by CPD, the date and signature of the complainant or his representative. Templates of the complaint are available in hard copy or electronic form and the CPD office provides assistance to complete them. Templates are in Albanian, English, Greek and Roma language. If the complain does not fulfill the prerequisites asked by the law,

<sup>31</sup> There are 21 employers, 10 of who have a second level degree and the rest have degrees or are in process of graduating for social sciences and/or law.

<sup>32</sup> Structure defined by the Decisions of the Assembly, no. 34/20.05.2010 on Approval of the Structure, Organization and Classification of the Work of the Office of CPD.

<sup>33</sup> Regarding initiation of the judicial procedure, article 34(3) of LPD provides: "An organization with legitimate interest or CPD can present a lawsuit on behalf of a person or group of persons, with the condition that CPD or the organization is provided with a proxy or a declaration before the court from the person or group of persons affected by discrimination".

the complaint is considered inadmissible.<sup>34</sup> CPD notifies the natural or legal persons against whom the complaint has been submitted, in writing, within 15 days from the day of receipt of the complaint.

- After receiving the complain CPD verifies the facts. CPD may ask the complainant and the person against whom the complaint has been made to submit written explanations within 30 days from the day the parties receive the notice. When necessary, CPD also takes information from other persons or sources and also when appropriate, holds a public hearing session and invites the parties and other interested person.
- CPD seeks to reach a conciliation agreement between the complainant and the person against whom the complaint was submitted.
- CPD expresses itself by a decision. If CPD orders regulations or measures, the person against whom the complaint was submitted reports within 30 days before CPD in connection with the actions undertaken for the implementation of the decision. If the person against whom the complaint was submitted does not inform CPD or does not implement the decision, CPD imposes a measure of punishment by fine for the person against whom the complaint was submitted. The sanction by fine may be repealed if the person against whom the complaint was submitted implements the decision within seven days after the sanction was imposed.<sup>35</sup>

□ CPD public awareness role

Pursuant to the Strategic Plan 2012-2015, awareness raising is the main priority of CPD.<sup>36</sup> For that, CPD prepares strategic documents like decisions, periodic reports, booklets/leaflets publications and studies, and also organizes and participates in various activities<sup>37</sup> like conferences, workshops, meetings, *ex-officio* investigations, awareness raising campaigns, common agreements with other institution/NGO's regarding the fight against discrimination in Albania. These documents are available at the official website of the Commissioner. Some documents, for example legal basis or complaint forms, are also available in other languages (Roma, Egyptian, Montenegrin and Aromanian languages) in order to be accessible for everyone. CPD conducts outreach work and public relations work through a variety of activities like: open days in community, open lectures with students, presentation of discrimination problematic in media or various social programs, organization of roundtables, conferences and collaboration with students of social sciences and law schools for the distribution of awareness raising materials in schools and health centers.

□ CPD database and extending/strengthening offices consist in collection and analysis of the complaints and establishment of the local offices initially in 6 cities where the appeal

<sup>34</sup> LPD, Article 33(4): "The complaint is not accepted if: a) it is anonymous; b) it constitutes abuse of the right of complaining to CPD, or is incompatible with the provisions of this law; c) the same case is being examined in the framework of another complaint or a prior decision has been taken on it and there are no new data; ç) it is openly without a basis or there is insufficient information to make in investigation possible; d) all the facts that constitute the essence of the complaint happened before the entry of this law into force; dh) it is submitted later than three years from the occurrence of the discrimination or later than one year from receipt of knowledge of this fact by the injured party".

<sup>35</sup> Every person who violates the provisions of the law is punished by a fine as follows: a) a natural person, from 10,000 to 60,000 ALL; b) a legal person, from 60,000 to 600,000 ALL; c) a natural person within a legal person who is responsible for the violation, from 30,000 to 80,000 ALL; 16 d) a person who exercises a public function and is responsible for the violation on the basis of this law, from 30,000 to 80,000 ALL.

<sup>36</sup> CPD, "Strategic Plan 2012-2015", p. 27.

<sup>37</sup> See all activities at: <http://www.kmd.al/index.php?fq=brenda&gj=gj1&kid=15>, (24.02.2016).

courts are located with the perspective to extent the activity throughout the country.<sup>38</sup> Another strategic goal of CPD is providing an appropriate institutional organization and strengthening of the institution through enhancing the capacities of human resources for the implementation and monitoring of the legislation, with the ultimate goal of increasing the efficiency of the CPD office for receiving, reviewing and resolving complaints.<sup>39</sup> As necessary means to fulfill the strategy, CPD considers:

- Strengthening the managerial capacities that influence qualitative management, continuous improvement of services, appropriate separation of duties, increase transparency and improvement of budget planning, through: (i) revising rules of operation and regulations; (ii) reviewing/changing in organizational structure and organizational chart; (iii) applying modern methods on the managing system, by monitoring its performance;
- Enhancing the capacities of the civil servants;
- Building a close cooperation with the Department of Public Administration (DPA), as the main institution that plays an important role in the training process and training of civil servants in Albania;
- Inclusion of the institution in the network and establishing cooperation with similar institutions;
- Research; coordination of activities with other inter/national stakeholders.

- Assessment of CPD effectiveness is made by the relevant stakeholders such as: Foundation for the Rights of Persons with Disabilities, Ministry of Justice, Ministry of Social Welfare and Youth, the State Commissioner for Legal Aid, Commissioner for Protection of Personal Data, General Directorate of State Police, General Directorate of Prisons, Municipalities, Chambers Industry, etc., and is reflected in different agreements and memorandums of cooperation between these stakeholders. The Assembly of the Republic of Albania has assessed the activity of CPD through the above mentioned resolutions during 2013 and 2015. Also there is a large number of NGOs, CSOs and other stakeholders which in the exercise of their activities, in formulation of various reports and in the implementation of different projects on discrimination, refer and assess the CPD's activity and its effectiveness.<sup>40</sup>

### 2.2.2 Ombud Institution(s)

- People's Advocate (Here in after PA) is a constitutional institution, an independent body elected and appointed by the Assembly for a period of 5 (five) years with the right to be re-elected, responsible for protecting the rights, freedoms and lawful interests of individuals from unlawful acts or irregular omissions of public administration bodies, as well as third parties acting on its behalf. It was established in 1998 upon the approval of the AC and Law No. 8454/04.02.1999 on People's Advocate. The Code of Administrative Procedures (No. 8485/12.5.1999), Law on the Rights and Treatment of Prisoners and Pre-trial Detainees (No. 9888/10.3.2008), Law on Consumer's Protection (No. 9135/11.9.2003) and Law on Mental Health (No. 44/2012/19.4.2012) constitute the legal basis setting out almost all rights and functional duties of the People's Advocate.

<sup>38</sup> CPD, "Strategic Plan 2012-2015", p. 29.

<sup>39</sup> CPD, "Strategic Plan 2012-2015", p. 30.

<sup>40</sup> For example, the Agency for Support of Civil Society implemented the project named "On a more effective implementation of the Law on Protection from Discrimination" by assessing and supporting the work of CPD.

- ❑ Role and Recommendations of PA against discrimination.<sup>41</sup> PA can make recommendations and seize the Constitutional Court in cases of violation of the rights and fundamental freedoms by the public administration bodies. PA gives a great contribution in of the combating discrimination, guided by principles of impartiality, confidentiality, professionalism and independence. PA exercises its functions issuing strategic documents such as: annual reports before the Assembly; special reports; recommendations; requests, proposals and publications. PA is not a decision making body and does not have executive powers. Despite this fact, PA pays particular attention to the reviewing of the complaints from individuals belonging to vulnerable groups, who are most at risk from the phenomenon of discrimination by acts, actions or omissions of the organs of central and local administration or any other body vested with public authority.
- ❑ PA role in improving legal frame: different reports and interviews show the role of AP in recommending improvement and amending legislation in order to provide adequate legal frame against discrimination such as Labor Code, Family Code, Criminal Code, etc.
- ❑ Access to PA. Not any particular form is requested for drafting the complaints nor for filing the requests and notifications to the Ombudsman but they must clearly express the object of the complaint or the request.<sup>42</sup> All the services rendered by PA regarding complaints, requests and notifications are free of charges. Also, PA has established the necessary infrastructure in order to enable free access for persons with disabilities. The same standards are applicable also for the protection of foreigners, independently of being regular residents in Albania or not, as well as refugees, asylum seekers and stateless persons. PA aims to address issues related directly or indirectly to the vulnerable groups of different situations that could constitute cause for violation of the principle of equality or discrimination between individuals.
- ❑ Procedural aspects. Following the complaint, request or notification of a violation, PA decides to (a) accept the case or not; (b) reply to the complainant showing the rights and the ways to protect these rights; (c) forwarding the case to the competent body. In case that PA decides to accept the complaint, undertakes an investigation or request explanation from the administrative bodies. After completing the investigation, PA explains to the complainant if the right is violated, makes recommendations to the administrative bodies to take measures for restoration of rights or recommends filing of a lawsuit. If elements of a criminal offense are found, PA recommends starting investigation by prosecution. In case of the complaint related to discrimination, PA delegates it to the specialized institution such as CPD.<sup>43</sup>
- ❑ PA's proactive function to conduct investigations and inspections. Over the past 15 years PA has developed and consolidated the principles and standards for handling and examination of the complaints and issues submitted to the institution. Currently PA has a consolidated practice for receiving complaints such as a form that includes a set of data to reflect the full circumstances of the case, recording complaints in the electronic system, and the establishment of a number of means of electronic communication with applicants nationwide. Evaluation and monitoring of the implementation of these standards is implemented.

<sup>41</sup> For more information see the Reports of PA for the period 2010-2015, published in the official website of the institution <http://www.avokatipopullit.gov.al>

<sup>42</sup> Law no. 8454 dated on 4.2.1999 "*On People Advocate*" (amended), article 15.

<sup>43</sup> Source: Interview with PA commissioner, 03.03.2016.



- ❑ Structure and expertise level. PA has 3 (three) sections for the treatment and the examination of various complaints presented or taken with its initiative. Parts of the institution's structure are also: Citizen Services Department, National Mechanism for the Prevention of Torture, Department of Finance and Support Services, and Department for Protection and Promotion of the Rights of the Child. Sections activity is based and supported in daily work by the Department of the People's Reception and Receiving Complaints, and the Protocol and Registration of Complaints Sector. Experts of the institution of PA are mostly graduated in law. Training opportunities are provided and implemented by the cooperation with different stakeholders performing activities such as the School of Magistrates, ASPA or in cooperation with the international partners. The National Preventive Mechanism (NPM) as a separate structure of the PA has the main purpose to monitor through visiting all the premises where individual's freedom is limited.

### 2.2.3 Intermediaries

- ❑ Representatives of the CSOs and NGOs play an important role and give a distinguished contribution in combating the discrimination by enhancing the community awareness about the phenomenon of discrimination and, in particular by providing support for the victims and the subjects vulnerable to discrimination. They have good capabilities in identifying and supporting cases of discrimination by providing legal aid, raising awareness by promoting anti-discrimination policies, educating the public about the principle of equality, monitoring and supporting such cases, cooperating with specialized bodies in this field etc. In order to assess the irreplaceable role of NGOs, CPD has supported the realization of a number of their projects. Also it has drafted a particular manual<sup>44</sup> providing information on international and domestic law on anti-discrimination, elements of anti-discriminatory behaviors, forms, causes, and ways of defense. NGO's have prepared a lot of informative guidelines such as that of Albanian Foundation for the Rights of Persons with Disability,<sup>45</sup> Center for Legal Civic Initiative,<sup>46</sup> Gender Alliance for Development Center, Albanian Helsinki Committee, TLAS, ALTRI center<sup>47</sup> etc.
- ❑ Lawyers<sup>48</sup> can play an important role against discrimination. Beside their education at the Faculty of Law, the National Bar Association has established in 2013 the National School of Lawyers which is a prerequisite for granting permission for the exercise of the legal profession. While the National School for Lawyers started functioning for training assistant lawyers, there is a need for consolidation of this entity and its function at a full capacity, for the implementation of the legal obligations in relation to training. The school has a one-year academic program at the end of which, assistant attorneys are certified to enroll in the exam for advocacy license or permit for practicing the

<sup>44</sup> "Protection from Discrimination, Training Manual", Switzerland Cooperation Office in Albania, Albanian Helsinki Community, Commissioner for Protection from Discrimination, Tirana 2013, available at: <http://kmd.al/skedaret/1443437435-Manuali%20i%20Trajnimit.pdf> (24.02.2016); Minority protection available at: [http://www.adrf.org.al/images/guida\\_diskriminimi.pdf](http://www.adrf.org.al/images/guida_diskriminimi.pdf), 'To understand and apply the anti discrimination law' in: [http://www.qag-al.org/WEB/publikime/Manuali\\_per%20mbrojtjen\\_nga\\_diskriminimi.pdf](http://www.qag-al.org/WEB/publikime/Manuali_per%20mbrojtjen_nga_diskriminimi.pdf) (27.03.2016).

<sup>45</sup> Find the electronic copy at: [http://www.adrf.org.al/images/guida\\_diskriminimi.pdf](http://www.adrf.org.al/images/guida_diskriminimi.pdf)

<sup>46</sup> A. Mandro, A. Bozo, A. Anastasi, "Gender Equality Standards in Court Proceedings", available at: [http://www.qag-al.org/WEB/publikime/raporti\\_shqip.pdf](http://www.qag-al.org/WEB/publikime/raporti_shqip.pdf), (27.03.2016).

<sup>47</sup> V. Mecaj, A. Anastasi, A. Mandro, "Monitoring the knowledge level of the LPD", available at: [http://www.qag-al.org/WEB/publikime/Manuali\\_per%20mbrojtjen\\_nga\\_diskriminimi.pdf](http://www.qag-al.org/WEB/publikime/Manuali_per%20mbrojtjen_nga_diskriminimi.pdf), (27.03.2016).

<sup>48</sup> Law no. 9109/17. 07. 2003 "On the profession of the lawyer in the Republic of Albania", amended.

profession. The program for professional education of the young lawyers has seven core courses: Criminal Law (general and specific); Private Law (Civil, Obligations, Family, Commercial and Labour); The Civil Procedure Law; Criminal Procedural Law; Public Law (Constitutional Law and Human Rights and Administrative Law); Advocate Vocational (Ethics, Deontology, advocacy technique, writing and legal reasoning). The Bar Association (NCA) has launched a five-year program in cooperation with USAID Strengthening the Justice System in Albania (JuST), and the Legal Training Center ACLTS, with the main purpose of strengthening the continuous legal education for lawyers. Discrimination is not a specific course, but it is integrated as legal and practical information in all the courses initial and continuous. Bar exams have such questions in order to control the student's knowledge on non discrimination standards. The initial training curricula and courses contain subjects of ethical nature which appear essential for the formation of a lawyer with the necessary professional integrity. There is a great need to increase the competence of the lawyers which seem having a lot of difficulties in considering a discriminatory case.

- ❑ Mediators: Article 33(9) of LPD grants the right of CPD to support an amicable agreement between the parties. In the spirit of this provision, but not limited to, the role of the mediator could be factorized in order to help in the process of conciliation. Taking into consideration the fact that mostly the vulnerable groups affected by LP do not have proper information about the sequences of the procedure either before the CPD or before the Civil Court, we notice that the role of mediator should take a special importance. Albania has the adequate legal framework regarding mediation. The Law no.10385/24.02.2011 on Mediation in Resolving Disputes as amended provides the organization of mediators in the National Chamber of Mediators, as a legal entity exercising its activity independently from the state. Its obligation is to complete the training program and the vocational training of mediators. Initial and continuous training of mediators is still at early stages of development, and it remains a priority to prepare mediators to address the discrimination.
- ❑ Albanian School of Public Administration (ASPA) is a public institution which activity aims at the vocational training of the civil servants, as well as of any other individual, local or foreign, which is not part of the civil service and meets the required criteria. This school provides modules on gender equality and non discrimination standards.
- ❑ Trade unions: It should be noted that the Trade Union organizations in our country are not very active. In this regard it would be necessary to consolidate the practice of the collective bargaining and negotiations between these organizations and other stakeholders, in order to extend the effectiveness of "collective bargaining" in the area of employment discrimination. Representatives of these unions should also show the proper assessment on their role and tasks assigned to them. The training of union leaders with different practical methods is also a necessary requirement. As it is mentioned below, there are some agreements between CPD and trade unions regarding unified efforts against discrimination.

#### 2.2.4 Police

- ❑ State Police<sup>49</sup> (here in after SP) is a structure under the authority of the Ministry of Internal Affairs. The mission of the State Police is to protect the public order and security, respecting the human rights and freedoms in compliance with the law. SP has the responsibilities to protect people's life, their security and personal property; to

<sup>49</sup> Law no. 108 / 2014 on the State Police.

prevent, detect and investigate the criminal offences etc. SP is guided by the principle of equality and non-discrimination (Article 5(1)(b) of SP Law) and it should provide police service equal for all and carry duties without discrimination (Article 85 of SP Law).

- ❑ Main obligations of State police are (a) obligation to respect (negative obligation) by avoiding discrimination; (b) obligation to protect (positive obligation) offering protection for the victims of discrimination as well as training the police in order to address these cases; (c) obligation to fulfill (positive obligation) taking appropriate measures to ensure implementation of the standards of equality and non-discrimination.<sup>50</sup> The state polices are considered as the first door to address the conflicts. What is considered important is how to change its working culture in order to effectively combat the discrimination. The creation of diversity as a value among police helps in fighting prejudice, discrimination, stereotyping and different harassments and also creates a pleasing environment where everyone is aware of the impact of the bilateral relations. With this purpose, the SP has established a 24-hour telephone service in each police directorate as well as on-line station to ensure the service at any time. Another special measure is the quote 50%, which doubles the number of female officers among the ranks of the state police. The participation of the female workers among the Police directly influences the increase of reliability and efficiency in the context towards Police in the fight against discrimination.
- ❑ The level of effectiveness of SP in combating discrimination in Albania continues to be low. Some recommendations are necessary in this direction: (a) Police officers must put aside prejudices and discriminatory attitudes by getting trained and become aware of their role in community; (b) Incensement of a partnership and interaction between the state Police and marginalized communities, (case of the LGBT, Roma and Egyptian communities); (c) Incensement of police officers' approach towards minorities and "familiarization" with their culture; (d) Having representation of the marginalized communities and of the minorities in the ranks of the SP.
- ❑ The Prosecutor Office<sup>51</sup> exercises the criminal prosecution and represents the accusation in court on behalf of the State. Article 5 of the Rules of Ethics and Conduct of Prosecutors, foresees that the prosecutor should respect the right of all persons to be equal before the law and act with objectivity and impartiality, avoiding any discrimination and prejudice about political affiliation, ethnic, social, cultural, religious or gender, sexual orientation, age, status, physical or mental disability.

### 2.2.5 Other Relevant Stakeholders

There are also some other relevant stakeholders that contribute to combating discriminations like:

- ❑ Institute of Statistics (INSTAT) that produces economic and social indicators and statistics, with latest data releases highlighted. INSTAT has conducted a series of national surveys<sup>52</sup> regarding the position of women in Albania, domestic violence, gender equality, women's access to schemes of social benefits. The results of these

<sup>50</sup> "Domestic violation, responsibilities of State Police to prevent and reduce it", UNDP publication, pp. 8-9, [http://www.undp.or.jp/undpandjapan/widfund/pdf/Albania\\_Manual%20for%20Policy%20Officers%20in%20Albania.pdf](http://www.undp.or.jp/undpandjapan/widfund/pdf/Albania_Manual%20for%20Policy%20Officers%20in%20Albania.pdf), (02.03.2016).

<sup>51</sup> Law 8737, dated on 12.2.2001 "For organization and function of prosecution in the Republic of Albania", <http://www.pp.gov.al>, (02.03.2016).

<sup>52</sup> "Domestic Violence in Albania" 2013; "Women and Men in Albania" 2013, INSTAT editions, available at: <http://www.instat.gov.al/>, (03.03.2016).

surveys have provided a valuable contribution in identifying the level of various forms of discrimination as discrimination because of gender or economic one. Also INSTAT has participated in a many joint activities regarding the fight against discrimination with the CPD.

- ❑ Albanian Competition Authority (ACA): Equality is one of the main principles on the basis of which the law on ACA<sup>53</sup> is implemented, as well as national policies and activities of the Albanian Competition Authority are guided. The Authority does not allow discrimination of economic enterprises in similar circumstances. With this regard ACA has the authority to impose penalties for serious violations, where the fine ranges from 2 to 10% of the total turnover of the preceding financial year, in case of abuse of a dominant position in the form of discrimination (Article 74 of the Law on ACA).

## 2.3 Mapping the Cooperation among Stakeholders

- ❑ The cooperation among the stakeholders in the area of anti-discrimination is reflected mainly in the form of agreements and memorandums of cooperation, the participation in joint projects, roundtables, conferences, workshops, briefings, seminars, awareness campaigns, which affect the growth of the effectiveness of each stakeholder in addressing the issues of discrimination and most of all combating it.

### 2.3.1 Equality Body/Bodies

- ❑ Agreements for collaboration: In order to establish an institutional collaboration, the CPD has signed 32 Collaborative Agreements with state institutions; local government bodies; national and international NGOs and CSOs etc. The role of these bodies is significant in the fight against discrimination and in the promotion of equality. Part of their common work are awareness activities; monitoring cases of victims of discrimination; supporting and representing them; database/percentage of cases handled by CPD or the court, which are referred to by these stakeholders; how is LPD applied to support the victims etc. The CPD's collaboration with CSOs and NGOs is considered very valuable for the community and marginalized groups awareness regarding the phenomenon of discrimination and the LPD. This cooperation is extended to all areas where discrimination occurs. Specifically, the CPD has signed cooperation agreements with a considerable number of NGOs.<sup>54</sup>
- ❑ CPD has already a list of 80 local NGOs and CSOs operating in the field of protection of human rights. The cooperation with CSOs and NGOs is ongoing and consists mainly on

<sup>53</sup> Law no. 9121, dated 28.7.2003 for Protection of Competition (amended).

<sup>54</sup> CPD (2013) *Annual Report 2013*, pp. 61, 62 available at: <http://kmd.al/skedaret/1442830777-Raporti%20vjetor%202013.pdf> (24.02.2016). list of NGOs that CPD has agreements: Association "United Pro LGBT Cause (Pro LGBT)", dated 05.07.2013; Alliance against Discrimination, dated 05.07.2013; The "Open Mind Spectrum Albania (OMSA)" dated 10.05.2013; Institute of Roma Culture in Albania on 18.04.2013; Organization "Different but equal", dated 12.04.2013; Rromani Baxt Albania Association, dated 25.03.2013; Women Roma Rights Association, dated 25.03.2013; Albanian Group of Human Rights, dated 25.03.2013; Romano KHAM Association, dated 25.03.2013; Egyptian Association of Community "We are also in" dated 25.03.2013; MEDPAK Association, dated 25.03.2013; Amaro Drom, dated 25.03.2013; Disutni Albania Association, dated 25.03.2013; Roma Active Albania Association, dated 25.03.2013; Roma Women Association Center for Development dated 25.03.2013; Roma Integration Association, dated 25.03.2013; Sphinx Association, dated 15.03.2013; "Hope for the Poor", dated 28.02.2013; Association "Roma of North integration", dated 28.02.2013; Pink Embassy / LGBT Pro Albania, dated on 26.02.2013; North Roma Association, dated 26.02.2013.

organizing and participating in joint activities such as training, roundtables, conferences, seminars, continuous consultations, twining projects etc.

- ❑ Cross country cooperation with foreign NGOs and CSOs as well as CPD membership in the European Network of Equality Bodies EQUINET which promotes equality in Europe through supporting and enabling the work of national equality bodies, is another positive aspect.
- ❑ CPD constantly collaborates with Trade Union Organizations, Chambers of Commerce and Industry, Inspectors of Labor and Vocational Training Centers, School for Magistrate with the aim to fight each case of discrimination and to educate the society on discriminatory attitudes in the employment and the economic sector. This cooperation is expressed mainly in organizing campaigns to increase the public awareness, organizing meetings, organizing and participating in joint conferences to set as a priority the fight against this phenomenon in the employment and economic sector. As an example we can mention: National Conference “For Protection from Gender Discrimination in Economic Sector” organized on November 2012, during which was signed the Cooperation Memorandum between CPD and Union of Trade and Industry Chambers.<sup>55</sup> Seminar “Equal Opportunities in the Economic Sector”, May 2014, in collaboration with National Union of Trade and Industry Chambers and Christian Association of Albanian Women with purpose to work and discuss on the efficient mechanisms for prevention and reporting systems regarding gender discrimination in economic sector.<sup>56</sup>

### 2.3.2 Ombud Institution(s)

- ❑ Cooperation of PA with NGOs and CSOs (national and international ones): PA has a close cooperation with the Albanian NGOs in order to obtain information on the concerns and problems of the groups they represent. In this context, the Advisory Board is established with Membership consisted of members from the civil society. The board was designed to provide a consistent and sustainable communication with the CSOs and, through them, with all stakeholders and public. The board members are selected by CSOs and coalitions, providing the plurality of opinions and attitudes of the Albanian society. Also, the Advisory Board is led by (a) a Commissioner who represents and defends the interests of a group of persons with disabilities to which he belongs, making their protection a reliable and honest cause and (b) a Commissioner (women) who is coming from civil society.<sup>57</sup> PA by evaluating the importance of cross-country cooperation is engaged in full rights membership in 8 (eight) international associations/organizations of Ombudsman.<sup>58</sup>

<sup>55</sup> Cooperation Memorandums no. 532/27.11.2012 and no. 452/22.11.2012 on the Cooperation Between the CPD and Union of Chambers of Commerce and Industry, available at: <http://kmd.al/skedaret/1442931614-Marreshje%20KMD-Dhoma%20e%20Industrise.pdf>, (24.02.2016).

<sup>56</sup> CPD (2014) *Annual Report 2014*, p.76, available at: <http://kmd.al/skedaret/1450450221-Raporti%202014%20shqip.pdf> (24.02.2016).

<sup>57</sup> PA (2014) *Annual Report 2014*, p. 117.

<sup>58</sup> International Ombudsman Institute (IOI) founded in 1978, member since 2000; European Ombudsman Institute (EOI) created in 1988, member since 2000; Association of Francophone Ombudsmen and Mediators (AOMF), created in 1998, member since 2000; Ombudsman Association of the United States (USOA) founded in 1977, member since 2006; International Ombudsman Association (IOA) founded in 1977, member since 2007; Ombudsmen Association of Mediterranean Countries (AOM), created in 2008, member since 2009; International Coordinating Committee of National Institutions for Human Rights (ICC), created in 1993; Ombudsman institution is accredited to ICC for the first time in 2004 and 2008 re-accredited;

- ❑ Collaboration with Trade Unions of Employees and State Police, pursuant to which PA has sent a series of recommendations with the purpose of improving the working conditions or the financial treatment of these employees. The challenge is that PA officially addresses the problems of this category and if possible provides solutions for them.<sup>59</sup>
- ❑ Main direction of cooperation of PA with other stakeholders is the promotion and awareness raising of the Albanian society to guarantee the protection against discrimination; the exchange of information and monitoring problems in the implementation of legislation in this field; the implementation of Cooperation Agreements;<sup>60</sup> the handling of the special cases, as complaints about illegal actions or omissions of public administration bodies, to the marginalized communities; conducting inspections;<sup>61</sup> organizing and participating in joint conferences, roundtables, open days etc.; preparing of evaluating studies and reports regarding the situation of discrimination.

### 2.3.3 Intermediaries

- ❑ The support of victims of discrimination is the main objective of collaboration between CPD and PA with Intermediaries. This cooperation is mainly expressed through refereeing the cases of discrimination by the intermediaries to these institutions. During 2015 before the CPD, despite the individual complaints, 7 complaints from organizations with legitimate interest were submitted. These complaints generally came from organizations that protect interests of Roma, Egyptian, LGBT, persons with disabilities, women, children, in the field of education etc.
- ❑ The interactions between CPD/PA and Intermediaries have been very effective for identifying cases of alleged discrimination, raising of the awareness and improvement of situations. In some cases, the information sent by NGO-s and CSO-s served as an indication for CPD to initiate an *ex-officio* investigation.

### 2.3.4 Police

- ❑ The cooperation between the Police and the other stakeholders in the fight against discrimination is characterized by progressive steps. The CPD cooperation with SP consist in activities such as: training on anti-discrimination within the module “Humans rights”; training on the content of the LPD with representatives of the police departments in all regions (May 2015); lecture of CPD at the Security Academy Discrimination and Hate Speech in the Police Activity (November 2015), etc.
- ❑ Despite all the positive steps, the report and handling of the discrimination cases in police activity still remains in a very low level. Cases of negligence or failure to identify the complaint made by vulnerable individuals such as Roma community members, raped women, members of the LGBT community are not fully avoided.

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European Network of National Institutions of Human Rights (ENNHRI) on 10.11.2014, according to information available at: <http://www.avokatipopullit.gov.al/sq/antar%C3%ABsia-e-avokatit-t%C3%AB-popullit>, (19.01.2016).

<sup>59</sup> Source: Interview with the PA commissioner, 03.03.2016.

<sup>60</sup> Such as agreements with: “PINK/LGBT Pro Albania Embassy”, “Alliance against Discrimination LGBT”, “Together Pro LGBT Cause”, etc.

<sup>61</sup> Out under the project for strengthening mutual communication of PA with local governments and civil society organizations, funded by DANIDA Programme of Denmark.

### 2.3.5 Other Relevant Stakeholders

- ❑ In dealing with the cases of discrimination it is necessary to have recourses in other public institutions such as the Commissioner for Protection of Personal Data, in cases of discrimination through violation and disrespect of the right to protection of the personal data.
- ❑ The CPD reports a case where the complainant V.N., alleged discrimination because of sexual orientation, from different television channels such as “News-24”, “ABC news” and the newspapers such as “Panorama”, “Shqiptaraja.com” and “Koha jonë”, and disrespect of the right to protection of the personal data.

## 3. The Role of Courts in Combating Discrimination

- ❑ The Albanian judicial system is guided by constitutional principles and is governed by an extensive legal framework.<sup>62</sup> The judicial power is exercised by the High Court, by the Courts of Appeal<sup>63</sup> (as second instance courts) and Courts of First Instance,<sup>64</sup> which are established by law. In case of violation of the principle established by the Article 6 of the ECHR, the Constitutional Court can be seized too. Judges are independent and subject only to the Constitution and the laws.

### 3.1 Capacities of Courts in Combating Discrimination

- ❑ Any person or group of persons who claims of being a victim of discrimination based on any protected grounds can file a claim to the court. A lawsuit can be filed regardless of exhausting the CPD administrative procedure. Complaint before CPD is not a condition to sue in court or to refer the case to the criminal prosecution bodies. The lawsuit in this case is subject to the same regime as any other civil lawsuit. These lawsuits are subject to ordinary lot and after that are scattered to judges according to the lot. In the Republic of Albania, there are no specialized judges in the adjudication of cases of compensation from discrimination.
- ❑ The burden of proof is regulated by the Civil Procedure Code, and more specifically by the LPD, which provides the principle of shifting of the burden of proof between both parties in a judicial proceeding. The CPD finds that this principle is applied correctly and always tries to bring it to the attention of the court when any written opinion is required or when it is participating in the process as a defendant or as a third person.
- ❑ Usage of statistical data on discriminatory cases is not specifically provided by law. However despite the absence of a specific legal provision on this regard, the practice has provided cases of usage of statistical data in the discrimination cases. CPD provides a practical case: A.K employed at the Regional Directorate of Social Insurance has been

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<sup>62</sup> Law no. 9877/18.02.2008 on the Organization of the Judiciary in the Republic of Albania, amended; Law no. 8588/03.15.2000 on the Organization and Functioning of the High Court, amended; Law no.9110/24.7.2003 on the Organization and Functioning of the Serious Crimes Court, amended; Law no. 49/3.5.2012 on Organization and Functioning of the Administrative Courts and Adjudication of Administrative Disputes, amended; Law no. 8811/17.5.2001 on the Organization and Functioning of the High Council of Justice etc.

<sup>63</sup> There are eight (8) courts of appeal in total. Of these, 6 (six) are courts of appeal of ordinary jurisdiction, 1 (one) for administrative cases and 1 (one) for serious crimes.

<sup>64</sup> There are 29 courts of first instance in total, of which 22 district courts of ordinary jurisdiction; 6 administrative court of first instance and one court of first instance for serious crimes.

fired with the motivation of position shortening. The complainant alleges that it is discriminated against because of the gender, as she was substituted with an employee of a different gender. During verification of documents the CPD found that the new structure of RDSI provided 11 employees that held the same position as the complainant. Among these 11 employees there was no female employee. Also female employees with a higher education were fired and substituted with male employees without the required education. CPD verified statistical data and found that the position of the complainant was not dismissed. In this case CPD found gender discrimination and recommended the return to work of the complainant. Since RDSI did not meet this recommendation CPD imposed a fine sanction.<sup>65</sup>

- ❑ The victimization consists in an unfavorable treatment or adverse consequence that comes as a reaction to a complaint or to a proceeding that aims the implementation of the principle of equality. The LPD does not expressly provide the role of the court in a discrimination case, in preventing further victimization, but it establishes the obligation of the employer to take all necessary measures, including disciplinary measures, to protect employees from being victimized.<sup>66</sup> Despite the fact that the law does not provide any specific measures that can be taken in this case, the court may grant an interim measure in accordance with the provisions of the Civil Procedure Code. Ex: An employee sues a claim for damage compensation alleging he/she has been discriminated by the employer. While the trial is ongoing the employer treats the plaintiff employee in a prejudicial way or even worse, decides to fire him/her. In such case the employee may request the court to issue an interim measure to stop the actions of the employer or even to suspend the decision of dismissal in order to stop further victimization.
- ❑ The denial of appropriate adaptations and modifications necessary for people with disabilities constitutes discrimination under Article 5 of the LPD. It is provided in the DCM no. 1503/19.11.2008 for the Regulation for Use of Facilities by Persons with Disabilities that all buildings of administrative purposes, including the courts, should suit to avoid architectural barriers, as physical barriers and lack of signaling device, that hinder access of these buildings by people with disabilities. Besides access to the buildings, the court during judicial processes should take measures for accommodation of diversity like: translation for people who do not speak Albanian, interpreters for persons belonging to the minorities, sign language interpreters etc. CPD has handled a particular case in relation to this topic. Based on a complaint filed by the Foundation for the Rights of Persons with Disabilities, the prisoner S.D alleged discrimination because of disability. CPD found discrimination because of disability towards S.D and other individuals with disabilities by District Court of Kruja and requested immediate measures by this court in order to find concrete solutions to establish suitability for the movement of people with disabilities in the premises of this court. This Court, in cooperation with the Office of Judicial Budget, is in the process of implementing the recommendations of CPD.<sup>67</sup>
- ❑ The LPD provides the rights of the CPD to participate in the judicial processes. According to data made public in the report of 2014, CPD's participation in judicial processes has been increasing from year to year: 3 cases in 2012; 6 (3 of which carried over) cases in 2013 and 18 in 2014.<sup>68</sup> Participation of the CPD in judicial proceedings

<sup>65</sup> Source: Interview with the CPD, 26.02.2016.

<sup>66</sup> Law on Protection from Discrimination, Article 13.

<sup>67</sup> Source: Interview with CPD, dated on 26.02.2016.

<sup>68</sup> CPD (2014) *Annual Report 2014*, p. 58, available at: <http://kmd.al/skedaret/1450450221-Raporti%202014%20shqip.pdf> (24.02.2016).



consists in: (a) Submission of a written opinion and inquiry results (if it has made an inquiry) or any other information for any issues related to discrimination upon the court's request; (b) Representation of the Claimant with his/her approval on matters relating to the discrimination; (c) As a Respondent in the case when considering claims against decisions of CPD on finding discrimination or setting of penalties and also in the status of the third person; (d) Judicial proceedings initiated by CPD for issuance of execution order for decisions that determine punitive measures; (e) The obligation of the court to notify CPD for any lawsuit about discrimination and for notifying its decision.

- ❑ CPD contributes to the effective implementation of LPD in the judicial system and the treatment of discrimination cases. In the cases in which CPD was summoned by the court to file a written specialized opinion, this opinion has become part of the court's decision. So far the courts, in all cases, have taken into account CPD opinions. However, CPD finds some deficiencies regarding the notification of lawsuits for discrimination. The courts have not notified CPD about the claims for discrimination in every case. Also, the courts should be more precise to fulfill the legal obligation to communicate the final judicial decision on these issues. As regards to the lawyers, CPD suggests that they must include the request for ascertainment of discrimination when drafting lawsuits, referring to Law 1022/2010 on Protection from Discrimination.<sup>69</sup> Despite CPD's role, the LPD has provided the right of organizations with legitimate interest to submit claim and to represent before the court a person or group of persons affected by discrimination provided that these organizations have the consent of the person or group of persons represented.
- ❑ The Analytical Report of Justice System Reform in Albania highlights that, adjudication of cases from the courts of all three levels do not fully guarantee the trial within a reasonable time. There is a widespread public perception that the system suffers from the phenomenon of the corruption and outside influence in delivering justice. Not all the courts have the infrastructure for the access of people with disabilities. This infrastructure does not exist in Saranda and Gjirokastra District Court.<sup>70</sup>
- ❑ The European Parliament in the draft resolution of the Foreign Commission (04.22.2015) underlines the need to strengthen the rule of law and reform of the judiciary, to ensure the confidence of citizens and business in the justice system; welcomes Albania's commitment to judicial reform, but deplores the persistent deficiencies in the functioning of the judicial system, such as politicization and limited accountability, high level of corruption, insufficient resources and delays in the review of litigation.
- ❑ The recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe on measures to facilitate access to justice, provides that the parties are not required any payment on behalf of the state as a condition for opening a judicial process if the amount requested is unreasonable in relation to the matter to be considered. Moreover, the ECTHR on a number of cases said that the high court tariffs and the refusal by the domestic courts to order payments have been exceptions in the violation of the applicants' right for access to justice.
- ❑ An aspect that hampers the application of the legal provisions for protection from discrimination, which is related to the court access, is the prepaid court service fee for a lawsuit. A Guideline of the Ministers of Finances, dated on 21.09.2013, provides that the

<sup>69</sup> Source: Interview with the CPD, dated on 26.02.2016.

<sup>70</sup> "Analytical Report of the justice Reform in Albania", 27.11.2014. pg. 300, available at: <http://www.eurailius.eu/images/pdf/Analysis-of-the-Justice-System-in-Albania.pdf>, (07.03.2016).

court service fee is 1% of the amount claimed, instead of 3% that used to be before September 2013. Taking into consideration the fact that in most of the cases the discriminated persons belong to the vulnerable groups, the court service fee is an inhibitory factor in demanding restoration of an infringed or denied right. Regarding the court service fee, the Albanian Constitutional Court issued the Decision no. 7/27.02.2013,<sup>71</sup> which inter alia argues: “Each individual that addresses the court by a lawsuit is obligated to prepay tax on acts (or “court services fee” according to the guideline 13/2009, supra) which is determined according to the value of the lawsuit. However, the Court considers that, according to Articles of CPC, the regular Judge is not prohibited to investigate and exempt the plaintiff from payment of this fee in case of financial inability. The regular Judge has room to evaluate this procedural requirement for submitting the lawsuit and to make exceptions case by case, in order not to hinder the right of access. Under civil procedural provisions, in cases of exclusion of individuals from court fees, including taxes on acts, these costs are borne by the respective funds allocated in the State Budget (Article 105(1)(b) of CPC). Through systematic interpretation of previous provisions of CPC and in analogy with the Law no. 10 039/22.12.2008 on Legal Aid (respectively Articles 2, 10, 13, 14), it is clearly reached the conclusion that the purpose of this legal framework is to ensure access to justice for all individuals to the court. In function of this guarantee, and the spirit the legislator wanted to convey in this legal context, the Court emphasizes that the judge must investigate on basis of documentation evidences, the economic inability of the plaintiff and estimate, referring the civil procedural legislation and specific legal provisions, if it is the case to exempt the plaintiff from payment of court services fee.

- ❑ Nevertheless, this decision is not applied in practice by the courts, because it does not define proper criteria on the cases and criteria for the exemption from the tax. According to a dissenting opinion of a Constitutional Court judge: “The possibility of exemption from tax by the judge leaves room for arbitrariness, because it provides no cases of exclusion, nor the extent or stage of the process in which lies the exemption, or the criteria on the basis of which will be the exemption (deadline of submission of documentation, documentation that must be submitted, the minimum and maximum limits of income, such as verification of the financial situation made by the judge in cases where it is impossible the submission of documents etc.)”.

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

- ❑ There is no official data/information on the number of discrimination cases filed to the court or that the court issued a decision. The only data is that on the number of discrimination cases the Commissioner has participated to.<sup>72</sup>

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<sup>71</sup> Factual background: a lawsuit for damage remuneration was submitted to Pogradeci District Court. The lawsuit value exceeded 100.000 ALL. The respondent claimed before the court prepayment of court tax on acts consisting of 3% of the lawsuit value. Plaintiff alleged insolvency to prepay the tax. He proved/documented the insolvency before the court and the court accepted it. The court has concluded that the court fee is a compulsory condition for continuation of the trial; otherwise, the court return acts without committing actions (Article 154 /a; 156 of the CPC). Having analysed the content of laws, that provide obligation of paying the court fee, and concluded that some specific provisions of these acts pose constitutionality problems; the referring court has suspended the trial asking the Constitutional Court.

<sup>72</sup> See CPD, “*Annual Report 2015*”, p. 71, available at: [http://kmd.al/skedaret/1458135488-Raport%20Vjetor%202015\\_KMD.pdf](http://kmd.al/skedaret/1458135488-Raport%20Vjetor%202015_KMD.pdf), (21.03.2016).

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

#### School of Magistrates (SM)<sup>73</sup>

- ❑ SM functions since 1997 and has two main training programs for judges and prosecutors: an initial training and a continuous one. “Non-Discrimination and Gender Equality” courses are part of the curriculum of Initial Training Program and also one of the topics covered by the Continuous Training Program. These courses are a part of the Initial Training Program since the academic year 2004-2005 and a part of the Continuous Training Program since the academic year 2003-2004. The purpose of these courses has been the completion and the development of the knowledge of the candidates for magistrate as well as judges and prosecutors and also deepening their knowledge with international standards and the case law of ECtHR; The Albanian legal framework and effects of discrimination in access to justice; public trust on the judiciary; human rights etc. The main aim is to improve granting of justice by judges and prosecutors and to better understand the reality and what is behind a certain behavior, normative act, recruitment process, etc.
- ❑ These courses are a part of the regular curriculum of both initial and continuous training program which over the year has been improved. A positive aspect in this direction is the collaboration of the School of Magistrates with the international partners and their support to develop the curricula and the training sessions. The School of Magistrates has collaborated with various partners such as: UNDP, UNIFEM, UN WOMEN, European Training Institute, Slynn Foundation, Albanian Group of Human Rights, Soros Foundation for Albania, Hans-Seidel Foundation, TLAS, CLCI, CDI, Association of Blind People of Albania, etc. The school has occasionally involved in these activities also CPD and various domestic NGOs and state institutions that have played an important role in this cause.
- ❑ The challenge regarding this issue lies in the lack of the domestic case law and the illustrations are made only by referring to ECtHR, ECJ, CEDAW or other countries’ case law. Experts are well trained and competent in this field. The participants in these trainings are very interested and the discussions generate interest, but such cases, even when genuinely discrimination cases, do not appear under this object, due to the lack of knowledge among the lawyers and other stakeholders.
- ❑ The School has published reports, guidelines and books with judicial practice analysis that help lecturers and judges/prosecutors to better understand and familiarize themselves with their role against the discrimination. As an example, the School of Magistrates has published the Guideline “Gender Equality Issues in Legal Standards and National and International Jurisprudence”, prepared with the support of UNIFEM, under the auspices of the Joint UN Program on Gender Equality (2008- 2010), with a team of Albanian and foreign experts.<sup>74</sup> Also, in the context of gender discrimination, two publications have been prepared with the support of UNDP, one related to the family law cases<sup>75</sup> and the other on labour

<sup>73</sup> Law Nr.8136/31.7.1996 'For the School of Magistrates' amended.

<sup>74</sup> Agnes Bernhard, Arta Mandro, Aurela Anastasi (2009) *Reference guide on gender equality standards in national and international legal frame and case law*, available at: [http://www.magjistratura.edu.al/media/users/4/UNIFEM\\_permbajtja.pdf](http://www.magjistratura.edu.al/media/users/4/UNIFEM_permbajtja.pdf) (02.03.2016).

<sup>75</sup> Arta Mandro, “*Gender Discrimination in family matters. Role of judiciary against discrimination*”, a publication of Albanian School for Magistrate, Tirana 2014, available at <http://www.undp.org/content/>

case law.<sup>76</sup> Still, the developments of the legal framework and standards ask for additional materials.

- During the period 2010-2015, continuous training program consisted in 38 training activities (two days each) where judges/prosecutor participated in different topics regarding the role of the justice system in cases of discrimination were held. Detailed information is provided by the Albanian School for Magistrate regarding the target group, the title of course, the description of content, the teaching aims, the profile of trainers, number of participants, and the date of implementation. During this period more than 500 judges participated in the training courses, some of them in more than one training activity.

## 4. Procedural Aspects in Discrimination Cases

### 4.1 Mediation

- According to the provisions of the Law no. 10 385/24.2.2011 on Mediation in Dispute Resolution<sup>77</sup> the mediation is an extrajudicial activity in which parties seek resolution of a dispute by a neutral third party (mediator), to reach a mutually acceptable solution to the dispute and that does not conflict with the law. Mediators operate as natural or legal persons, through their offices or centers, licensed and registered in the Register of Mediators. Mediation is applied to civil, commercial, labor and family disputes and also to criminal disputes examined by the court at the request of the injured accuser, or the appeal of the injured. Mediation is applied at any time when the parties to the dispute seek or accept mediation as an alternative dispute resolution on their own volition before the dispute is submitted to the body designated by law for resolving it, as well as in those cases where the court or the relevant state body, after propelled for resolving the dispute, guide the parties to mediation. Given that mediation has a comprehensive field of application, there is no legal prohibition that the issues related to the discrimination be resolved through mediation. The LPD states that CPD when appropriate can reach a conciliation agreement between the complainant and the person against whom the complaint is filed.<sup>78</sup>

### 4.2 Evidencing Discrimination

- According to CPD there are a number of cases in which the applicant has difficulties to indemnify the cause of the discrimination, and then it has difficulties in verifying the connection between the discriminatory conduct and the alleged cause. There are cases when the information requested is not provided at all or a vague one is provided, which is insufficient to reach a correct and founded decision.

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dam/albania/docs/misc/Diskriminimi%20gjinator%20ne%20ceshtjet%20familjare%20A.%20Mandro.pdf (accessed, 02.03.2016).

<sup>76</sup> Mariana Semini, “*Court conflict in labor relation from the gender perspective*”, a publication of Albanian School for Magistrate, Tirana 2014. <http://www.undp.org/content/dam/albania/docs/misc/Konfliktet%20gjyqesore%20te%20marredhenieve%20te%20punes%20nen%20kendveshtrimin%20gjitor.pdf> (accessed, 02.03.2016).

<sup>77</sup> Law no. 10 385, dated 24.2.2011 on Mediation in Dispute Resolution, Article 2.

<sup>78</sup> During 2014, 3 (three) cases reported before the CPD were solved through mediation. See CPD (2014) *Annual Report 2014*, p. 36, available at: <http://kmd.al/skedaret/1450450221Raporti%202014%20shqip.pdf> (24.02.2016).

### 4.3 Strategic Litigation

- ❑ Regarding the strategic litigation, there is no evidence for involvement of stakeholders in such litigation. The CPD does not exclusively select the cases to be sent to court. This could be done only if the victim of discriminatory behaviors requires it.

### 4.4 Class Action/Actio Popularis

- ❑ In order to set up a legal proceeding, the Civil Procedural Code (CPC) provides that claimant must have a direct, personal and actual interest. CCP in Article 90(2) provides as general rule that: “No one can represent the rights of others in a civil trial, unless the law provides otherwise”. Art 161 of CPC stipulates that: A lawsuit may be brought jointly by many plaintiffs or against many defendants (co-participants) if: (a) they have joint rights or obligations on the subject of the lawsuit; or (b) their rights or obligations have the same basis from the point of view of the fact or of the law; while Article 162 of CPC states: “Each of the co-participants is represented in an independent manner against the opposing party in order that his procedural actions or omissions do bring neither damages nor benefits to the others. When, due to the nature of the legal relations in conflict or due to a legal provision, the effect of the decision which shall be given is extended to the entire co-participants, the procedural actions which have been carried out by some co-participants have effect also on other co-participants who have not appeared in court or who have not undertaken any action in the designated time-limit”. Class Action in its typical form is not foreseen by the Albanian Law. There exist some forms of representative actions provided by the LPD, or Environment Protection or Consumer Law.
- ❑ Article 33 of the LPD provides: “(1) A person or group of persons who claim that they have been discriminated against, or an organization with legitimate interests that claims discrimination in the name of a person or group of persons, may submit a complaint together with available evidence to CPD, in writing or in exceptional cases orally, so that minutes can be taken. (2) An organization with legitimate interests submits a special power of attorney to represent the person or group of persons”. According to Article 34 of LPD: “1. Every person or group of persons who claim the discrimination that has been exercised against them for one of the causes mentioned in Article 1 of this law may submit a lawsuit to the competent court according to the provisions of the CPC for indemnification according to law or, as the case may be, to make a criminal denunciation before the competent authority for criminal prosecution [...] (3) An organization with a legal interest or CPD may submit a lawsuit in the name of a person or group of persons, subject to the consent given by a special power of attorney or by declaration before the court of the person or group of persons injured by the discrimination.” According to this law, the right to initiate an administrative procedure before the CPD or court procedures in any case belongs to the individual alleging discrimination, which according to the rules of representation may delegate this right to a representative elected by his/her free will. In the absence of such act of representation (proxy) proceedings before the CPD or before the court cannot start Article. So, the right of representation cannot be taken *a priori* by any organization with legitimate interests in terms of this law. CPD emphasizes that this right cannot be given *a priori* to a person

or organization, whether an organization of persons with disabilities, without the express consent of the person with disabilities.<sup>79</sup>

#### 4.5 Shifting of the Burden of Proof

- ❑ Burden of proof in CPC and LPD: Article 36 of the LPD provides the principle of shifting of the burden of proof. According to this Article: “(5) Claimant has the obligation to bring evidence in support of the lawsuit, using every kind of lawful evidence that may show discriminating behavior. (6) After Claimant submits the evidence ..., the defendant is obligated to prove that the facts do not constitute discrimination according to this law”. The burden of proof provided by LPD is in compliance with Article 12 of CPC and provides that: “The party which claims a right has the burden of prove that in conformity with the law, to prove the facts on which it supports its claim”. There is a slight difference between these provisions referred to the standard of proof (not to the burden of proof). The standard of proof in the case of application of the LPD is lower than the general one provided by the CPC.

#### 4.6 Remedies

- ❑ As LPD provides, remedies consist in: (a) regulations, measures and fines decided by the CPD and (b) the indemnification decided by the court. CPD at the end of the procedure may order regulations or measures to be performed by the person against whom the complaint is submitted and setting a deadline for performing them.
- ❑ If CPD orders regulations or measures, the person against whom the complaint was submitted reports within 30 days before CPD in connection with the actions undertaken for the implementation of the decision. If the person against whom the complaint was submitted does not inform CPD or does not execute the decision, CPD imposes a fine. The sanction by fine is repealed if the decision is implemented within seven days after the fine is imposed. When the CPD imposes a measure it assures that it will be: (a) effective and preventative; and (b) proportionate with the situation that caused the imposition of the measure.
- ❑ If a fine is imposed, CPD determined the amount of the fine while taking into account: i) the nature and field of action of the violation and the effect on the victim, and ii) the personal and financial circumstances of the violator, especially taking into account all the sources of income, and if the violation is committed by a private legal person, the balance sheet assets and profit are taken into account, as well as the total payroll; c) if the same violation discriminates against several persons, only one fine is imposed, but taking into account the requirements of letter “b” of this Article.<sup>80</sup> Also according to Article 33 of LPD every person who violates the provisions of the law is punished by a fine.<sup>81</sup> As a final means, especially when the natural or legal subject does not comply with the decision of CPD or does not pay the fine within three months after the time period set by CPD and the sanction has not been objected to in court, CPD may ask the

<sup>79</sup> Opinion of the CPC addressed to the Constitutional Court of the Republic of Albania in response to the request no. 12 act, dated on 16.04.2013, p. 9, available at: [kmd.al/skedaret/1443005809-shkrese%20gjykates%20kushtetuese.pdf](http://kmd.al/skedaret/1443005809-shkrese%20gjykates%20kushtetuese.pdf), (24.02.2016).

<sup>80</sup> Law “*On Protection from Discrimination*”, article 33, point 11.

<sup>81</sup> Article 33, point 13: “a) a natural person, from 10,000 to 60,000 ALL; b) a legal person, from 60,000 to 600,000 ALL; c) a natural person within a legal person who is responsible for the violation, from 30,000 to 80,000 ALL;”.

competent authorities to remove or suspend the license or authorization of the natural or legal subject to conduct activity.<sup>82</sup>

- ❑ The indemnification decided by the court includes, among other things, the correction of the legal violations and their consequences through a return to the prior situation, appropriate compensation for the property or non-property damages or through other appropriate measures.<sup>83</sup>

#### 4.7 Follow-Up to Opinions and Recommendations

- ❑ CPD is the stakeholder entitled by the LPD for issuing opinions and recommendations in cases of discrimination. According to the Article 32, CPD has the competence to: (a) Make recommendations to the competent authorities, especially by proposing the approval of a new legislation or the amendment or reform of the existing legislation; (b) Make recommendations about any kind of issue related to discrimination; (c) Set out an opinion at the request of the court; (d) Address public opinion directly about any kind of issue related to discrimination.
- ❑ CPD makes legislative recommendations for law amendments in order to comply with LPD.
- ❑ CPD recommendations are addressed to the respective bodies and they are not legally binding.

## 5. The Role of Universities in Combating Discrimination

### 5.1 Law Departments

- ❑ The Departments of Public, Civil or Criminal Law are generally the three main departments of the law faculties (private or public ones). While the Department of Public Law of Faculty of Law, University of Tirana has a specific course on Anti-discrimination and Gender Equality, LPD standards and principles as part of the legislation in general, are covered by almost all law courses. As particular subjects, non-discrimination and gender equality curricula enclose courses such as:
  - “Gender Equality and prohibition of Discrimination” is an elective course in Bachelor program, first year, second semester. Its object is to study the legal and institutional instruments to implement the principle of gender equality in a comparative perspective in Europe and Albania. The purpose of this course is to provide basic knowledge on the contemporary issues and developments in the field of gender equality and discrimination at international, European and national level. This course contributes to the deepening of the knowledge of the students about the concepts of human rights, prohibition of direct and indirect discrimination, mainly roles and types of positive measures needed to combat discrimination, etc. It also pays particular attention to addressing issues of gender-based violence as well as measures that can be taken to prevent and combat it. Overall, through this course student have the opportunity to receive updated information on the evolution of the principle of gender equality, taking

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<sup>82</sup> Law “On Protection from Discrimination”, article 33, point 15.

<sup>83</sup> Law “On Protection from Discrimination”, article 38.

into account modern developments of law and judicial practice in this area. The main source of the course is a text book<sup>84</sup> as well as other didactic material.

- “Legal Search Instrument for Implementing the Principle of Equality and Non-Discrimination” a course of 65 hours’ lectures and 15 hours’ of seminars is a compulsory course that takes place in the doctoral school program at the Department of Public Law. Its object is the study of the main directions of the legal research in the field of equality and non-discrimination crosswise with other areas of the study of law. The principle of equality is a versatile principle that permeates and should be considered in all specialties of law. It is important that the researcher recognize this principle and be able to understand its implementation in the relevant fields of study at key moments where it crosses and is present. This is the main goal of this course in the doctoral study program. It will run through several activities with theoretical and practical character, in order to prepare the student for the desired search. The practical element occupies a significant place in order that the study and the research are based not only in the study of law, but also in the study of the methods to make the law really applicable, which remains a persistent problem for the Albanian society. The entire content of the subject is treated in comparison with the international constitutional court case law. Course objectives are: to increase research skills of students in the field of law; to deepen the knowledge of international and constitutional case law of different countries in the field of equality and non-discrimination; to familiarize the students with Albanian legislation and Constitutional Case Law regarding equality and non-discrimination; to increase the capacity of students to study the methods required for the implementation of laws in the field of equality and non-discrimination; to make students able to work independently on topics and essays about these issues.

- ❑ A significant research is dedicated to the area of discrimination. There are around three theses per year related to anti-discrimination chosen by the students of bachelor program. There are also some PhD theses on this topic, such as: (a) The Evolution of the Principle of Gender Equality in the Provision of Services and Goods- Nadia Rusi; (b) The Principle of Equality and Nondiscrimination in the International Private Law - Ervis Cela; (c) Criminal Juridical and Comparative Aspects of the Offenses of Violence in Family - Fran Qafa.

## 5.2 Legal and Institutional Structures Combating Discrimination

- ❑ At the Faculty of Law, University of Tirana there is no special body to promote equality or non-discrimination and take care of the complaints related to the discrimination. However, there is an established Legal Clinic, in the context of which the law students can provide legal assistance in cases related to discrimination.
- ❑ All the above mentioned courses offered by the Faculty of Law, University of Tirana are easily accessible.

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<sup>84</sup> A.Anastasi, A.Mandro, E.Shkurti, A.Bozo, ‘Gender equality and non discrimination’, PH Pegi, Tirana, 2012.



## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

- According to the relevant stakeholders a regular citizen finds difficulties mainly in understanding the meaning of the discrimination and its causes. For this reason there have been many allegations that any illegal behavior constitutes discrimination. Citizens understand the areas in which discrimination is prohibited and also the responsible institutions they can address, but often they do not have information on where to seek the redress.
- Incensement of awareness level of public opinion is one of the strategic priorities and challenges regarding the issues of discrimination. This challenge can be overcome by achieving: a basic level of general public awareness; a certain level of awareness in pre-university and university educational institutions (specifically the directors of educational institutions, teachers, psychologists and students); a high level of awareness in the field of employment in the public and private sector (specifically the Department of Public Administration, Labour Inspectorates, Trade Unions, Chambers of Commerce); a basic level of awareness in the area of the provision of goods and services for civil servants and employees of local government units; increasing the awareness of the media from reporting/presenting issues of discrimination.
- In order to achieve the goals mentioned above a series of positive steps are taken by the stakeholders:
  - CPD has conducted a lot of awareness activities and drafted many specific reports and studies regarding legal framework and the situation of discrimination such as: Study “On Discrimination Problematic of Roma community in Albania”; “Discrimination in Education as Seen by CPD”; Special Report “On Protection and Respect of LGBT Rights in Albania”; Study “On the Situation of Female Discrimination in Albania”; Monitoring the implementation of the LPD by the courts (ongoing). Also, in order to evaluate the role of the media, the CPD during the period January 2015-31 December 2015 has conducted a periodic monitoring of the press from which 238 Articles were extracted 238 focused on some vulnerable groups like: children, violated women, individuals with disabilities, Roma community, LGBT community etc.<sup>85</sup>
  - PA during the recent years has organized several auditoriums for specific issues and groups that can raise awareness of public administration bodies for the protection and guarantee of their rights. PA activity is now focused on protecting and guaranteeing the legitimate rights and interests of vulnerable groups, who have difficulties to face the public administration, due to their physical, economic, social or family conditions. Because of the media coverage, as well as due intensive official communications with various bodies of public administration to regulate situations that cause a violation of human rights, there is already increased level of awareness on those sensitive issues. Also PA addressed to the competent institutions a set of recommendations for improving the situation of alleged discrimination, namely to restore the violated rights of the vulnerable groups mainly Roma and Egyptians; improvement of living conditions; improvement of legal framework, respect of international standards etc.

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<sup>85</sup> Some of these vulnerable groups that appear in press are: Women (especially violence towards them) – 16 articles, LGBT community – 13 articles, Children with their problematic especially violence and trafficking)– 49 articles, Roma community – 42 articles, Persons with disabilities – 42 articles, Articles regarding protection of human rights – 19 articles, Domestic Violence – 24 articles.

## 6.2 Achievements in Awareness Raising

- ❑ CPD, PA and various CSOs/NGOs are the stakeholders mostly involved in working on awareness raising. As this report highlights, the main priority of the cooperation between the stakeholders is public, institutional and court awareness raising. Training activities, meetings, conferences, workshops, etc., are organized with different target groups such as: women and violated women, children, persons with disabilities, LGBT community, Roma and Egyptian community, etc. There is always room for improvement. Awareness strongly depends from policies and lack of uniform understanding from different stakeholders.
- ❑ Publication of activities: All the activities are published at the official website of CPD<sup>86</sup> such as: “5 Years Law”; Conference: “Together for the Protection and Promotion of the Rights of Citizens”; Workshop: “Inclusive and Non-Discriminatory Policies for LGBT Community”; Conference: “Protection from Discrimination, Positive Models and Challenges”; Regional Conference: “Special Challenge to Discrimination Complaint Review Ethnically”; Lecture on the topic “The role of CPD”, in the Academy for Minority Rights, organized by the Albanian Group for Human Rights with the support of the German Embassy; National Conference: “For Protection from Gender Discrimination in the Economic Sector” etc.
- ❑ Method used for awareness raising consist of:<sup>87</sup>
  - The compilation, publication and distribution of awareness materials and training manuals such as: Publication “Summary of Decisions of CPD” in 1200 copies; Informative Booklet on the Law on Protection from Discrimination in employment field in 1000 copies; Informative Booklet on the Law on the Protection from Discrimination in the area of services in 1000 copies; Informative Booklet on the Law on the Protection from Discrimination in the field of education 1000 copies.
  - Organization of trainings, meetings, workshops and Open Days for example: During 2015, the CPD has launched an awareness campaign in the education system, particularly in the 9-year and secondary schools of the Tirana region. Until March, the CPD has conducted 8 briefings with students and teaching staff of the selected schools; On April 24, 2015, in collaboration with PINK Embassy / LGBT Pro Albania and the Ministry of Social Welfare and Youth a Workshop was organized, entitled “5 Years of Anti-discrimination and Further Measures”; in Collaboration with the State Police CPD organized “State Police training on the Law on Protection from Discrimination”.
  - Participation in different activities: During the period 2010-2015 the CPD in collaboration with other stakeholders has organized and participated in: 23 activities organized by CPD; 10 open days; 13 open lectures; 74 activities initiated and organized by other counterparts.

## 6.3 Preventing Future Discrimination

- ❑ Legal Framework provides that CPD *inter alia* has the power to: make recommendations to the competent authorities, especially by proposing the adoption of a new legislation or the amendment of the existing legislation; publish reports and make recommendations

<sup>86</sup> Source: <http://www.kmd.al/?fq=brenda&emri=Te%20Reja&gj=gj1&kid=151&kidd=78>, (24.02. 2016).

<sup>87</sup> CPD “Annual Report 2015”, p. 71-86, available at: [http://kmd.al/skedaret/1458135488Raport%20Vjetor%202015\\_KMD.pdf](http://kmd.al/skedaret/1458135488Raport%20Vjetor%202015_KMD.pdf), (21.03.2016).

on any matter relating to discrimination.<sup>88</sup> Thus CPD has issued different legislative recommendations for amendments of legal framework in order to be in accordance with the LPD. These recommendations are addressed to the competent authorities.<sup>89</sup> CPD recommendations are published at the official website of CPD.<sup>90</sup>

- ❑ PA can issue recommendations not necessarily related to an individual case. Thus, according to the Articles 21 and 24 of the Law no. 8454 4.2.1999 on People's Advocate (amended), PA has the right to issue recommendations to restore violated rights and also legislative recommendations. In this regard PA has addressed the competent institutions with a set of recommendations to improve the situation of alleged discrimination, namely to restore violated rights of vulnerable groups mainly Roma, Egyptian, persons with disabilities, LGBT community, improvement of living conditions, improving the legal framework, respecting international standards etc.
- ❑ CPD has the right for *ex officio* investigation after receiving reliable information about violations of the law.<sup>91</sup> Based on the provisions of the law CPD has conducted 65 *ex officio* investigations during the period 2010-2015.<sup>92</sup>
- ❑ Partnership & internships: Regarding the actions undertaken to combat stereotypes there are a lot of awareness activities where persons of Roma and Egyptian communities or persons with disabilities are involved as partners. There are also cases where they have conducted practices at several state institutions and at the end they became employed in these positions.
- ❑ Promotion and awareness: The CPD offers a great example regarding the fight against prejudices and stereotypes. It is referred to an Informative Booklet on the Law on Protection of Discrimination in the education field for pre-university education that was prepared by a girl with disabilities. This booklet was distributed in all schools (as part of an informative material package), granting a positive model for all students. Educational institutions, due to the great influence of CPD, usually react immediately in cases of discriminatory behaviors without the need for a decision from CPD.
- ❑ There is no strategy or action plan on anti-discrimination and on the other hand there is a great need for issues of discrimination to not continue to be fragmented as in those of the Roma, LGBT, children etc.

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<sup>88</sup> LPD, article 32.

<sup>89</sup> The opinion CPD addressed the Constitutional Court, Recommendation for MAS 2014; Comments for changing the Labour code; Recommendation on Article 113 of the Criminal Code; Recommendations for Penal Code etc.

<sup>90</sup> Source: <http://www.kmd.al/?fq=brenda&emri=Baza%20Ligjore&gj=gj1&kid=176&kidd=86> (24.02.2015)

<sup>91</sup> LPD, article 32/c.

<sup>92</sup> Source: Interview with the Commissioner dated on 26.02.2016.

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### **List of Abbreviations**

AC - Albanian Constitution  
 ACA - Albanian Competition Authority  
 ASPA - Albanian School of Public Administration  
 CC - Criminal Code  
 CEDAW - Convention for the Elimination of all forms of Discrimination against Women  
 CPC - Civil Procedural Code  
 CPD - Commissioner for Protection from Discrimination  
 CRC - Convention on the Rights of the Child  
 CoE - Council of Europe  
 DPs - Persons with Disabilities  
 ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms  
 EQUINET - European Network of Equality Bodies  
 EU – European Union  
 GE – Gender Equality  
 GEL – Law on Gender Equality  
 ICCPR - International Covenant on Civil and Political Rights  
 ICESCR - International Covenant on Economic, Social and Cultural Rights  
 INSTAT - Institute of Statistics  
 LPD – Law on Protection from Discrimination  
 NCGE - National Council on Gender Equality  
 NPM - National Preventive Mechanism  
 SAA - Stabilization and Association Agreement  
 SCLA - State Commission for Legal Aid  
 SP - State Police



## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from the particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviors of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, Labor Inspectorates, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination. Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counselors, etc.)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination



## Annex 2 – Template for Good Practice Examples

<b>Area:</b> <sup>93</sup>	Evidencing discrimination, guiding implementation of relevant law
<b>Title (original language)</b>	“5 vjet anti- diskriminim dhe masat e metejshme”
<b>Title (EN)</b>	“5 Years of Anti-discrimination and Further measure”
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Ambasada Pink/LGBT Komisioneri per Mbrojtjen nga Diskriminimi Fondi Kanadez për Iniciativat Lokale
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Pink/LGBT Embassy Commissioner for Protection from Discrimination Canadian Fund for Local Initiatives
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Ministry of Social Welfare and Youth
<b>Internet link</b>	<a href="http://www.pinkembassy.al/zhvillohet-me-sukses-workshopi-%E2%80%9C5-vjet-ligj-p%C3%ABr-mbrojtjen-nga-diskriminimi-dhe-plani-i-masave-2015">http://www.pinkembassy.al/zhvillohet-me-sukses-workshopi-%E2%80%9C5-vjet-ligj-p%C3%ABr-mbrojtjen-nga-diskriminimi-dhe-plani-i-masave-2015</a>
<b>Type of initiative</b>	Workshop
<b>Main target group</b>	LGBT community
<b>Brief description (max. 1000 chars)</b>	The workshop was focused on two main directions: Firstly, the evaluation of CPD’s performance in support of the fight against discrimination during this 5 years’ period (2010-2015) and secondly submission and evaluation of recommendations on five key issues related to the LGBT community; legislation; security and protection from violence; social services and employment; education and health.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> no</li> <li><input type="checkbox"/> yes how?</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes The Commissioner for Protection from Discrimination supported this activity and submitted a presentation of the main challenges and measures planned 2015-2020 in the field of discrimination.</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> </ul> <div style="float: right;"> <input type="checkbox"/> transferability  <input checked="" type="checkbox"/> sustainability         </div>

<sup>93</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

## Annex 2.1 Albanian School of Magistrates – Courses on Anti-Discrimination (2010-2015)

Title of course	Description of content	Teaching aims	Target groups	Educators/lecturers/speakers	Mandatory (M)/ Elective (E)	Basic training (BT)/ professional development training (PDT)	No. of participants	Date of implementation
Training Judges of Tirana Court regarding the LPD	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role of court in their implementation	Judges Lawyers Magistrate Candidates	K. Imholz E. Fejzulla I. Baraku A. Zeneli Moderator: E. Ballauri	M	PDT	16	21.10. 2010
Gender Equality and issues of family right	Gender equality in marital life and the role of the court in the application of this principle	To strengthen knowledge and equip judges with national standards, international practices, etc.	Judges Lawyers Trainers, Professors	A. Mandro D. Post	M	PDT	10	28-29.10. 2010
Training Judges of Tirana Court regarding the LPD	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role of court in their implementation	Judges, Lawyers, Jurists	K. Imholz E. Fejzulla E. Kokona Moderator: E. Ballauri	M	PDT	9	29.10. 2010
Training Judges of Tirana Court regarding the LPD	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role of court in their implementation	Judges, Lawyers, Jurists	K. Imholz E. Fejzulla E. Kokona Moderator: E. Ballauri	M	PDT	13	19.11.2010
Law on Antidiscrimination	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role	Judges Prosecutors Lawyers Jurists	L. Lleshi A. Anastasi	M	PDT	32	18-19.04.2011

		of court in their implementation						
European Convention on Human Rights			Judges, Prosecutors Lawyers	E. Kokona K. Traja	M	PDT	17	19.12.2011
European Convention on Human Rights			Judges, Prosecutors Lawyers	E. Kokona K. Traja	M	PDT	4	20.12.2011
National and international standards for the protection from discrimination and ECHR/ECJ jurisprudence regarding them	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role of court in their implementation	Judges Prosecutors	A. Mandro A. Anastasi	M	PDT	10	19-20.12.2011
Law on Antidiscrimination	Analysis of concepts and content of law	Educate all judges and prosecutors with legal standards and the role of court in their implementation	Judges Prosecutors Professors Jurists	A. Mandro A. Anastasi Moderator: A. Malaj	M	PDT	14	5-6.04.2012
The concepts of gender equality national/international obligations of and the EU in terms of gender equality, more specifically in the field of labor law and social protection	As per above	As per above	Judges Prosecutors	A. Anastasi M. Dharmo V. Meçaj Moderator: E.Gjermeni	M	PDT	10	9-10.10.2012
The concepts of gender equality national/international obligations of and the EU in terms of gender equality, more specifically in the field of labor law and social protection			Judges Prosecutors Lawyers Professors Jurists Public Administration	V. Meçaj E.Gjermeni M. Buhali Moderator: M. Dharmo	M	PDT	10	16-17.10.2012
The concepts of gender equality national / international obligations of and the EU in terms of gender equality, more			Magistrate Candidates	V. Meçaj E.Gjermeni M. Buhali Moderator: M.	M	BT	25	30-31.10.2012

specifically in the field of labor law and social protection				Dhamo				
The concepts of gender equality national/international obligations of and the EU in terms of gender equality, more specifically in the field of labor law and social protection			Judges, Lawyers, Psychologists Social workers	A. Anastasi M. Dhamo E.Gjermeni Moderator: A. Mandro	M	PDT	21	7-8.11.2012
Expanding access to people in need in the realization of their rights through the courts			Judges Court Administrative	D. Kore V. Kosta A.Karanxha Moderator: A. Mandro	M	PDT	9	22.11.2012
Expanding access to people in need in the realization of their rights through the courts			Judges Court Administrative	D. Kore V. Kosta E.Metalla Moderator: A. Mandro	M	PDT	19	23.11.2012
Specific aspects in relation to decisions taken on the mentally ill.	Standards of Human Rights Legislation Institutional Legislation Legal Psychiatry Mental Health Issues		Jurists Lawyers	I. Panda Nj. Shtino	M	PDT	8	18.12.2012
Specific aspects in relation to decisions taken on the mentally ill.	Standards of Human Rights Legislation Institutional Legislation Legal Psychiatry Mental		Magistrate Candidates	I. Panda Nj. Shtino	M	BT	26	19.12.2012

	Health Issues							
ECHR (most important legal-subject guarantees e.g. free for family life, religion, freedom of assembly and protection of property)			Judges Prosecutors Lawyers	Xh. Zaganjori O. Mallman Moderator: A. Mandro	M	PDT	21	25-26.02.2013
Training to enhance skills in the interpretation and implementation of new legislation on gender equality, with integrated sessions on the rights of persons with disabilities			Judges Prosecutors Lawyers	V. Vata A. Anastasi A. Ahmeti Moderator: A. Mandro	M	PDT	11	18-19.03.2013
Training to enhance skills in the interpretation and implementation of new legislation on gender equality, with integrated sessions on the rights of persons with disabilities			Judges Prosecutors Lawyers	V. Vata A. Anastasi B. Qori Moderator: A. Boksi	M	PDT	21	20-21.03.2013
Training to enhance skills in the interpretation and implementation of new legislation on gender equality, with integrated sessions on the rights of persons with disabilities			Judges Magistrate Candidates Lawyers Jurists	V. Vata A. Anastasi E. Kalaja Moderator: A. Mandro	M	PDT	19	25-26.03.2013
Training to enhance skills in the interpretation and implementation of new legislation on gender equality, with integrated sessions on the rights of persons with disabilities			Judges Prosecutors	V. Vata A. Anastasi B. Qori Moderator: A. Boksi	M	PDT	11	27-28.03.2013

Training to enhance skills in the implementation legislation on gender equality for other legal professions			Ombudsman Bailiffs Lawyers Professors Forensic experts	A. Anastasi V. Vata A. Ahmeti Moderator: I. Totozani N. Shtino	M	PDT	16	2-3.05.2013
Training to enhance skills in the implementation legislation on gender equality for other legal professions			Commissioner for Protection from Discrimination Professors Jurists Bailiffs	A. Anastasi V. Vata A. Ahmeti Moderator: I. Baraku	M	PDT	12	14-15.05.2013
Training to enhance skills in the implementation legislation on gender equality for other legal professions			Bailiffs	A. Anastasi A. Ahmeti Moderator: P. Qarri	M	PDT	27	21-22.05.2013
Training to enhance skills in the implementation legislation on gender equality for other legal professions			Bailiffs Professors Lawyers	A. Anastasi V. Vata A. Ahmeti Moderator: P. Qarri	M	PDT	24	28-29.05.2013
Expanding access to people in need in the realization of their rights through the courts			Judges Court Administration	V. Kosta D. Kore A. Belishta	M	PDT	19	24.10.2013
Expanding access to people in need in the realization of their rights through the courts			Judges Court Administration	V. Kosta D. Kore I. Shehu	M	PDT	11	25.10.2013
ECHR [Articles 8,9, 11, 12, 13 and 14]			Judges Prosecutors	Sir H. Brooke J. Cooper M. Spurrier A. Mandro	M	PDT	19	26-17.03.2014
Law on Antidiscrimination	Analyze of concepts and content	Acknowledge all judges and prosecutors with legal	Judges Prosecutors	K. Imholz A. Hoxha E. Kokona	E	PDT		15.04.2014

	of law	standards and the role of court in their implementation		E. Fejzullai				
Training for dealing with issues of access to justice for persons with disabilities			Judges Prosecutors	A. Mandro S. Tafaj	M	PDT	12	29.06.2015
The role of the judiciary in protecting and promoting the standards of gender equality and non-discrimination. The role of the ASM through continuous training program		Assessment of needs in these areas	Judges Prosecutors	A. Mandro A. Belishta I. Balli S. Kllapi	M	PDT	16	16.12.2015
The role of the judiciary in protecting and promoting the standards of gender equality and non-discrimination. The role of the ASM through continuous training program		Assessment of needs in these areas	Judges Prosecutors	A. Çela D. Banushi A. Agolli	M	PDT	14	15.12.2015
The role of the judiciary in protecting and promoting the standards of gender equality and non-discrimination. The role of the ASM through continuous training program		Assessment of needs in these areas	Judges Prosecutors	A. Liçaj H. Haxhiraj E. Mihali Moderator: A. Çela	M	PDT	13	16.12.2015
The role of the judiciary in protecting and promoting the standards of gender equality and non-discrimination. The role of the ASM through continuous training program		Assessment of needs in these areas	Judges Prosecutors	A. Mandro F. Islamaj D. Peka A. Boksi	M	PDT	8	17.12.2015

The role of the judiciary in protecting and promoting the standards of gender equality and non-discrimination. The role of the ASM through continuous training program		Assessment of needs in these areas	Judges Prosecutors	A. Mandro V. Vata A. Zefi F. Vjerdha Moderator: B. Nikëhasani	M	PDT	12	21.12.2015
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### Annex 3 – Statistics Equality Bodies/Ombud Institutions

	2010	2011	2012	2013	2014	2015
<i>Budget in €</i>	53,371	238,786	279,329	237,143	267,857	267,857
<i>Number of staff (full time equivalent)</i>				21	20	21
<i>Number of professional/legal staff (full time equivalent)</i>						21 employers, 10 of who have a second level degree and the rest have degrees or are in process of graduating for social sciences and justice.
<i>Complaints/queries received</i>	4	15	90	166	172	180
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	-	1	14	25	8	17
<i>Total number of cases (please break down according to different grounds)</i>	4	16	104	191	180	197
<i>Age</i>		1	3	4	5	
<i>Belief</i>						
<i>Disability</i>		1	19	23	19	17
<i>Ethnic origin</i>		1	3	7		12+ race 88
<i>Gender</i>	1	3	2	5	8	9
<i>Gender identity</i>						
<i>Religion</i>				1	5	1
<i>Sexual orientation</i>	1	3	7		3	4
<i>Other grounds</i>	2 without identifying any cause	3 not identified	Race 36 6 without cause 5 special qualities 2 residence 3 political conviction 1 social state and ancestry 16 economic conditions	151 Colour, pregnancy and health conditions		
<i>Total number of cases (please break down according to different forms)</i>						

<i>Direct discrimination</i>						
<i>Indirect discrimination</i>						
<i>Harassment</i>						
<i>Victimization</i>						
<i>Other forms</i>						
<i>Number of surveys</i>					"On the situation of discrimination against the Roma community". "To protect and respect the rights of the LGBT community in Albania"	Monitoring the implementation of the Law "On Protection from Discrimination" by the courts (continued) Study "On the Situation of Discrimination against Women in Albania"
<i>Number of research projects</i>		UNICEF (1 for training and awareness) and (1 for monitoring the implementation of law) both in education			IPA 2013	IPA 2013
<i>Number of awareness initiatives</i>					8 activities, 10 days open, 7 open lectures 34 activities organized by other stakeholders	7 Organization of activities (seminars, conferences, roundtable discussions) Participation in 40 activities initiated by coworkers, 6 open lectures with student
<i>Number of training actions</i>						
<i>Number of promotional initiatives to support good practice</i>						



# **Legal Protection against Discrimination in Bosnia and Herzegovina**

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# Table of Contents

<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>139</b>
1.1 Overview of Constitutional and Legal Provisions.....	139
1.2 Assessment of the Legal Framework .....	140
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>142</b>
2.1. Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	142
2.2. Stakeholders Putting Combating Discrimination into Practice .....	142
2.2.1. <i>The Institution of Human Rights Ombudsmen of Bosnia and Herzegovina</i> .....	142
2.2.2. <i>B&amp;H Ministry of Human Rights and Refugees (Department for Human Rights)</i> ....	145
2.2.3. <i>The Agency for Gender Equality of Bosnia and Herzegovina and Gender Centres of FB&amp;H and RS</i> .....	146
2.2.4. <i>Centres for Free Legal Aid</i> .....	146
2.2.5. <i>Intermediaries</i> .....	147
2.2.6. <i>Police</i> .....	148
2.3. Mapping the Cooperation among Stakeholders .....	148
<b>3. The Role of Courts in Combating Discrimination.....</b>	<b>149</b>
3.1 Capacities of Courts in Combating Discrimination.....	149
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	151
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies. ...	153
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>155</b>
4.1. Mediation .....	155
4.2. Evidencing Discrimination.....	155
4.3. Strategic Litigation.....	156
4.4. Class Action/Actio Popularis .....	157
4.5. Shifting of the Burden of Proof.....	158
4.6. Remedies.....	159
4.7. Follow up to Opinions and Recommendation.....	160
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>160</b>
5.1 Law Departments .....	160
5.2. Other Educational Institutions.....	163
5.3. Legal and Institutional Structures Combating Discrimination .....	164
<b>6. Developing a Culture of Rights .....</b>	<b>166</b>
6.1 Assessing the Levels of Awareness .....	166
6.2 Achievements in Awareness Raising .....	167
6.3 Preventing Future Discrimination .....	168
<b>Annexes .....</b>	<b>173</b>
Annex 1 - Glossary.....	173
Annex 2 – Template for Good Practice Examples .....	174
Annex 3 – Statistics of the BIH Ombudsperson .....	184



# 1. Legal Framework Prohibiting Discrimination

## 1.1 Overview of Constitutional and Legal Provisions

The Constitution of Bosnia and Herzegovina is a part of an international agreement: Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (The Dayton Peace Agreement or DPA).<sup>1</sup> The Constitution entered into force on December 1995 with the signing of the DPA, which was never ratified by the Parliament of B&H. The Constitution was written in English without an official translation into the official languages of B&H (Bosnian, Croatian and Serbian). Therefore, only the unofficial translations are in use, which leads to different understandings of the certain provisions or terms.<sup>2</sup> Already in the first line of the Preamble an explanation is given that in making the Constitution, its creators relied on the principles of the protection of human dignity, liberty and equality. The central provision with this regard is the Article II (1) of the Constitution stating that Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. Further on, according to Article II (2) of the Constitution: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”.<sup>3</sup> The principle of non-discrimination got a distinct position in Article II(4) of the Constitution.<sup>4</sup> In accordance to this provision, “the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Finally, according to Article II (7) of the Constitution, Bosnia and Herzegovina shall remain or become a party to the international agreements listed in Annex I to this Constitution.<sup>5</sup>

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<sup>1</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina was signed between the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia on 14 December 1995.

<sup>2</sup> K. Trnka (2006) *Ustavno pravo*, Sarajevo: Fakultet za javnu upravu, p. 41.

<sup>3</sup> Although this provisions suggests that the ECHR has a priority also over the Constitution, the Constitutional Court of Bosnia and Herzegovina decided in U 5/04 from 31 March 2006 that the ECHR cannot have priority over the Constitution of Bosnia and Herzegovina, because it entered into force in Bosnia and Herzegovina only on the grounds of the Constitution itself; This decisions earned much criticism from the science; Ch. Steiner/N. Ademović (2010), *Constitution of Bosnia and Herzegovina - Commentary*, Sarajevo: Konrad Adenauer Stiftung, p. 154 with further references.

<sup>4</sup> Č. Sadiković (2001) *Evropsko pravo ljudskih prava*, Sarajevo: Magistrat, p. 178.

<sup>5</sup> Annex I to the Bosnia and Herzegovina Constitution contains in total 15 international instruments, including International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966) and Optional Protocols (1966 and 1989); International Covenant on Economic, Social and Cultural Rights (1966); and the Convention on the Elimination of All Forms of Discrimination against Women (1979); Bosnia and Herzegovina became the party to all 15 conventions listed, and therefore fulfilled its obligation under the Article II/7 of the Constitution. The last convention was the European Charter for Regional or Minority Languages (1992), which Bosnia and Herzegovina ratified in 2010.



## 1.2 Assessment of the Legal Framework

The most important national act on non-discrimination is the Law on Prohibition of Discrimination of B&H (LPD).<sup>6</sup> The proposal of the LPD expressly stated that this act is harmonised with the Directives 2000/43<sup>7</sup> on equal treatment irrespective of racial or ethnic origin and 2000/78<sup>8</sup> on equal treatment in employment and occupation.<sup>9</sup> Besides these expressly listed Directives, the LPD also aims to harmonise with other relevant EU Directives on non-discrimination, such as 2004/113/EC<sup>10</sup>, 2006/54/EC<sup>11</sup>, 97/80/EC<sup>12</sup> etc.<sup>13</sup> Its scope of application is wider than the scope of the abovementioned Directives. In accordance to the Article 2 of the LPD the prohibition of discrimination covers the grounds of the race, skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation, and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life. The LDP provides for equal rights to all persons in B&H (Article 1 of the LPD), irrespective of their nationality. Article 2 of the LPD widens the scope of addressees of this act apart from the public bodies to “all natural and legal persons, in public and private sector, in all spheres”. Thereby the prohibition of discrimination is moved from its usual application in the public sector in a very general manner to the private sector.<sup>14</sup> The Law on Gender Equality in B&H (GEL) was adopted in 2003 and amended in 2009.<sup>15</sup> The declared primary aim of the GEL is not the harmonisation with EU law, but staying in conformity with the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>16</sup> The CEDAW is listed in the Annex I to the Constitution of B&H. The harmonisation clause contained in the Article 70 of the Stabilisation and Association Agreement (SAA)<sup>17</sup> requires the courts and other institutions to interpret existing legislation in line with the EU law. There are several other laws passed in B&H, that are a direct result of the harmonization process and that contain non-discrimination clauses. According to the Article 7(4) of the

<sup>6</sup> Law on Prohibition of Discrimination, Official Gazette of Bosnia and Herzegovina, No. 59/09.

<sup>7</sup> Council Directive 2000/43/EC (29.06.2000) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22.

<sup>8</sup> Directive 2000/78/EC (27.11.2000) establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 3013/16.

<sup>9</sup> F. Vehabović *et al.* (2010) *Komentar zakona o zabrani diskriminacije –sa objašnjenima I pregledom prakse u uporednom pravu*, Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, p. 28.

<sup>10</sup> Council Directive 2004/113/EC (13.12.2004) implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004, L 373.

<sup>11</sup> European Parliament and Council Directive 2006/54/EC (5.06.2006) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006, L 204.

<sup>12</sup> Council Directive 97/80/EC of (15.12.1997) on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998.

<sup>13</sup> Council of Ministers (31.12.2009) Programm of Priorities of Harmonisation in Legislative Activities for the Implementation of the European Partnership and the Interim Agreement, p. 15.

<sup>14</sup> Council of Ministers (31.12.2009) Programm of Priorities of Harmonisation in Legislative Activities for the Implementation of the European Partnership and the Interim Agreement, p. 29.

<sup>15</sup> Law on Gender Equality in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 16/03 and 102/09.

<sup>16</sup> Agency for Gender Equality in Bosnia and Herzegovina (2011) *Priručnik za usklađivanje zakona sa Zakonom o ravnopravnosti spolova i sa međunarodnim standardima u oblasti ravnopravnosti spolova*, Sarajevo: Agencija za ravnopravnost spolova, p. 28.

<sup>17</sup> Entered into force on June 1, 2015.

Consumer Protection Law of 2006 (CPA)<sup>18</sup> the trader may not discriminate any consumer, especially not by denying to sell the displayed products or by denying the provision of the services which he is capable to provide.

The concept of discrimination is not precisely defined in the Constitution, but the Constitutional Court of B&H (CC) fills this gap by relying very strongly on the jurisprudence of the ECtHR. Opposite to the Constitution, the LPD defines all grounds and forms of discrimination in great detail. The LPD has separated the definition of discrimination from the definition of direct, indirect discrimination and other forms of discrimination. According to the Article 2 of the LPD “Discrimination, in terms of this Law, shall be every different treatment including every exclusion, limitation or preference based on real or assumed features towards any person or group of persons“ on grounds already mentioned above, with an open-end clause. In order to establish the discrimination, it is consequently not only necessary to fulfill the criteria of the Article 2 of the LPD, but also to establish the form of discrimination.<sup>19</sup> Direct and indirect discrimination are defined in the Article 3 of the LDP. The Article 4 of the LPD lists other forms of discrimination and these are harassment, sexual harassment, mobbing and segregation. The Instruction to discriminate, the assistance to others in discrimination as well as the incitement to discriminate are in accordance to the Article 4(5) and (6) of the LPD considered to be a discrimination.

In the Article 5 of the LPD, under the misleading title “Exceptions from Principle of Equal Treatment“, the LPD regulated the question of justification. The regulation of justification applies equally to all forms of discrimination. Pursuant to the Article 5 of the LPD the first sentence „Legal measures and actions shall not be considered discriminatory when reduced to unfavorable distinction or different treatment if based on objective and reasonable justification“. It is unclear why the legislator has chosen the terms „legal measures and actions“ considering that by strict interpretation we may come to the conclusion that only state measures can be justified, but those of private persons do not. Even more of confusion causes the following sentence of the same para. stating that „following measures shall not be considered discriminatory if they realize a legitimate goal and if there is a reasonable relation ratio of proportionality between means used and goals to be achieved“ and then names an exhaustive list of measures which include preventive measures, employment in religious institutions, age as a condition for retirement etc. The legislator did not define a clear connection between these two provisions of the Article 5(1), since the first sentence seems to be the general provision on justifications and the second sentence a list of exceptions to the principle of equal treatment.

The GEL recognizes direct, indirect, harassment, sexual harassment, incitement to discriminate and gender based violence as possible forms of discrimination (Article 3(2) of the GEL). Justification is possible in case of any form of discrimination. According to the Article 2(5) of the GEL discrimination on grounds of gender shall not be considered a norm, criteria or practice which can be justified by achieving legal goal, proportionate to take necessary and justified measures. The discrimination by association in the sense of the “Coleman” judgment by the ECJ<sup>20</sup> is not covered neither by the LPD nor by the GEL. The same is true with regards to the multiple discrimination. However, both forms of discrimination are contained in the new Proposal for amendments of the LPD from 23 December 2015.

<sup>18</sup> Official Gazette of Bosnia and Herzegovina, No. 25/06.

<sup>19</sup> F. Vehabovićet al. (2010) *Komentar zakona o zabrani diskriminacije – saobjašnjenima i pregledom prakse u uporednom pravu*, Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, p. 29.

<sup>20</sup> ECJ (01.07.2008) C-303/06 – *Coleman*[2008] I- 05603.

## 2. Institutional Framework for Combating Discrimination

### 2.1. Overview of Legal Provisions Determining Stakeholders in Combating Discrimination

In accordance with the B&H Constitution and the relevant legislation there are several executive, independent institutions and organizations authorized to combat the discrimination. The State institutions are: B&H Ombudsperson, B&H Ministry for Human Rights and Refugees (MHRR), Gender Equality Agency (GEA), Gender Centres of FB&H and RS (GCs), Centre for free legal aid (CFLA) in FB&H, RS and BD B&H. There are also numerous non-governmental organizations – CSOs in this field.<sup>21</sup>

The equality bodies are empowered to assist the victims of the discrimination by initiating investigations after receiving the complaints related to discrimination or supporting victims of discrimination in achieving protection against judicial and administrative authorities (advising, providing information about the methods of legal protection, etc.). Some of them may be qualified as tribunal (quasi-court) type, such as B&H Ombudsperson and others as promotional type of bodies such as Sector of Human Rights of the MHRR, GEA, GCs and CFLA.

The Legislative competence for the regulation of a free legal aid in B&H is conducted at the level of FB&H, RS and BD B&H. In FB&H this competence has been granted to 10 cantons. Therefore, there are several laws on free legal aid in B&H.<sup>22</sup> These laws are applied to free legal aid in cases of discrimination.<sup>23</sup>

### 2.2. Stakeholders Putting Combating Discrimination into Practice

#### 2.2.1. The Institution of Human Rights Ombudsmen of Bosnia and Herzegovina

The B&H Ombudsperson is regulated by the Annex IV and VI of the DPA signed on 14. 12. 1995. It began to operate in 1996. The legal basis for functioning *de lege lata* are the provisions of the B&H Constitution and the Law on Ombudsman for Human Rights Bosnia and Herzegovina (OMBL) adopted in 2002, which was amended in 2004 and 2006.<sup>24</sup> The Human Rights Ombudsman of B&H is an independent Institution. Three Ombudspersons are appointed with 6 year mandate by the Parliamentary Assembly of B&H. They are liable for their work only to the Parliamentary Assembly of B&H. On the basis on the Article 7 of the LPD B&H Ombudsperson is the central institution responsible for the protection against discrimination.

<sup>21</sup> To name a few: *Ambasada lokalne demokratije Sarajevo, Fond otvoreno društvo B&H, Vaša prava, Centar za pravnu pomoć ženama Zenice, Inicijativa za razvoj i saradnju u B&H, Udružene žene, Prava za sve, Analitika, Media centar, Sarajevski otvoreni centar, Centar za ljudska prava u Mostaru, centri za podršku, informisanje i zajedničko djelovanje romskih udruženja, Forum građana Tuzle, ect.*

<sup>22</sup> Law on Free Legal Aid of RS, Law on Free Legal Aid of Brčko District Bosnia and Herzegovina as well as laws on free legal aid in eight cantons of Federation of Bosnia and Herzegovina.

<sup>23</sup> All these laws on the free legal aid contain provisions on prohibiting any form of discrimination of beneficiaries of free legal aid in the realization of their right to free legal aid.

<sup>24</sup> The OMBL defines powers and competencies of the Bosnia and Herzegovina Ombudsperson, rules of procedure in following up the work of bodies and institutions according to the allegations contained in a complaint and *ex officio*, including other important issues related to functioning of this national human rights mechanism for protection of fundamental human rights and freedoms.

The Department for Elimination of all forms of Discrimination (DED) has been established within the B&H Ombudsperson office on the basis on the Article 7 of the LPD.<sup>25</sup> The DED receives individual complaints and *ex officio* initiates investigations in the cases of the violations of the rights defined in the ECHR and the other international documents on the prohibition of discrimination as well as in the domestic legislation, especially in the cases of an alleged discrimination on any base. Appart of that, the DED has a wide range of competences: it carries out a procedure of conciliation with possibility to reach an agreement (based on a consent of parties); collects and analyses statistical data with regards to the cases of discrimination;<sup>26</sup> submits annual and when needed, extraordinary reports on discrimination in house of the Parliament Assembly of B&H; informs the public on the appearance of discrimination cases and promotes the principles of non-discrimination in the media; gives opinions and recommendations to the B&H CoM and to the Parliamentary Assembly of B&H with an aim to prevent and combat discrimination, proposes corresponding legislative and other solutions; works on prevention of discrimination; cooperates with relevant CSOs, etc.<sup>27</sup>

The procedure for protection against discrimination is led before the B&H Ombudsperson according to the OMBRoP. If after the submission of appeals the B&H Ombudsperson determines that the criteria for initiating the procedure have been meet, it requests from the party marked responsible to comment on the appeal within a certain period of time, then it is considering the launch of mediation procedure in order to achieve an amicable settlement of the case and collect any data relevant for the decision.<sup>28</sup> After finishing the procedure, the B&H Ombudsperson may render a decision on the closure of the case; if the B&H Ombudsperson finds a violation/discrimination, it writes a recommendation with the purpose of adopting measures to remove the violation or discrimination. This is Available upon request, because currently capacity of the server and the web site is not capable to have all recommendation of OMB posted. Only the typical and important recommendation are posted, but a list of all recommendation of OMB including discrimination ones can be find in Annual report in Annex.

The decision (recommendation) of the B&H Ombudsperson is not binding, but according to the LPD (Article 19(4)), the failure to act on that recommendation is punishable by a fine (misdemeanor liability). It should be noted that the procedure on the individual complaints is

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<sup>25</sup> Department was established before the adoption of LPD, based on the needs, complains that we were receiving Too? as well? and international commitments and obligations. This Department was established in January 2009. The Head of the Department is at the same time an Assistant of Ombudsperson and has a competence pursuant to the Article 7 of the LPD.

<sup>26</sup> The special database on discrimination cases that are based on individual complaints to the Bosnia and Herzegovina Ombudsperson, as well as data on cases initiated *ex officio* by Bosnia and Herzegovina Ombudsperson has been established. The database contains detailed overview of the cases classified by the grounds and forms of discrimination. The Bosnia and Herzegovina Ombudsperson regularly collects data through monitoring of court cases in the area of discrimination. See: E. Čerimović – Dž. Hrlović (2013) *Od evidencije do prevencije, Pretpostavke za sistemsko prikupljanje informacija o diskriminaciji u Bosni i Hercegovini*, Sarajevo: Analitika, p. 26.

<sup>27</sup> More information on the Department's competence is available on: <http://www.ombudsmen.gov.ba/Default.aspx?id=19&lang=BS> (15. 3. 2016).

<sup>28</sup> During the investigation, the Ombudsperson may seek the assistance of any person, body or service for which she/he believes can help him in deciding the case. The Ombudsperson has access to any government body or official, in order to verify all necessary information, conduct individual interviews or study the necessary files and documents.

free and simple, which makes it easily accessible to the poor and marginalized members of the society.<sup>29</sup>

According to the OMBL (Article 4(2)), the B&H Ombudsperson is authorized to initiate court proceedings or intervene in pending proceedings, whenever it finds that such action is necessary for the performance of its duties. The B&H Ombudsperson may also give recommendations to the government body which is a party in proceeding or the proceeding party could ask it for an advice. The practice has shown that B&H Ombudsman has been involved in the proceedings only at the stage of monitoring, because of the lack of capacities to take part in the other stage of the proceedings.<sup>30</sup>

There are certain discrepancies of the OMBL and LPD related to the jurisdiction in the cases of discrimination. Pursuant to OMBL (Article 2) the B&H Ombudsperson has the jurisdiction to consider complaints about violations of human rights against actions of public authorities, while according to the LPD (Article 7(5)) B&H Ombudsperson is responsible to take up complaints about discrimination which are committed by public bodies and government institutions, as well as by all legal and natural persons in B&H.<sup>31</sup>

The main problem that arises in the work of the B&H Ombudsperson as a body for equality/protection against the discrimination is the way the institution is funded. As it is funded from the budget of the institutions and bodies of B&H and has no influence on the creation and adoption of its own budget, this affects the financial and the human resources needed for the combating discrimination and implementation of the LPD. Because of this, there are limited capabilities for the promotion of the LPD, monitoring of court proceedings and conducting research in the area of discrimination, monitoring the harmonization of legislation with new regulations in this area. It also causes the inability to timely resolve complaints on discrimination.<sup>32</sup> According to the LPD there is a provision in the Law for separate budget line for this new antidiscrimination mandate. The B&H Ombudsperson, since the adoption of the Law did not received additional resources to implement this mandate.

The practice had shown that the role of the B&H Ombudsperson in the protection against discrimination is to a much greater extent reactive than proactive. Most of its time the B&H Ombudsperson spends dealing with the individual complaints. For that reason, not so much time is left for outreach work and promoting the LPD among the citizens, still B&H Ombudsperson relies on the cooperation with the international partner organizations and NGO's for promotion of the activities.<sup>33</sup>

According to the opinion of CSO's involved in the court proceedings for the protection against discrimination, B&H Ombudsperson has failed to fulfill its purpose. Since the recommendations of the B&H Ombudsperson are non-binding, they are not sufficient recognized and executed in

<sup>29</sup> Although the Bosnia and Herzegovina Ombudsperson recommendations are not legally binding, the practice has shown that it is sometimes enough to stop the discriminatory behavior after BOSNIA AND HERZEGOVINA Ombudsperson requested information, answers or information from the party which has committed discrimination or after the Ombudsperson issues a recommendation. See: F. Idžaković – V. Vukmanić, *Vodič Ne/diskriminacija u institucijama u B&H, Primjena Zakona o zabrani diskriminacije B&H*, Sarajevo: Prava za sve i ICVA, p. 24.

<sup>30</sup> Interview with the representative of Bosnia and Herzegovina Ombudsperson.

<sup>31</sup> F. Vehabović – M. Izmirlija – A. Kadribašić (2010) *Komentar Zakona o zabrani diskriminacije sa objašnjenjima I pregledom prakse u uporednom pravu*, Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, p. 84.

<sup>32</sup> A. Hanušić (2012) *The Ombudsman in the System of Protection against Discrimination in BOSNIA AND HERZEGOVINA, Situation Analysis and Characteristic Problems*, Sarajevo: Analitika, p. 25-30.

<sup>33</sup> Interview with the representative of Bosnia and Herzegovina Ombudsperson.

practice. The B&H Ombudsperson does not use the assets available in the OMBL and the LPD which could have helped to combat the discrimination (appearing in the proceedings as interveners, more aggressive reporting, naming the offenders, the filing of and misdemeanor charges, etc.).<sup>34</sup>

## 2.2.2. B&H Ministry of Human Rights and Refugees (Department for Human Rights)

The MHRR<sup>35</sup> has an indirect role in the protection against the discrimination. It is obliged to monitor the implementation of the LPD by establishing a system of collecting and processing the information on discrimination cases, which all authorities in B&H are obliged to submit. The MHRR is authorized to regularly report to the B&H CoM and propose measures to prevent and combat the discrimination in B&H, based on the collected data on the occurrence and the extent of the discrimination. Through the B&H CoM, the MHRR is obliged to regularly report to the Parliamentary Assembly of B&H about discrimination cases and to propose measures for suppression of the discrimination.<sup>36</sup> On the basis of Article 8 LPD, the MHRR is obliged to establish and maintain a central database of cases of discrimination in B&H. Although the LPD had entered into force seven years ago, the database has not yet been established.<sup>37</sup> Within the IPA 2011 entitled "Technical Strengthening of the Capacity of the Ministry for Human Rights and Refugees and Social Services" all the necessary activities have already been undertaken in order to establish that central database. It should be established before the end of 2016. The Department for Human Rights and Refugees operates within the MHRR,<sup>38</sup> with the main task to establish and implement policies in the area of human rights and fundamental freedoms. This Department observes and controls the application of the LPD. Its competences include also: monitoring the application of B&H legislation related to human rights; receiving and processing applications, complaints and petitions from individuals, groups and collectives in order to protect their rights; collecting data, preparing reports and providing assessments and recommendations on human rights violations to the competent institutions and bodies of the state and entity governments.<sup>39</sup> The function of monitoring the implementation of the LPD is divided between the MHRR and the B&H Ombudsperson, but the role of the MHRR is much bigger, because it is a member of CoM can directly initiate amendments to the LPD.<sup>40</sup>

<sup>34</sup> Interview with the representative of CSO Vaša prava.

<sup>35</sup> The Ministry has been established based on the Law on Ministries and Other Executive Bodies of Bosnia and Herzegovina (Article 7, Article 12), Official Gazette of Bosnia and Herzegovina 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 59/09 i 103/09.

<sup>36</sup> The MHRR has drafted a concept to create the Strategy for Combating Discrimination in Bosnia and Herzegovina and has sent it to the Bosnia and Herzegovina Ombudsperson, all the governmental institutions involved in combating against discrimination and CSO's. The MHRR requested from all those institutions to nominate the representatives for the working group which should further draft the Strategy. After the nomination, a working group will begin to create the Strategy.

<sup>37</sup> In order to collect data and establish a database in accordance with the provisions of the LPD (Article 8(6)), the Rulebook on the Method of Collecting Data on Cases of Discrimination in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina 27/13, [http://www.podaci.net/\\_gBiH/propis/Pravilnik\\_o\\_nacinu/P-nppdi02v1327.html](http://www.podaci.net/_gBiH/propis/Pravilnik_o_nacinu/P-nppdi02v1327.html)) and the Questionnaire on data collection which contains data on cases of discrimination were promulgated but not till 2013. Reasons for such a huge delay in establishing a database were of the financial, organizational and personnel nature.

<sup>38</sup> The Rulebook on the internal organisation of the Ministry for Human Rights and Refugees (Article 8).

<sup>39</sup> More on the jurisdiction of the Department see on: [http://www.mhrr.gov.ba/organizaciona\\_struktura/default.aspx?id=5&langTag=bs-BA](http://www.mhrr.gov.ba/organizaciona_struktura/default.aspx?id=5&langTag=bs-BA) (15. 3. 2016).

<sup>40</sup> F. Vehabović – M. Izmirlija – A. Kadribašić (2010) *Komentar Zakona o zabrani diskriminacije sa objašnjenjima i pregledom prakse u uporednom pravu*, Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu p. 91-93.

### 2.2.3. *The Agency for Gender Equality of Bosnia and Herzegovina and Gender Centres of FB&H and RS*

GEA is defined by the GEL (Article 25 and 26) and the LMEB (Article 12). Based on these provisions the Agency operates within the MHRR and in accordance to the GEL (Article 27) Gender Centres at the entity level have been established.<sup>41</sup> The GEA and gender centres monitor the implementation of the GEL. They also examine violations of the GEL's provisions made by state authorities or legal persons and carry out activities for their elimination.<sup>42</sup> These institutions are authorized to investigate cases of discrimination based on sex initiated by an individual or a group of persons. The result of the procedure may be: peaceful resolution of the dispute; informing parties of the possibility to use other legal proceedings in order to protect their rights; examining the depositions and complaints and sending recommendations to the competent authorities on ways to eliminate disputes; making recommendations to the competent authorities to amend regulations. The GEA and gender centres are not authorized to abolish or contest the decision of the competent institution nor perform procedural actions in administrative or judicial proceedings. They also cannot take up cases that are already being disputed in court.

### 2.2.4. *Centres for Free Legal Aid*

Centres for Free Legal Aid operate in the F B&H (at the cantonal level),<sup>43</sup> Republic of Srpska<sup>44</sup> and Brčko District of B&H.<sup>45</sup> CFLA's are independent administrative (governmental) organizations that provide the legal aid (right to fair trial and equal access to justice) to the indigent persons. CFLAs represent the users of free legal aid at all stages of the proceedings for protection of their rights. They are also authorized to participate in the procedure for the protection against the discrimination. According to the LPD the centres may participate in the proceedings as representatives or interveners, and they are authorized to file a collective action for the protection against discrimination.<sup>46</sup>

According to the relevant provisions of Civil Procedure, CFLAs may represent the parties in cases of individual legal protection against the discrimination. They can only be represented by the Centre's employees. This means that a victim of discrimination may not authorize this organization to represent him/her, but must specifically authorize an employee to take the procedural actions. This can cause practical problems (delay in the process and failure to act because of the authorized employees are indisposed to show up at hearing, the termination of

<sup>41</sup> In addition to these institutions operating within the executive branch, there are some institutions that promote gender equality at the level of legislature. They exist at the state level, in both entities and the Brčko District as well as at the cantons in the Federation of Bosnia and Herzegovina and at the municipal level – in almost all municipalities in Bosnia and Herzegovina. Some commissions at the cantonal and municipal level are not functional, and it is necessary to strengthen the capacity of these committees so that they can carry out the activities of their mandate.

<sup>42</sup> More on the jurisdiction of the GEA and gender centres of the entities see on: Agencija za ravnopravnost spolova, <http://arsbih.gov.ba/>, Gender Centre Federation of Bosnia and Herzegovina, <http://www.gcfbih.gov.ba/>, Gender Centre Republic of Srpska, <http://www.vladars.net/sr-SP-Cyrl/Vlada/centri/gendercentarrs/Pages/default.aspx> (15. 3. 2016).

<sup>43</sup> CFLAs have not been established in all 10 cantons yet.

<sup>44</sup> The Head office of the Centre is in Banja Luka and there are five offices in other cities.

<sup>45</sup> There is one Centre for Free Legal Aid in Brčko District. The Centre shall take all actions and take part in all stages of the proceedings before the courts and the prosecutor's office of Brčko District.

<sup>46</sup> Bearing in mind that the CFLA's are state organizations responsible for representing victims of discrimination in proceedings, and that other state bodies who have committed discrimination can appear as a counterpart to these procedures, it is reasonable question if the CFLA's can acts independent of it in such cases.

employment for the organization, etc.).<sup>47</sup> Therefore, this provision should be changed in order to allow the organization itself to represent victims of discrimination in court.

### 2.2.5. Intermediaries

In accordance with the Laws on Free Legal Aid, legal aid can be provided by associations and foundations registered for performing these activities. On the territory of B&H there are several CSO's that provide a free assistance,<sup>48</sup> including a legal assistance in proceedings for protection against discrimination. CSO's have been granted a procedural role in the proceedings for protection against discrimination, equal to those which have CLF's. All that is stated in relation to the individual representing of the victims of the discrimination stated in the section 2.2.4. of this Report also applies to CSO's. In addition to CSO's engaged in providing a free legal aid that can directly appear before the courts, also other CSO's dealing with obtaining the data to collect and process of statistical data or perform other research necessary for the successful management of process roles according to the LPD. As a positive example we can bring up the activities of the "Fond otvoreno društvo B&H" (Open Society Fund of B&H) in launching of a multi-year anti-discrimination program.<sup>49</sup>

One of the first CSOs engaged in the anti-discrimination court proceedings is CSO "Vaša prava". This organization has successfully represented the victims of the discrimination in several individual court proceedings, and it has successfully filed several class actions for the protection against the discrimination.<sup>50</sup> The organization continuously educates its employees both in the area of anti-discrimination, as well as in the field of strategic litigation management. Because they "lack experience in this area which their peers in the region possess", they "consider every aspect of training desirable and useful".<sup>51</sup>

CSO's gather information on the discrimination cases through the outreach work, which is not exclusively related to discrimination. Outreach work with certain vulnerable groups, such as the Roma, refugees etc. helps them to identify cases of discrimination through interviews and workshops with these groups and to assist the victims in order to achieve the legal protection.<sup>52</sup>

Lawyers who are members of the Bar Associations in B&H are authorized to provide free legal aid. They can represent the victims of discrimination in the proceedings and give protection from discrimination *pro bono* or according to the Bar's tariffs. Some lawyers have been specialized in cases of discrimination.

Trade unions have a very important role in the protection against discrimination in the field of labour, which comprises of: providing legal protection to workers against the discrimination; participation in decision-making through the submission of comments on laws and other regulations to public institutions; training of workers and trade union activists for combating discrimination in the field of labour and employment; keeping records of complaints of workers and submitting them to the relevant institutions. The Unions are the first instance which should record the cases of discrimination and act in accordance with the

<sup>47</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika, p. 13. i 14.

<sup>48</sup> To name a few: Vaša prava, Centar za pravnu pomoć ženama, Inicijativa za razvoj i suradnju u BOSNIA AND HERZEGOVINA, Udružene žene, Centar za ljudska prava Mostar, etc.

<sup>49</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika p. 43.

<sup>50</sup> Good practice examples of these organizations are described in the appendix.

<sup>51</sup> Interview with the representative of CSO *Vaša prava*.

<sup>52</sup> Interview with the representative of CSO *Vaša prava*.



internal regulations in order to resolve them. If this is not possible, the reported cases of discrimination should be forwarded to the higher authorities. In practice, the Unions do not exercise this role. The research has shown that the Trade Unions do not provide an adequate protection against the discrimination to the workers. The workers and the Trade Unions ineffectively spot cases of discrimination, and the workers do not see the Unions as institutions that can help and protect them from discrimination. The Unions are not fully familiar with the provisions of the LPD and the workers are not familiar with it at all.<sup>53</sup> Their human and material resources in the field of protection against discrimination are very limited. Some Unions say that the process of proving discrimination under the provisions of the LPD is very difficult for them. Employers are not willing to execute judicial decisions made in favor of workers and because of this it is extremely difficult to achieve their implementation.<sup>54</sup>

### 2.2.6. Police

The role of the Police in the protection against discrimination is defined in the Article 6(1)(f.) of the LPD, stating that this law applies in the areas of justice and administration, including The Police and other Law Enforcement Officers.

## 2.3. Mapping the Cooperation among Stakeholders

LPD obliges B&H Ombudsperson to cooperate with CSO's involved in the protection and promotion of the human rights in preparing its reports and in recommendations on the discrimination (Article 7 (3)). Such an obligation is prescribed also for other institutions responsible for the protection against the discrimination (Article 10).

The B&H Ombudsperson adopted a platform for cooperation with the CSO's, published guidelines and criteria for this cooperation and invited all CSO's for cooperation, including those involved in the prevention of discrimination. Pooling resources of the B&H Ombudsperson and the CSO's in this segment can help strengthen the role of CSOs in the procedures for protection against the discrimination.<sup>55</sup> CSOs can also get help from the B&H Ombudsperson in each individual case for the protection against discrimination.

The B&H Ombudsperson points out that in the field of the protection against discrimination it has a very good cooperation with the Parliamentary Assembly of B&H (Human Rights Commission), while the executive bodies hardly accept the fact that the B&H Ombudsperson is independent institution, and because of this it does not accomplish good cooperation with them. The cooperation of the B&H Ombudsperson with other levels of the government in practice depends on the institution or its chief.<sup>56</sup>

The Governmental and non-governmental Organizations that provide free legal aid have signed a Memorandum of Understanding in January 2012 and established a Network for the Coordination of Free Legal Aid in B&H.<sup>57</sup> Another good practice example is the formation of a Network of CSO's – "Forum jednakosti" (Equality forum), which brings together 25 organizations. The Network was founded in 2012 and its aim is to combat the discrimination

<sup>53</sup> Interview with the representative of trade union.

<sup>54</sup> E. Demir (2015) *Diskriminacija u oblasti rada u Bosni i Hercegovini*, Sarajevo: Asocijacija za demokratske inicijative Sarajevo, p. 27 – 39.

<sup>55</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika p. 51.

<sup>56</sup> Interview with the representative of Bosnia and Herzegovina Ombudsperson.

<sup>57</sup> Good practice examples of these organizations are described in the Annex 2.

and implement regulations pertaining to this area.<sup>58</sup> A part of this network, four CSO's<sup>59</sup> have established a coalition Equality for All: Coalition of Civil Society for Combating Discrimination in 2014, with support of USAID and "Fond otvoreno društvo B&H" (Open Society Fund). The Coalition promotes an active role of the CSO's and citizens in the preventing and the combating of discrimination in B&H. The CSO's involved in the combating the discrimination cooperate very well with each other and have achieved a good collaboration with the Courts. The victims of the discrimination often address them on the recommendation of the Police, Social Welfare Centres, the city's administrative services etc. CSO's believe that they are unjustifiably excluded from enacting laws that concern them (eg. the Law of Free Legal Aid).<sup>60</sup>

A good example of cooperation is collaboration of some CSO's and Law Schools in the implementation of the Legal Clinics - Clinical Education of Lawyers, where students use the case studies on discrimination and ways to protect the victims through the relevant institutions. A best practice example in this area are the Legal Clinics of the Centre for Human Rights in Mostar.<sup>61</sup>

According to the result of the conducted research, the Trade Unions have established cooperation with Trade Unions in related fields from the region, but they have not established cooperation with CSO's and Government Institutions dealing with protection against discrimination.<sup>62</sup> However, there are examples of cooperation of the certain Unions with some local CSO's who provide free legal aid to victims of discrimination.<sup>63</sup>

### 3. The Role of Courts in Combating Discrimination

#### 3.1 Capacities of Courts in Combating Discrimination

The allocation of the cases to the judges is based on their field of work (Criminal law, Civil law, Labour law etc.), and on the System for Automatic Management of the Cases (hereinafter: CMS). After the case is assigned to the specific legal field, and marked by the code (for example PS for civil dispute, RS for labour dispute), the information on the case is registered in the CMS, and the CMS automatically and randomly allocates the case to the judge to whose field of work the case belongs based on the code.<sup>64</sup> Since the discrimination disputes are civil disputes by their nature, the cases are allocated to the judges dealing with civil disputes (or even labour disputes since these are one of the categories of civil disputes). Judges are not specialized for dealing with the discrimination cases, but they have been participating in mandatory trainings on the protection against discrimination, and during their appointment, they can participate in the training sessions related to discrimination issues.

<sup>58</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika p. 43.

<sup>59</sup> These CSOs are: *Media centar* Sarajevo, *Centar za društvena istraživanja* Analitika, *Vaša prava* Bosnia and Herzegovina and *Prava za sve*. See more on: <http://www.diskriminacija.ba/onama> (15. 3. 2016).

<sup>60</sup> Interview with the representative of CSO *Vaša prava*.

<sup>61</sup> See Annex 2.

<sup>62</sup> E. Demir (2015) *Diskriminacija u oblasti rada u Bosni i Hercegovini*, p. 33. i 37.

<sup>63</sup> Interview with the representative of trade union.

<sup>64</sup> Bosnia and Herzegovina/VSTV/Pravilnik o sistemu za automatsko upravljanje predmetima u sudovima (CMS)/23.03.2011.

The LPD provides the principle of shifting the burden of proof as set in the Article 15 of the LPD. But, according to the opinion of the representatives of the intermediaries and B&H Ombudsperson, the abovementioned provision is usually not applied by the judges. The judges apply the Law on Civil Procedure stipulating that the burden of proof resides on the claimant.<sup>65</sup> According to the representative of the Supreme Court of the FB&H, judges still do not possess enough specialized knowledge in order to apply the rule of shifting the burden of proof adequately. As stated by the representative, an overwhelming plausibility of existence of discrimination should be in place, in order to shift the burden of proof to another party.

Pursuant to the Article 15(2) of the LPD, the statistical data and other databases can be used by the party suffering from the act of discrimination, in the procedure before the court, and in accordance with the rules of evidence of the LCP. The statistical data are of great use in the cases when a seemingly neutral provision creates the effects “that they are disproportionately unfavorable to specific groups of persons by comparison to others in a similar situation”.<sup>66</sup> The statistical data are used in order to provide enough information in order to shift the burden of proof. According to the opinion of the representative of the Supreme Court of FB&H, the statistical data are rarely used in discrimination cases, since they are hardly accessible to the public, except of, for example, those published by the Agency for Statistics of B&H, which were used to prove the discrimination on grounds of ethnicity in the case before the Municipal Court in Čapljina in 2014.<sup>67</sup>

The protection against victimization is provided by the LPD, where the Article 18 states that “a person who reported discrimination or participated in legal proceedings for protection from discrimination shall not suffer the consequences of such report or participation”. However, according to the Article 14 of the LPD, a court may determine a temporary measure in proceedings from the Article 11 and 12, according to the LCP. In accordance to the Article 268 of the LCP, a temporary measure is based on the request of the party. According to the opinion of judicial institutions representatives, these measures, when accepted, usually do not aim at preventing victimizing actions of the discriminator. They aim at the recovery of the status or a certain right of the discriminated person. In order to improve the situation, the LPD should regulate the issue of the victimization in more detail, as well as certain measures directed towards the elimination of the victimization, and ordered by the court.

Regarding the easy accessibility to the court buildings, two entities legal acts regarding the technical standards of accessibility have been enacted.<sup>68</sup> Even though these provide detailed instructions regarding the modifications to all buildings in order to make them accessible to the persons with disabilities, the full modification of court buildings is limited by the budgetary constraints. The basic adjustments have been made, even though not all the

<sup>65</sup> Law on civil procedure/Official Gazette of FBOSNIA AND HERZEGOVINA, No. 53/03, 73/05, 19/06, 98/15, Article 123.

<sup>66</sup> European Union Agency for Fundamental Rights European Court of Human Rights – Council of Europe (2010), *Handbook on European non-discrimination law*, Luxembourg, Council of Europe, p. 129.

<sup>67</sup> For more details on this case, see: BOSNIA AND HERZEGOVINA/The Institution of the Ombudsman for Human Rights in Bosnia and Herzegovina (2014) *Annual report on the occurrences of discrimination in Bosnia and Herzegovina for 2014*, available at: [http://www.ombudsmen.gov.ba/documents/obmudsmen\\_doc2015052909224950eng.pdf](http://www.ombudsmen.gov.ba/documents/obmudsmen_doc2015052909224950eng.pdf) (03.03.2016.), p.18.

<sup>68</sup> Bosnia and Herzegovina/Bylaw on Technical Standards of Accesibility, Official Gazzette of RS 19/02; Regulation on architectural standards, urban– technical conditions and normatives for prohibition of creation of any barriers for persons with disabilities, Official Gazzette of Federation of Bosnia and Herzegovina 52/02.

obstacles have been removed. The persons with disabilities do not have the right to be exempted from paying interpreters fees on the grounds of their disability but only on the grounds of their unfavorable economic status.<sup>69</sup>

As it was stated under the title 2.2., relevant legal provisions provide legal basis for B&H Ombudsperson or CSO's to partake in the court proceedings, but no such provisions exist for the equality bodies. Even though the B&H Ombudsperson is entitled to institute proceedings before the court and to participate in the proceedings,<sup>70</sup> the practice shows no such cases, due to the lack of capacities, as stated by their representative. OMB test edthis mechanism, and one of the reason is a lack of capacity, but the other is a view of Courts on this role of OMB. If one of the proceeding parties submits a recommendation of the B&H Ombudsperson, the recommendation shall be treated as any other evidence submitted before the court. Therefore, the judges are not obliged to take into account the recommendations of the B&H Ombudsperson,<sup>71</sup> but are obliged to evaluate it along with the other evidence. Nevertheless, the recommendations, when submitted by the party, can be useful in providing the relevant facts of the case at hand.<sup>72</sup>

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

After the evaluation of the data provided by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC B&H), the total number of cases at the level of the Municipal / Basic Courts is 206, at the level of Cantonal / County / Appelant Courts is 108, at the level of the entities` Supreme Courts is 22, and at the level of the Court of B&H is 36.<sup>73</sup> The HJPC B&H does not provide data on the cases before the Misdemeanour Courts or the Constitutional Courts. Criminal Courts do not have the authority to decide on the issues of discrimination. There is no official data on the grounds of discrimination the cases were based on. On the other hand, the HJPC B&H provides the information on the legal issues accociated to the incurred discrimination.<sup>74</sup>

According to the LPD, every person or group of people who consider themselves to be discriminated shall be able to seek protection of his/her rights through the existing judicial and administrative proceedings.<sup>75</sup> Associations, bodies, institutions and other organizations established in a compliance with the appropriate regulations also have the right to file a lawsuit against a person who violates the right to equal treatment, provided that they have a justified interest for protection of the interest of a certain group of people, or they deal with protection from discrimination of a certain group of persons in the scope of their activities. Equality bodies are not entitled to file a lawsuit, and the B&H Ombudsperson has the right to

<sup>69</sup> Article 400 of the LCP Federation of Bosnia and Herzegovina.

<sup>70</sup> Article 4(2). of the OMBL.

<sup>71</sup> Pursuant to the Article 32 of the OMBL, the recommendations have specific effects towards government institutions, but not towards the courts.

<sup>72</sup> The opinion of the representative of the municipality court.

<sup>73</sup> The cases in which the court decided that are out of its jurisdiction, or delegated to the other court, are not taken into account (there are 23 cases decided to be out of the jurisdiction or delegated to the other court).

<sup>74</sup> According to the data of the HJPC Bosnia and Herzegovina, the majority of cases in which discrimination occurred is related to the issue of accesibility of the employment, occupation, or self-employment, the issue of working conditions, dismissals, wages and benefits at work; then, the cases related to the judiciary and public administration, the accesibility of the services and goods, equal participation of citizens in public life, family issues, issues related to education, sports and science etc.

<sup>75</sup> Article 11(1) of the LPD.

initiate and participate in misdemeanor proceedings for protection from discrimination, but not to initiate the civil procedure.<sup>76</sup>

*Number of discrimination cases decided on by courts (2011-2015)*<sup>77</sup>

	Type of the court	2011			2012			2013			2014			2015		
		NP	LP	AC	NP	LP	AC	NP	LP	AC	NP	LP	AC	NP	LP	AC
FB&H	Municipal court	6	1	-	10	2	1	33	1	1	34	3	1	47	4	2
	Cantonal court	3	2	-	15	5	-	11	1	1	19	2	2	8	1	1
	Supreme court	-	-	-	3	-	-	6	1	-	3	-	-	3	-	-
RS	Basic court	2	-	-	8	1	-	16	1	-	17	-	-	8	-	1
	County court	1	1	-	8	-	-	6	-	-	8	-	-	9	-	1
	Supreme court	-	-	-	-	-	-	2	1	-	1	-	-	2	-	-
BD B&H	Basic Court	-	-	-	-	-	-	1	-	-	4	-	-	1	-	-
	Court of Appeals	-	1	-	-	-	-	-	-	-	2	-	-	-	-	-
B&H	Court of B&H	-	-	-	2	-	-	7	-	-	12	1	-	14	-	-

According to the opinion of the representatives of the judiciary, references in the judgements are usually made to the UN conventions (CEDAW, ICCPR, ICESCR), ECHR and the case – law of the ECtHR, but rarely to the EU legal framework or the case – law, even though the Article 70 SAA requires the courts and other institutions to interpret existing legislation in line with the EU law.<sup>78</sup>

The LPD provides that both material and immaterial damage are taken into account when determining the sanction. Whether only material damage is taken into account or immaterial damage as well, primarily depends on the proposed sanction of the claimant in the claim, and the court is obliged to act within the limits of the claim. The immaterial damage is usually sought in the cases of suffered psychological pain; violated personal dignity related to mobbing etc.<sup>79</sup> Such sanctions are implemented through the entities' laws on enforcement proceedings. Other stakeholders do not find judicial sanction as effective as it should be, mainly because the procedure itself is not managed in line with the principle of urgency,

<sup>76</sup> Article 7(1)(j) of the LPD.

<sup>77</sup> All the data presented in the table are provided by the High Judicial and prosecutorial Council of Bosnia and Herzegovina (HJPC Bosnia and Herzegovina). The HJPC Bosnia and Herzegovina provides the division of the cases based on the fact whether the natural person (NP), legal person (LP) or association of the citizens (AC) took the case to the court.

<sup>78</sup> According to the representative of the judiciary, the references to the EU directives were made in the case known as „Two Schools Under One Roof“ (the judgement of the Supreme Court of Federation of Bosnia and Herzegovina of 29.08.2014.).

<sup>79</sup> For more details on the cases see: Bosnia and Herzegovina/The Institution of the Ombudsman for Human Rights in Bosnia and Herzegovina (2014) *Annual report on the occurrences of discrimination in Bosnia and Herzegovina for 2014*, available at: [http://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2015052909224950eng.pdf](http://www.ombudsmen.gov.ba/documents/obudsmen_doc2015052909224950eng.pdf) (03.03.2016.)

since the discrimination proceedings usually last for 1,5 – 2 years.<sup>80</sup> The representative of the judiciary explained this problem by stating that the courts are burdened by the case backlogs which are processed with priority.

The cases are usually discussed and disseminated through trainings of judges organised by the entities' judicial and prosecutorial training centres. In such way, the judges are informed about the relevant interpretations of certain legal provisions made by entities' Supreme Courts. Judges can also access the relevant judgements through the CMS system.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

There are two public judicial and prosecutorial training centers in B&H, organized at the entity level. These are established by the entities laws on judicial and prosecutorial training centers in FB&H (CEST FB&H) in 2002,<sup>81</sup> and in RS (CEST RS) in 2003,<sup>82</sup> with the aim to provide continued education and advancement of the judicial branch, thus striving to improve the level of professionalism of the judiciary. The centers offer few different types of judicial and prosecutorial trainings: a) basic training – for probationary employees, expert assistants, advisers employed at the courts and prosecutorial offices, who aspire the career as judge or prosecutor, b) advanced professional training for judges and prosecutors, c) complementary training, d) specialized trainings for judges and prosecutors working with juveniles.<sup>83</sup> While implementing their annual programs, entity centers organize each year together around twenty different events.

Soon after the LPD was enacted in 2009, as early as in 2010, the centers started to develop and offer trainings on the issues of legal framework for protection against the discrimination. These trainings differ depending on the type of the training. For the basic training, which lasts for three years, the trainees must attend four trainings per year (each training lasting for two days). These trainings cover different legal areas relevant for future judges and prosecutors, among others the issue of discrimination. During the second year of the basic training, the trainees are obliged to participate in a two-days training entitled “ECHR and the Gender Equality” (the education on the rights guaranteed pursuant to the Article of 5, 6, and 14 of the ECHR, and gender equality issues related to those). The educators participating in the training are usually judges, university professors, attorneys, and legal experts working for international institutions.

The advanced professional training for judges and prosecutors covers each year a mandatory three days training,<sup>84</sup> except for the newly elected judges, for whom the Centers provide a mandatory 8 days of the training during the first year of their appointment. The main purpose

<sup>80</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 35.

<sup>81</sup> Law on Center for Judicial and Prosecutorial Training in Federation of Bosnia and Herzegovina, Official Gazette of Federation of Bosnia and Herzegovina, No. 22/02, 42/02, 60/02.

<sup>82</sup> Law on Center for Judicial and Prosecutorial Training in Republic of Srpska, Official Gazette of Republic of Srpska, No. 34/02, 49/02, 30/07.

<sup>83</sup> For detailed overview see: CEST Federation of Bosnia and Herzegovina, *Program početne obuke i program stručnog usavršavanja za 2016. godinu*, decembar, 2016, available at: <http://www.fbih.cest.gov.ba/templates/JavaBean/doc/program2016.pdf> (02.03.2016.), CEST RS, *Program stručnog usavršavanja i početne obuke za 2016. godinu*, available at: <http://www.rs.cest.gov.ba/index.php/dokumenti/dokumenti-centra/1381-program-2016/file> (02.03.2016.)

<sup>84</sup> CEST Republic of Srpska, *Program...*, 11. CEST Federation of Bosnia and Herzegovina, *Program...*, 12.

of the advanced specialized trainings is to provide an information regarding novelties in the legislation, judicial practice, development and enhancement of judicial and prosecutorial skills, the exchange of experience and views, learning about the European integration process etc. After analyzing the current training program, judges and prosecutors apply, with the approval of their head officer, for topics they find relevant to the legal field they work in.

Regarding the issue of the prohibition of discrimination, after analyzing the training programs for the period of 2010 – 2015, the results show a remarkable development of the curricula of Centers' programs. For example, in the year 2010, four trainings related to the issue of discrimination were provided by the CEST FB&H, and two trainings (one explicitly and one only partially addressing the issue of discrimination) by the CEST RS, but, in 2015, six sessions directly related to the discrimination in FB&H, and five in RS. Some of the trainings are held regularly, every year, more precisely, those on the topics of "European Convention on Human Rights" (relevant aspects and application of ECHR by the national courts), "Gender Equality and protection against family violence" (analysis of the Act on gender equality and the Obligations of B&H regarding the recommendations of the CEDAW Committee), "Law on Protection against Discrimination" (substantive and procedural aspects of the protection against discrimination), "Labour Rights–Discrimination in Labour Relations" (analysis and the application of relevant conventions of the ILO, and relevant aspects of labor acts related to the issue of discrimination), "Protection Against Discrimination" (the advancement of the standards of the interpretation and the application of ECHR and fundamental freedoms in B&H), "Law on Prohibition of Discrimination and International Standards Related to the Issue of Discrimination" (the analysis of the LPD in the light of international standards). On the other hand, both entity Centers organize trainings which are not repeated every year, such as "European Labor Law" (legal sources of European labour law, free movement of workers, the principle of equal treatment and prohibition of discrimination in labour relations), "The basics of European Anti-discrimination Law" (anti-discrimination policy in the EU in the context of protection of human rights at all relevant levels of public institutions), "Labour Law" (case-study of relevant cases before the German Courts related to discrimination in labour relations), "Sexual and Gender Based Violence" (the ground of sexual violence, sexual harassment), "Mobbing" (analysis of the relevant cases of mobbing in countries from the region, the protection against the mobbing before the courts), "The Anti-discrimination Law – Combating Discrimination of Minority Groups", "Protection of Human Rights and the Rights of LGBT persons". The centers also participate in the organization of different conferences, where the issues of discrimination are discussed (Conference in the area of Civil Law, European Social Charter, Current Issues of Civil and Commercial Law etc.). According to the relevant representative of the CEST FB&H, the Centers should consider development of trainings regarding some aspects of the anti-discrimination law which are considered as sensitive topics in Bosnian society (like LGBT groups). He believes that there is a need for the trainings on more specific issues of the discrimination, besides the trainings covering all the basic aspects of the protection from discrimination. The total number of judges and prosecutors who have been participating in the aforementioned trainings organized by the CEST RS is 663, and in those organized by the CEST FB&H 1091.

The Centers have their lists of regular educators (based on the public application by the educators), which consist of judges, prosecutors, university professors, attorneys, legal experts in specific fields, but occasionally, the centers elect educators from different governmental institutions (gender centers, the B&H Ombudsperson) and international organizations (such as EU, CoE, OSCE, UNDP). The Centers publish modules for the basic training, but do not have other publications. However, the Centers have the libraries with relevant literature for all the areas of legal education relevant for the trainings, and available to judges and prosecutors.

## 4. Procedural Aspects in Discrimination Cases

### 4.1. Mediation

LPD contains the legal basis for mediation in cases of discrimination.<sup>85</sup> The law anticipates the possibility for B&H Ombudsperson as a central institution competent for protection from discrimination to initiate a process of mediation in compliance with the provisions of the Law on Mediation. In today's practice it is evident that the Ombudsperson does not initiate procedures of mediation. The lack of capacity of the Ombudsperson's Office is named as a reason for not initiating the procedure of mediation, as well as the incoherence of the LPD provisions and the Law on the Mediation Procedure.<sup>86</sup> The mediation is regulated in B&H, besides by the Law on the Mediation Procedure, also by series of legal acts defining the jurisdiction, procedure and conditions for mediation conducting.<sup>87</sup> These legal acts do not recognize the role of the Ombudsperson as one of the potential mediators. Procedural difficulties which are the result of unequal regulations represent the basic reason for not being able to initiate the mediation procedure, and as a result of that, for not applying of the above mentioned LPD provision. In the proposal of changes and amendments of LPD, the authorization of the Ombudsperson to initiate the procedure has been kept. It has been suggested for the legal acts which regulate the mediation in the following period to comply with the LPD.

As anti-discrimination procedures are led according to the provisions of the LCP there is a possibility that the court directs the parties to mediation. Law on Civil Procedure of FB&H and RS instruct that if the court decides it is appropriate in regards to the nature of the procedure and other circumstances it may suggest to parties to resolve the dispute in the procedure of mediation, as stipulated by a special law.<sup>88</sup>

### 4.2. Evidencing Discrimination

There is a wide array of types of evidence that may be used and that are used in anti-discrimination proceedings. They are, primarily, statements by witnesses and parties to the proceeding, documents and common knowledge, acts issued by the Ombudsperson and reports by the Non-Governmental or International Organizations. Other types of evidence that may be used in these proceedings are: statistics, situation testing, audio or video recordings, if so permitted by the law or through court practice, forensic expert opinions, public statements made to media, etc.<sup>89</sup>

The LPD explicitly prescribes the possibility of using the statistical data or databases as an instrument of evidence. As this is a relatively new phenomenon, it remains, to yet test the application of this progressive solution in the judicial practice, i.e. to test the readiness of the

<sup>85</sup> Article 7 of the LPD.

<sup>86</sup> Interview with the representative of Bosnia and Herzegovina Ombudsperson.

<sup>87</sup> Mediation is regulated by series of legal acts: Law on the Mediation Procedure, Law on Transfer of Mediation Affairs to the Association of Mediators, Rulebook on registration of mediators, Rulebook on Mediators' list, Rulebook on Referral to Mediation, Code of Mediation Ethics, Rulebook on Liability of Mediators for Damage Incurred During Performing Mediation Affairs, Rulebook on Disciplinary Liability of Mediator, Rulebook on Remuneration and Compensation of Mediation Costs, Rulebook on the Training Curriculum for Mediators. More available at: <http://www.umbih.ba/>

<sup>88</sup> Law on civil procedure / Official Gazette of Federation of Bosnia and Herzegovina, No. 53/03, 73/05, 19/06, 98/15, Article 86.

<sup>89</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 45.



judges to accept these data as relevant indicators of discriminatory practices. In addition, a question that remains open is to what extent the domestic judges will follow the specific standards developed in relation to the application of this method of evidence, which essentially requires their adequate education on this aspect of anti-discrimination protection. A specific challenge arising in B&H is the unavailability of the statistical indicators that might indicate a discrimination practice. This is, among other things, a result of the inactivity of the MHR in performing of its basic responsibilities – monitoring the implementation of the law, keeping a single database of discrimination cases and preparing the annual and special reports on the discrimination.<sup>90</sup>

In conditions of difficulties in proving patterns of discriminatory behavior, situation testing has often shown to be a key method for proving the discrimination. In B&H, the situation testing is not explicitly envisioned by the LPD. Legislative codification of this option would leave no room for ambiguities regarding the admissibility of this instrument of evidence, considering the potential resistance of the domestic judicial community to the innovation. However, this does not necessarily pose an obstacle to its use as a method of presenting evidence before courts.<sup>91</sup>

Harassment, gender (sexual) harassment, mobbing, incitement to discrimination or giving orders to discriminate are defined as "other forms of discrimination" within the LPD. As with direct and indirect discrimination, in the case of these forms of discrimination, the transfer of the burden of proof switches to the defendant if the claimant corroborates allegations that the prohibition of discrimination is violated. But the basic specificity of "other forms of discrimination" is that proving them does not require the use of comparative tests and comparators.<sup>92</sup>

Unfortunately, as e.g. the "Katović" case shows there is misapplication of the rules of proving discrimination and misinterpretation of the comparators in the anti-discrimination cases. After the expiration of her mandate at the position of director of "Butterfly" kindergarten, Katović was the only candidate who applied for the same position which was announced by the Glamoč Municipality. However, her mandate was not renewed because she was a nun. The Supreme Court of FB&H concluded that in the event of a lawsuit of Janja Martina Katović against the Glamoč Municipality there were no elements of discrimination based on religious affiliation although the Municipal Court in Livno has confirmed discrimination, and the Cantonal Court in Livno confirmed the first instance verdict. According to the interpretation of the Supreme Court of FB&H, Ms. Katović could not be discriminated because she was the only candidate who applied for the position.<sup>93</sup>

### 4.3. Strategic Litigation

Since the adoption of the LPD, the NGO "Vaša prava," is systematically committed to strategic litigation in the discrimination field. In the B&H context, the experience of "Vaša prava", speaks about the adequate approach to the problem of the financial burden of

<sup>90</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 49.

<sup>91</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 47.

<sup>92</sup> See: <http://www.analitika.ba/en/publications/osnovni-principi-i-dokazivanje-ostalnih-oblika-diskriminacije-prema-zakonu-o-zabrani>

<sup>93</sup> See: <http://www.analitika.ba/en/publications/mistaken-logic-proving-anti-discrimination-proceedings-case-supreme-court-fbih>

litigation in this field. In providing legal aid in individual discrimination cases, the organization “Vaša prava” as a rule files a motion for release from payment of court fees as its clients are generally indigent. With the goal of minimizing the negative financial effects that potential loss of the lawsuit would have on the claimant, the organization has created a fund with the support of the “Open Society B&H” to cover costs in case of losing the lawsuit. The filing of the lawsuit was preceded by extensive preparation, analysis and selection of cases, which most likely would not have been possible without a concrete financial and other support. The combination of the support and good selection of instruments of evidence led to the first judgment on a collective lawsuit and establishment of discrimination due to existing segregation in schools, all with minimal costs of the judicial proceeding. Namely, the claimant “Vaša prava” based most of its evidence on already available reports by international organizations, concluding observations of bodies that monitor implementation of human rights treaties and testimony by only a handful of witnesses. This experience confirms that even a proceeding conducted upon a collective lawsuit, in other words when the effects of the judgment may refer to a large number of people, may be held without considerable financial costs related to the court fees, suggesting and obtaining public documents or witness costs. It should be emphasized in this regard, as one of the goals of the strategic litigation is to provoke public debate that the very initiation of social discussion on a particular matter may mean that the goal is achieved, regardless of the outcome of the specific lawsuit.<sup>94</sup>

#### 4.4. Class Action/Actio Popularis

The LPD introduces the possibility of instigating a so-called collective lawsuit. The mechanism of the collective lawsuit involves the possibility of the lawsuit being instigated by an association, body, institution or other organization registered in compliance with the law, which in the scope of its activities deals with the protection against discrimination of a particular group of persons or has a justified interest in protecting a particular group of persons.<sup>95</sup> The admissibility requirement for this kind of a lawsuit is that a specific organization makes plausible that the respondent’s conduct violated the right to equal treatment of a large number of persons predominantly belonging to the group whose rights the claimant is protecting. In this case, the organization instigates the lawsuit in its own name and the injured victims thus do not have the status of a direct party in the proceeding. In addition, the claimant, with his consent, may be joined in the role of an intervener, at their expense, by a “body, organization, institution, association or another person dealing with protection from discrimination of a person or group of persons whose rights are being decided upon in the proceeding”. This gives an opportunity to intervene in a court proceeding even to the Ombudsperson, as well as some other groups of persons who do not have legal standing for the sole reason that they are not registered. The point of all these solutions is to strengthen the position of the victim of the discrimination in the civil proceeding, who is thus no longer alone in combating discrimination.<sup>96</sup>

The organization “Vaša prava” B&H has submitted a collective suit against the Hercegovina-Neretva Canton, elementary school Stolac and elementary school Čapljina in order to determine discrimination. The defendants have physically separated children of different ethnical background attending the same school, as well as their teachers, and also introduced

<sup>94</sup> B. Topić (2012) *Neiskorišteni potencijal, Uloga iznačaj nevladinih organizacija u zaštiti od diskriminacije u Bosni i Hercegovini*, Sarajevo: Analitika, p.50.

<sup>95</sup> Article 17 of the LPD.

<sup>96</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 17.

a different curricula. FB&H Supreme Court proved the case and ordered the introduction of appropriate measures aimed at stopping any further discrimination.<sup>97</sup>

#### 4.5. Shifting of the Burden of Proof

The Article 8(1) of the Directive 2000/43 and the Article 10(1) of the Directive 2000/78 provide that it is on the claimant to establish the facts from which it may be presumed that there has been direct or indirect discrimination, and in case that the claimant is successful in proving that, it shall be up to the respondent to prove that there has been no breach of the principle of equal treatment. The legislator of B&H transposed these provisions using a less precise formulation, stated in the Article 15(1) LPD that it is on the claimant to provide facts corroborating allegations that the prohibition of discrimination is violated and after that it is on the alleged offender to prove that the principle of equal treatment or prohibition of discrimination has not been breached. The formulation seems to suggest that the alleged victims need to prove the discrimination and that only after that the burden of proof will shift to the alleged perpetrator. This would basically mean that there is no special rule for the discrimination cases, since the rule is similar to the standard rule of the civil proceedings. Therefore it is necessary to interpret the national provision in line with the abovementioned Directives, which is an obligation under the Article 70 of the SAA Agreement. According to the Article 8(1) of the Directive 2000/43 and the Article 10(1) of the Directive 2000/78, the victim needs to establish that there was a less favorable treatment, that the victim belongs to a particular group and that the less favorable treatment was based on the affiliation to that group. However, the less favorable treatment and the fact that the less favorable treatment was based on the affiliation to the group only need to be proved only to a decreased level of certainty. It is sufficient to prove that it is more probable that the discriminatory treatment occurred than that it did not occur (51% probability).<sup>98</sup> In the para 21 of the preamble of the Directive 2000/43 and the para. 31 of the Directive 2000/78 this rule is called a *prima facie* evidence rule. However, it is not a *prima facie* evidence rule in a common sense; because it does not help to prove that typically (*prima facie*) such violation of law is causal for the damage occurred (like it is the case in car accidents).<sup>99</sup> It reduces the level of probability that the alleged victim has to prove in regards to the less favorable treatment and the discrimination ground, which provides a much better protection for the alleged victim in the discrimination cases than just a *prima facie* rule. If the alleged victim establishes facts that prove the reduced level of probability, then the burden of proof shifts to the alleged perpetrator who needs to establish the full proof (not just a counterevidence) that either the facts of the case different, that there was no less favorable treatment or that it was not based on the affiliation to the group. Finally, the alleged perpetrator can try to establish that the discrimination was justified, more precisely that the discriminatory measure followed a legitimate aim and was proportional.

The GEL does not regulate the question of burden of proof, but on the basis of the reference made in the Article 23 of the GEL to the proceedings under the Article 12 of the LPD, the rule established under the Article 15(1) of the LPD also applies to GEL. Unfortunately, as e.g. the case of the “Coffee in Zavidovići” shows where persons belonging to the Roma population were not served in a coffee place, the court decided that the claimant failed to prove the discriminatory intent and rejected the claim. Not only that the intent is not a

<sup>97</sup> More available at: <http://www.diskriminacija.ba/biblioteka/2-%C5%A1kole-pod-1-krovom-presuda-vrhovnog-suda-federacije-bih>

<sup>98</sup> H. Wendtlandt, Article 22 AGG, in H. Bamberger/H.Roth (eds.) (2015), *Beck'scher Online-Kommentar BGB*, München: Beck, para. 2.

<sup>99</sup> W. Däubler, Article 22 AGG, in W. Däubler/M. Bertzbach (eds.) (2013) *Allgemeines Gleichbehandlungsgesetz*, Baden/Baden: Nomos, para. 8.

substantive requirement for the discrimination under the LPD, but also the alleged victim only needed to prove a predominant probability of the discrimination ground, but even the Ombudsperson for human rights did not recognize this mistake.<sup>100</sup>

#### 4.6. Remedies

Protection from discrimination can be realized in two ways. It can be given in a procedure in which a party asks for protection of some of her or his right which had been violated due to discrimination, where the discrimination will be determined by the court as a pre-judicial issue. A party can also by her or his free choice enjoy a protection with a special law suit for protection. If the protection from discrimination is realized in a pre-judicial way in a procedure in which the violated or endangered right is being protected, procedural rights from the special laws are applied, apart from the provisions on the burden of proof that the principle of shifting the burden of proof is being applied to.

A person or a group of persons who are subjected to any form of discrimination, according to the LPD provisions, can file a lawsuit for determining the discrimination, lawsuit for prohibition or removal of the discrimination, compensation lawsuit, and the verdict of the court which proved the violation of the right to equal treatment is to be published in the media at the expense of the claimant, in a case when the discrimination was conducted through the media (printed and electronic) of any kind.

When all the requests are based on the same factual legal basis, requests can be joined together (cumulative) in one lawsuit that is being decided upon in the civil action, if all the requests are correlated and if the same court is competent for each of these requests. Deadline for submitting the lawsuit is 3 months after finding about the violation of a right and latest one year as of the day a violation was committed.<sup>101</sup> There is an opinion that the legal deadlines to address the court are too short and are not harmonized with the best practice in this area.<sup>102</sup> There is a proposal to amend the LPD as follows: the subjective time limit is 3 years and the objective is 5 years. In cases of continued violations the calculation of the timeframes starts from the last action. The deadlines do not count in the cases of a systematic discrimination. The law also stipulates a procedural specificity for anti-discrimination proceedings with regard to revision of the court decisions passed in these proceedings. The Supreme Court of the FB&H and the Supreme Court of the RS are competent for a revision, with the application of a 3-month deadline from the day of the delivery of the second-instance judgment. However, with the aim of protecting the victim of discrimination, it is stipulated that it is admissible in all anti-discrimination proceedings, abandoning for these proceedings the principle of the standard means test (10,000 KM) as the criterion of admissibility of appeals to the entity supreme courts. This is an expression of the legislator's determination to ensure, through the revision in all anti-discrimination proceedings, the harmonization of the application of the law and the equality of citizens before the law, as the primary role of The Supreme Courts. The possibility of developing harmonized standards and case-law guidelines regarding the application of this law as soon as possible is particularly important in the light of the regency of the law and the innovations it introduces.<sup>103</sup>

<sup>100</sup> Bosnia and Herzegovina/Institucija Ombudsmena za ljudska prava Bosne i Hercegovine, (2011) *Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011*, p. 20.

<sup>101</sup> Article 13 of the LPD.

<sup>102</sup> Judicial protection from discrimination in Bosnia and Herzegovina: analysis of laws and practice based on initial cases in this field, Policy Brief No 6, Analitika, April 2013.

<sup>103</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 18.

The LPD prescribes protection from victimization, meaning that persons who report discrimination or in another way participate in an anti-discrimination legal proceeding must not suffer any consequences thereof. Violation of the prohibition of victimization, under the LPD, is a separate misdemeanor as well, and the issue of misdemeanor liability of the victimizer may consequently be raised.<sup>104</sup>

#### 4.7. Follow up to Opinions and Recommendation

See section 6.3.

## 5. The Role of Universities in Combating Discrimination

### 5.1 Law Departments

The Faculty of Law of the “Džemal Bijedić” University of Mostar (DŽBU) still has not offered a special course on the international, European and national legal provisions prohibiting the discrimination. Instead of that, the issue on anti-discrimination has been integrated into a large number of courses within the curriculum of the undergraduate (bachelor) course (first cycle, Bologna model 4+1+3). Those courses are: Constitutional Law, Administrative Procedure Law, Civil Litigation Procedure Law, Criminal Procedure Law (Offense Law), Labour Law, Social Law, European Union Law, Matrimonial Law, Parental and Guardianship Law, Civil Law – General Principles, Inheritance Law and Human Rights Law (mandatory courses), Personal Rights, Medical Law, Civil Society and International Labour Law (elective courses). Each of the listed courses deals with the discrimination and legal protection against it from their specific aspect. The main learning objective is to teach the students about the term and the types of discrimination, the forms in which it appears in specific areas and the legal means for combating it.<sup>105</sup>

Each student enrolled at the first cycle of the Faculty of Law DŽBU attends all the mandatory courses while he/she chooses elective courses from the special list of the elective courses. Previously listed elected courses which deal with the issue on the anti-discrimination have been integrated into that special list. The students attend 5 elective courses in total (one course on the second year, two courses in the third and two courses on the fourth year of study). The total number of students enrolled in the first cycle from 2010 to 2015 is 1862.

The Faculty has been delivering courses in the second cycle on: Private Law of the European Union, International Relation and Diplomacy and Criminal Law. The issue on anti-discrimination has been integrated into the curriculum of these courses.<sup>106</sup> The total number of students enrolled in the second cycle from 2010 to 2015 is 39.

Some of the stakeholders have been involved in the teaching on anti-discrimination in a certain way. Namely, the Faculty of Law occasionally organizes lectures held by the Ombudsperson of B&H, judges of the Court of Bosnia and Herzegovina, CSOs representatives etc. As a part of invites, the students enrolled in the first cycle, ordinarily

<sup>104</sup> A. Hanušić (2013) *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika – Center for Social Research, p. 22.

<sup>105</sup> Pravni fakultet Univerziteta “Džemal Bijedić” u Mostaru, *Nastavni plan i program dodiplomskog studija*, available at: <http://www.pf.unmo.ba/studij/i-ciklus.aspx> (1.2.2016).

<sup>106</sup> Pravni fakultet Univerziteta “Džemal Bijedić” u Mostaru, *Nastavni plan i program master studija*, available at: <http://www.pf.unmo.ba/studij/ii-ciklus.aspx> (1.2.2016).

visit Regional Office of the Institution of Human Rights Ombudsman of BH situated in Mostar, Social Welfare Centre, Municipal and Cantonal court in Mostar and some other state and public institutions where they learn about the practical cases of discrimination and how to combat against it. The students of the IV year have obligatory 3-weeks internship in judiciary and other relevant institutions (Ministry of Interior, Police, lawyers, Office of the Ombudsman, Office of the Prosecutor etc.).

The Faculty has a Moot court room and a Mock Law Office where the students can perform practical training on discrimination cases. Each academic year students participate in some national, regional and international moot court competitions on human rights and achieve very good results. A part of them have attended Law Clinics organized by Centre for Human Rights in Mostar.

The official cooperation between the Faculty of Law DŽBU and the Judicial Training Academy (Centre for Judicial and Prosecutorial Training of Federation of Bosnia and Herzegovina) in order to harmonize the education on anti-discrimination for different legal professions still has not been established. So far there is a cooperation between these two institutions in a way that some of the professors from the Faculty of Law train as educators the judges and prosecutors. Among the other topic, their training covers the anti-discrimination issue as well.

The faculty of Law DŽBU has not conducted any special research project on discrimination still but some professors do individual researches on that issue in the specific area of law and write scientific articles on that topic.

The law Faculty in Sarajevo does not have a special course which would deal exclusively with the issue of the prohibiting discrimination and anti-discriminatory legislation. At the Sarajevo Law Faculty the prohibiting discrimination and anti-discriminatory legislation has been included as the constituent part of the curriculum of a series of courses taught at the I (under-graduate), II (post-graduate) and III cycle (doctorate studies). The mandatory courses of the I and II cycle of the studies attended by all of the students at the Faculty and which include the issue of prohibiting discrimination are the following: Constitutional Law (Human Rights as the central part of the constitutional material), Family Law (Principles of Family Law, Respect of Family and Private Life, Equality of Parents and Parental Responsibility), Labour Law (Individual Labour Law, Protection of Rights and Obligations of the Employee), Social Law (Health Security and Health Protection, Social Protection), System of Human Rights (Enjoying Human Rights and Research of Discrimination / Stereotypes, Culture, History), European Labour Law and the Law on Social Security (Issue of Employment and Flexible Kinds of Employment with the Principles of Discrimination Prohibition) and Constitutional Law – selected topics (Conventional System of Human Rights Protection). Elective courses consisting of the Discrimination Prohibition are: Gender and Law (Understanding the notion of Sexual / Gender Equality, learning about Cultural Stereotypes and their connection with the law, Global Policy of Women Discrimination Prevention, Regional Policy for Discrimination Prevention, situation in B&H in relation with the sexual discrimination, mapping out the main problems at the global level in relation to acknowledgement, enjoyment and protection of Women's' Human Rights), Legal Clinic in Human Rights (Instruments of Human Rights Protection, Mechanisms of Human Rights Protection), Civil Servants Law (Principles of Legality and Prohibition of Discrimination), Right of the Minorities (Principle of Equality and Prohibition of Discrimination, „Positive Discrimination“) and Mechanisms for Protection of Human Rights. At the I cycle of studies students' chose 5 elective courses in the period between 2010-2011 and since 2011 the

students are choosing 3 elective courses in total. At the II cycle of studies the students choose 1 elective course. At the III cycle of studies students choose 2 elective courses.<sup>107</sup>

The total number of the students enrolled between 2010-2015 at the I cycle of studies was 2552. The number of enrolled students at the II cycle of studies was 1197, and at the III cycle was 37.

Law Faculty is engaging practical experts (judges, lawyers, public notaries, inspectors and others) to hold lectures which encompass the themes of discrimination prohibition at all the cycles of the studies. The students of the Faculty have also been participating for years now in numerous national, domestic and international competitions. A team of the Faculty students participates every year in the Moot Court on European Human Rights (involving the anti-discrimination issues).

The official cooperation between the Law Faculty and the CEST FB&H in order to harmonize the education on anti-discrimination for different legal professions has not been established yet. So far there is cooperation between these two institutions in a way that some of the professors from the Law Faculty participate as trainers. The education covered the anti-discrimination issue as well.

Sarajevo Law Faculty has not conducted any special research project on discrimination yet but some professors do individual researches in this specific area of law and write scientific articles on that topic.

The curricula analysis of the Faculty of Law in Zenica shows that there is a special course on prohibiting the discrimination at master level, but, principally, the issue of anti-discrimination is partly included in other courses program.

The undergraduate cycle offers studying of the issue of the Anti-discrimination Law as a part of the curricula of the Constitutional Law (the issue of discrimination is analyzed as one of the human rights guaranteed by the ECHR and the Constitution of B&H and the Entities' Constitutions), European Union Law (the discrimination on the grounds of nationality as the obstacle to freedom of movement in the Internal Market), Labour and Social Law (studying of relevant aspects of anti-discrimination in labour and social matters), European Private law (the application of directive related to anti-discrimination issues in national law) as well as Family Law and Law on Inheritance.<sup>108</sup> The course "Civil Procedure Law" still does not include relevant aspects of Anti-discrimination Law, but in the near reform of the Faculty program will be taken into account recent developments of anti-discriminatory legal protection. Since these courses are in the 2<sup>nd</sup> and 3<sup>rd</sup> year of the undergraduate cycle, in the period of 2010 – 2015, 1445 students have participated.

In the second cycle of studying, the master level, a special course is dedicated to the Anti-discrimination Law, named "Anti-discrimination Private Law of European Union". The emphasis of the course is on the understanding of the horizontal effects on the rights and

<sup>107</sup> Pravni fakultet Univerziteta u Sarajevu (2011) *Nastavni plan i program dodiplomskog studija*, Sarajevo, available at: <http://www.pfsa.unsa.ba/pf/wp-content/uploads/2014/09/Nastavni-plan-i-program.pdf>; Pravni fakultet Univerziteta u Sarajevu (2010) *II ciklus studija Nastavni plan i programi*, Sarajevo, available at: <http://www.pfsa.unsa.ba/pf/wp-content/uploads/2014/09/Nastavni-plan-i-program-drugog-ciklusa-studija1.pdf>; Pravni fakultet Univerziteta u Sarajevu (2011) *Doktorski studij na Pravnom Fakultetu Univerziteta u Sarajevu - Treći ciklus studija*, Sarajevo, available at: <http://www.pfsa.unsa.ba/pf/wp-content/uploads/2014/09/NOVI-DOKTORSKI.pdf> (08.02.2016.).

<sup>108</sup> Pravni fakultet Univerziteta u Zenici (2010) *Nastavni plan i program dodiplomskog studija*, Zenica, available at: <http://www.prf.unze.ba/Docs/NASTAVNI%20PLAN%20I%20PROGRAM%20DODIPLOMSKOG%20STUDIJA%20PRAVNOG%20FAKULTETA%20UNZE%202010-27052014.pdf> (07.02.2016).

freedoms, and anti-discrimination, and the identification of the relevant regulations as the ground of anti-discrimination protection between the private persons.<sup>109</sup> This course is elective, but when elected, it becomes mandatory for the students. It was included in the revised Master Study Program that had started in 2013. In the academic year of 2013/2014, 8 students elected this course (out of 41), and in the academic year 2014/2015, 6 students elected it (out of 31). Still, there is no final number of students attending this course in the year 2015/2016, since the summer semester has not begun yet. There are also other courses at the master level providing studies on the specific aspects of the anti-discrimination Law, such as: European Labor Law, Comparative Constitutional Law, Basic Legal Principles of EU Law, which are mandatory courses, and, there are elective courses, which, when elected, become mandatory for the students, such as: European Family Law, Personal Rights Law, Human Rights Law, EU Internal Market Law, European Social Law.<sup>110</sup>

The third cycle, the PhD study program, does not provide special courses on the Anti-discrimination Law, but specific issues are included in the curricula of European Private Law I, European Private Law II, Personal Rights Law, European Public Law, and Human Rights Law.<sup>111</sup>

There have not been any Moot Courts organized by the Faculty of Law Zenica, but students have participated in the Moot Court on European Human Rights (involving the anti-discrimination issues) organized by Civil Rights Defenders, and the Moot Court took place before the ECHR.<sup>112</sup> The Moot Court has been the result of the Legal Clinic on the European human rights organized as the part of the European Council Program.<sup>113</sup> Students have also participated in the workshop “Discrimination Protection and the Institution of the Ombudsman in B&H” organized by the OSCE in May 2014. Judges, notaries and attorneys do participate in classes in courses at the all three levels of studying. On the other hand, Faculty of Law Zenica does not have formal institutional cooperation with Judicial Academy (Centers for Judicial and Prosecutorial Training at the entity level), although several Faculty professors, who are also researchers in anti-discrimination law, participated as the trainers in CEST FB&H courses on anti-discrimination.

## 5.2. Other Educational Institutions

There is a master and a doctoral programme “Gender Studies” within the Centre for Postgraduate Studies of the University of Sarajevo. Courses “Gender and Human Rights” and “Gender and Balkans” include issues of prohibition of discrimination. In the period between 2010 and 2015, 18 students have enrolled in the master programme and 10 students enrolled the doctoral programme.<sup>114</sup>

There are no other special courses which would deal exclusively with the prohibition of the discrimination at Faculties of Political Science, Sociology, Social work, Public

<sup>109</sup> Pravni fakultet Univerziteta u Zenici, *Nastavni plan i program magistarskog studija*, year 2013, Zenica, available at: <http://www.prf.unze.ba/Docs/Novi%20nastavni%20plan%20i%20program%20%20PDS.pdf> (08.02.2016.), p. 92.

<sup>110</sup> For more details regarding each of the courses, see: Pravni fakultet Univerziteta u Zenici, *Nastavni plan i program magistarskog studija*, year 2013, Zenica, available at: <http://www.prf.unze.ba/Docs/Novi%20nastavni%20plan%20i%20program%20-%20PDS.pdf> (08.02.2016.).

<sup>111</sup> For more details, see: Pravni fakultet Univerziteta u Zenici, *Elaborat doktorskog studija na Pravnom fakultetu Univerziteta u Zenici*, <http://www.prf.unze.ba/Docs/Elaborat%20doktorski%20studij.pdf> (08.02.2016.).

<sup>112</sup> [http://www.prf.unze.ba/Projekti\\_saradnja.html](http://www.prf.unze.ba/Projekti_saradnja.html).

<sup>113</sup> <http://www.prf.unze.ba/v1/docs/JAVNI%20POZIV%20%20kilnika%20iz%20ljudskih%20prava.pdf>.

<sup>114</sup> See more on: <http://cips.unsa.ba/>



Administration and Police Academies organized within the “Džemal Bijedić” University of Mostar, University of Sarajevo and University of Zenica.

### 5.3. Legal and Institutional Structures Combating Discrimination

The LPD stipulates that the prohibition of discrimination shall be applied to all public bodies, all natural and legal persons, in the public and private sector, in all spheres, including education.<sup>115</sup> GEL also stipulates that everyone shall have equal rights to education, regardless of gender<sup>116</sup> as well as the Framework Law on Higher Education in B&H, which entails prohibition of discrimination and access to a higher education to all those who have completed the four-year secondary education.<sup>117</sup>

The Statute of the “Džemal Bijedić” University of Mostar contains provisions which prohibit discrimination (Article 7 – A Right to Higher Education and Prohibition of Discrimination on Any Base to Enroll and Study at DŽBU; Article 170(2) – Rights of The Student and Prohibition of Discrimination; Article 190 – Rights of the academic staff and Prohibition of Discrimination on Any Base). The provisions of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region which promote anti-discrimination have been integrated into The Statute of the DŽBU.

A part of that, University Code on Practice and Procedure also contains few provisions which are prohibiting discrimination (Article 5 and 6 – Prohibition of Discrimination and Procedure to Protect from it). All the listed provisions have been harmonized with the relevant provisions of the Framework Law on Higher Education in Bosnia and Herzegovina.

DŽBU still has not established any function or a body which promotes equality and non-discrimination. Any survey to map the level of awareness for discrimination among students and academic staff has not been conducted.

The courses and services offered by the DŽBU are easily accessible to each student in terms of possibility to enroll without any discrimination. In regard to the physical accessibility to the DŽBU campus, having in mind students with special needs (e.g. students with physical disabilities) the problems exists. Due to the financial difficulties which University has faced in last couple of years, it is not possible to improve the study conditions for students with special needs, in terms of adapting all facilities, premises and equipment for their special needs.

The prohibition of discrimination at the Sarajevo University has been regulated by the Law on Higher Education of the Sarajevo Canton,<sup>118</sup> University Statute<sup>119</sup> and the Code of Ethics.<sup>120</sup> Ethical boards at the individual faculties have been founded based upon the Code of ethics of the Sarajevo University. The work and proceedings before the Ethical Board

<sup>115</sup> Article 2 (Discrimination) and Article 6 (Scope of Application) of the LPD..

<sup>116</sup> Article 10 and Article 11 (Education) of the GEL Bosnia and Herzegovina available at: [http://arsbih.gov.ba/wp-content/uploads/2014/02/GEL\\_32\\_10\\_E.pdf](http://arsbih.gov.ba/wp-content/uploads/2014/02/GEL_32_10_E.pdf) (08.02.2016.).

<sup>117</sup> Article 7 (Access to Higher Education) of the Framework Law on Higher Education in Bosnia and Herzegovina.

<sup>118</sup> Article 7 (Equal Rights) of the Law on Higher Education of Sarajevo Canton available at: <http://fpn.unsa.ba/bs/wp-content/uploads/2014/12/ZAKON-O-VISOKOM-OBRAZOVANJU-PRE%C4%8CI%C5%A0%C4%86ENI-TEKST.pdf> (08.02.2016.).

<sup>119</sup> Article 10 (Equality and Prohibition of Discrimination) of Statute of the University of Sarajevo available at: <http://unsa.ba/s/images/stories/A0/KonacniStatutUNSA.pdf> (08.02.2016.).

<sup>120</sup> Article 7 (Principle of Equality and Righteousness) and Article 11 (Discrimination) of the Code of Ethics of the University of Sarajevo available at: <http://unsa.ba/s/images/stories/AMOB/EK12.pdf> (08.02.2016.).

were regulated by the Code of Ethics.<sup>121</sup> Code of Ethics also regulates the work and proceedings before the Ethical Council of the Sarajevo University.<sup>122</sup>

The rulebook on the work of the Law Faculty prohibits the discrimination.<sup>123</sup> A person who considers him or herself to be discriminated against submits the request for protection to the Dean of the Faculty. Based upon the motion of the Faculty's Academic Council, the Dean has to make a decision on the request within 15 days. There have been no reported cases of discrimination at the Faculty so far.

There are no legal obstacles to study at the University of Sarajevo, and students can participate in all of the courses according to the legal acts. Regarding the physical obstacles, special attention has been dedicated in order to provide access to all the facilities and services. The approach to the facilities and services has been provided. The Law Faculty has initiated a project with the Association of Students to place the boards and signs in Braille on the Faculty offices' doors for the blind and visually impaired students.

There are no specific documents adopted by University of Zenica related only to the anti-discrimination issues, but, the prohibition of discrimination is guaranteed by the Law on High Education of Zenica-Doboj Canton,<sup>124</sup> Statute of University of Zenica<sup>125</sup> and the Ethical Code.<sup>126</sup>

There are no legal obstacles to study at the University of Zenica, and students can participate in all of the courses according to the legal acts. Regarding the physical obstacles, special attention has been dedicated at all faculties in the last previous years in order to provide access to all the facilities and services, in accordance with the material possibilities of the University. Therefore, not all of the physical obstacles have been removed, but the approach to the main facilities and services has been provided.

The example of a good practice in combating the discrimination at all three universities is Office for Support to Students with Special Needs. It has been established within TEMPUS project "Equal Opportunities for Students with Special Needs in Higher Education – EQOPP"<sup>127</sup> in April 2013. It is a coordinating body within universities which cherish the inclusive educational environment ready to provide the support for students with special needs. It also provides individual support to student with special needs who ask for it.<sup>128</sup> (More on this find in Annex 2: Example 9).

<sup>121</sup> Article 29 (Ethics Committees of Faculties) and Article 31; Article 32 and Article 33 (Procedure) of the Code of Ethics of the University of Sarajevo.

<sup>122</sup> Article 30 (Ethics Council of the University) and Article. 34 and Article 35 (Procedure) of the Code of Ethics of the University of Sarajevo.

<sup>123</sup> Article 47 and Article. 48 of Sarajevo Law Faculty Rulebook.

<sup>124</sup> Article 10, Bosnia and Herzegovina/Law on High Education, Official Gazette of Bosnia and Herzegovina 6/2009, 09/2013, 13/2013, 4/2015.

<sup>125</sup> Article 7(2), JU Univerzitet u Zenici, Statut Univerziteta u Zenici – prečišćeni tekst, <http://www.unze.ba/download/Statut%20precisceni%20%2009112012.pdf> (08.02.2016.).

<sup>126</sup> Article 7, Article 11 and Article 12, JU Univerzitet u Zenici, Etički kodeks, <http://www.unze.ba/download/ETICKI%20KODEKS%2011022013.pdf> (08.02.2016.).

<sup>127</sup> "Students with special needs make a heterogeneous group that includes students with physical, hearing, visual impairment, with specific learning disabilities, mental impairment, students with speech-language disorders, chronically ill students, students belonging to vulnerable groups such as ethnic minority, academically disadvantaged students and students with low socio-economic status, students who experienced trauma, violence, etc." For more on EQOPP: <http://www.sus.ba/eqopp/> (1.2.2016).

<sup>128</sup> For detailed competencies of the Office, see: [http://www.unze.ba/ba/o\\_uredu\\_zapodrsku.htm](http://www.unze.ba/ba/o_uredu_zapodrsku.htm) and [http://unsa.ba/s/index.php?option=com\\_content&task=blogcategory&id=190&Itemid=396](http://unsa.ba/s/index.php?option=com_content&task=blogcategory&id=190&Itemid=396) (09.02.2016.).

## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

In 2011, the OSF commissioned public opinion poll on the perception and the experiences of citizens with discrimination.<sup>129</sup> This research showed more than half of respondents, 55.7%, were not familiar with the LPD. Only 8.3% had some knowledge on the protection mechanism established by this Law. Majority of the respondents, 73.0%, stated that they have not taken legal or other action after they faced discrimination.<sup>131</sup> (More on this find in the Annex 2: Example 4)

According to the stakeholders interviewed in the development of this Report, unfortunately a little has changed in citizens' understanding of the Anti-discrimination Legislation five years later. The stakeholders assessed citizens' overall understanding of the basic concepts of the discrimination and relevant legislation as particularly concerning. Majority of the citizens understand, perceive, and equalize any violation of right(s) with discrimination. The citizens are not aware of the restrictive deadlines for submitting complains in discrimination cases and relevant protection procedures. Those factors limit the possibilities for and efficiency of victim protection mechanisms.

The representative of the B&H Ombudsperson emphasis a complicated state structures and many layers of competences as additionally challenging. Some policy areas, such as the social protection, are overregulated and it is challenging, even for a lawyer, to comprehend where and how to access a right or protection against violation or discrimination. Comprehensive harmonization of legislation with the LPD has not started. Yet, at the contrary, some new laws introduce standards and protection procedures different to those from the LPD (e.g. Labour Law) what might additionally confuse the citizens if protection is needed.

There is a lack of the assessment on the stakeholders' awareness on the antidiscrimination legislation but this issue was partially assessed in a research form 2013.<sup>132</sup> This research showed 40% of respondent, civil servants at the B&H institutions, were familiar with standards from the GEL; 33% were not sure in their awareness, while 27% were not aware of this Law at all. Deeper questions on the particularities from the GEL showed even less concrete knowledge ranging between 10-35% for some of the standards from the Law. This is an alarming fact if we have in mind the GEL has been implemented in B&H for more than ten years. (More on this find in Annex 2: Example 5).

The CSO's representative, with extensive practice in antidiscrimination litigation, stated only one judge applied shifting the burden of proof and, no judge has issued temporary protection measure ever in his experience; there is a court decision augmenting conditions for admissibility of a case revision although the LPD does not prescribe any, etc. Only limited numbers of CSO's use the LPD as a tool to litigate and advocate. The stakeholders

<sup>129</sup> Fond otvoreno društvo B&H (2011) *Report on results of public pool on perception and experience of discrimination*, available at: [http://www.diskriminacija.ba/sites/default/files/Diskriminacija\\_iz\\_vjestaj\\_final.pdf](http://www.diskriminacija.ba/sites/default/files/Diskriminacija_iz_vjestaj_final.pdf) (22.2.2016).

<sup>130</sup> The public opinion poll covered a sample of 1500 citizens older than 18 years.

<sup>131</sup> Fond otvoreno društvo B&H (2011) *Report on results of public pool on perception and experience of discrimination*, available at: [http://www.diskriminacija.ba/sites/default/files/Diskriminacija\\_iz\\_vjestaj\\_final.pdf](http://www.diskriminacija.ba/sites/default/files/Diskriminacija_iz_vjestaj_final.pdf) (22.2.2016).

<sup>132</sup> Bosnia and Herzegovina/Ministarstvo za ljudska prava Agencija za ravnopravnost spolova (2013) *Research on readiness of B&H institution to implement obligations from the B&H Gender Equality Law*.

highlighted the lack of public awareness on the B&H Ombudspersons role in protection against the discrimination.

A representative of the B&H Ombudsperson underlined that many of the important laws were adopted in an urgent, summary procedure and/or, became applicable in a shortened procedure. The institutions, including the judiciary had no time to prepare and develop the capacities for legislative implementation, which is particularly applicable in the case of the LPD. A representative of judiciary indicates lack of interest among the legal professionals to expand their knowledge on the LPD. A lack of developed court practices in discrimination cases prevents the capacity building of judges to deal with this type of cases.

There are some good practice examples of the practical tools supporting the implementation of the relevant legislations published and promoted by CSO's, such as: "Comments on the Law Prohibiting Discrimination with Explanations and Overview of Practice in Comparative Legislation",<sup>133</sup> "Comments on the Law on Gender Equality in B&H"<sup>134</sup> with overview of the relevant international standards and related national legislation; and two manuals: "Manual on the Law on Prohibition of Discrimination for Institutions" and "Manual on Non-Discrimination for Citizens."<sup>135</sup> (More on practical tools find in Annex 2: Example 6 & Example 7).

The interviewed stakeholders criticised the MHRR due to the omission of establishing a comprehensive data base in the cases of discrimination underlining that all debates have been based on a partial and a non-coherent data. The state omitted to identify the practical or legislative obstacles in the implementation of the anti-discrimination legislation that could be addressed by educational and outreach programs. The stakeholders recommend the educational programs for judiciary to be strengthened by the trainers with expertise in discrimination; to include regional and sharing experiences aspects; to focus on judges interested in discrimination issues. Regular coordination meetings of relevant stakeholders, particularly judges, are recommended. It is suggested that the existing tools supporting the implementation of the relevant legislations has to be improved by integrating the national and regional case studies of the court practices in discrimination cases.

## 6.2 Achievements in Awareness Raising

Antidiscrimination legislation is not precise or clear when defining or prescribing the awareness raising activities. The Article 1(2) of the LPD defines the responsibilities and obligations of the competent authorities in B&H to "ensure protection, promotion and creation of conditions for equal treatment". The central institution for protection against discrimination, the B&H Ombudsperson has competency, among other, to "raise awareness on issues related to racism and racial discrimination in society" (Article 7(2)(l) of the LPD).

<sup>133</sup> F. Vehabović, M. Izmirlija, A. Kadribašić (2010) *Comments on the Law Prohibiting Discrimination with explanations and overview of practice in comparative legislation*, Centar za ljudska prava Univerziteta u Sarajevu, available at: [http://civilnodrustvo.ba/files/docs/Komentar\\_zakona\\_o\\_zabrani\\_diskriminacije.pdf](http://civilnodrustvo.ba/files/docs/Komentar_zakona_o_zabrani_diskriminacije.pdf) (22.2.2016).

<sup>134</sup> H. Hadziomerovic - Muftic, F. Idzakovic, N. Petric, A. Zahiragic (2011) *Comments on the Gender Equality Law*, Helsinški parlament građana, available at: [http://hcabl.org/wp-content/uploads/2011/06/pdf\\_komentar%20prelom\\_web.pdf](http://hcabl.org/wp-content/uploads/2011/06/pdf_komentar%20prelom_web.pdf) (22.2.2016).

<sup>135</sup> F. Idzakovic, V. Vukmanic (2010) *Manual: Non/Discrimination in B&H Institutions – Implementation of the Law on Discrimination in B&H*, ICVA and PRAVA ZA SVE, available at: [http://www.diskriminacija.ba/sites/default/files/Vodi%25C4%258D%2520NEDISKRIMINACIJA%2520U%2520INSTITUCIJAMA\\_0.pdf](http://www.diskriminacija.ba/sites/default/files/Vodi%25C4%258D%2520NEDISKRIMINACIJA%2520U%2520INSTITUCIJAMA_0.pdf); F. Idzakovic, V. Vukmanic (2010) *Manual: Non-Discrimination for Citizens – What it is and what is not discrimination?*, ICVA and PRAVA ZA SVE, available at: [http://www.diskriminacija.ba/sites/default/files/ICVA-BrosuraDISKRIMINACIJA\\_0.pdf](http://www.diskriminacija.ba/sites/default/files/ICVA-BrosuraDISKRIMINACIJA_0.pdf) (12.3.2016).

Articles 26 and 27 of the GEL prescribe tasks of the GEA and Entities' GC to "perform activities in order to promote gender equality".

The stakeholders underlined the State awareness raising activities are largely missing, and those activities are implemented rarely. CSO's antidiscrimination programs and activities are filling the identified gap. The coalition of CSO's against Discrimination "Equality for All"<sup>136</sup> has been systematically implementing awareness raising activities upon the adoption of the LPD. The activities have been implemented through trainings, workshops and community meetings targeting the vulnerable groups and communities, CSO's and the stakeholders, particularly judges. The coalition in partnership with B&H Ombudspersons organize annual multi-stakeholders' conferences on the LPD implementation; produces policy documents and practical handbooks; implements a range of awareness raising campaigns, advocating for concrete discrimination cases through e-media, etc. (More on the Coalition find in Annex 2: Example 8). The antidiscrimination outreach programs have been implemented by CSOs such as Civil Rights Defenders, Association for Democratic Initiatives, Minority Rights Group. OSCE has been organizing Antidiscrimination Forum(s) convening various stakeholders, run public campaign on the LPD, etc.

The stakeholders stressed the importance and the obligation of the State to undertake the comprehensive, systemic awareness raising programs for different target groups. It is recommended the tailored made capacity building programs to respond on identified institutional weakness in the LPD implementation are repaired, as well as the public outreach programs. The responsible institution(s), specific activities, frequencies, and other issues in the awareness raising must be clearly regulated and defined by the legislation. The capacities and expertise of CSO's in the awareness raising activities should be integrated in development and implementation of future State programs.

### 6.3 Preventing Future Discrimination

Although reported as the overwhelming, particularly in the public and the media<sup>137</sup> there were no State run programs to combat stereotypes and prejudices. Again, CSO's filled a gap and run campaigns against those harmful practices such as the Helsinki Assembly for Human Rights against discrimination of marginalized population, Sarajevo Open Centre against homophobia, the already mentioned CSO Coalition the "Equality for All" against stereotypes and prejudices in upbringing of children. Although those CSOs' campaigns are extremely important to address different discrimination issues, the State must run a comprehensive program(s) targeting more in coverage, duration and cooperation with other stakeholders, to achieve more sustainable societal change in this regard.

Within its jurisdiction, B&H Ombudsperson prepares separate reports on the results of their activities and, the occurrence of discrimination, the special reports, and might recommend "appropriate individual and/or general measures" (OMBL and OMPRoP). In a reporting period from 2010 to 2015, B&H Ombudsperson issued 18 special reports, out of 23 in total and, two analyses of the human rights' violation with recommendations directed toward responsible authorities. Those reports cover a range of target groups and rights, such as rights

<sup>136</sup> Under Antidiscrimination Program (2009-2014): Vaša prava, Analitika, Media centar, PRAVA ZA SVE, ICVA, Forum građana Tuzle, Centar za ljudska prava Mostar, funded by OSF's; and continuing under "Equality for All" Coalition of CSO Combating against Discrimination (2015-currently) a core group of CSOs: B&H Vaša prava, Analitika, Media centar, PRAVA ZA SVE, funded by OSF and USAID.

<sup>137</sup> L. Turčilo (2012) 'Gender Based Discrimination in media (non)Culture of Bosnia and Herzegovina' in: Z. Popov-Momčinović, S. Gavrić, and P. Govedarica (eds.) *Discrimination One Concept, Many Faces*, Sarajevo: Sarajevo Open Centre, p. 93-107.

of the children and youth, particularly children/youth under risk(s), the rights of persons with disability, women's rights, elderly and Roma rights, the issue of property, etc.<sup>138</sup>

The B&H Ombudspersons more often use their jurisdiction to act *ex officio*. In the period covered by this report there is evident raise in *ex officio* investigations in discrimination cases from only a few to 32 cases reaching in 2014.<sup>139</sup> This trend might indicate citizens' lack of trust in the institutional mechanisms to protect them against victimisation if they report a case.

A representative of the B&H Ombudsperson highlighted a constant raise in their competencies and obligations and steady fall of the overall institutional budget.<sup>140</sup> Those factors prevent the institution to establish more a comprehensive follow up procedure to monitor the implementation of the issued recommendations, in both individual and systemic cases and, the accountability mechanism such as misdemeanour actions against legal entities and individuals that do not implement the B&H Ombudspersons' recommendations.

A representative of the B&H Ombudsperson highlighted that the operational data base and reporting on the cases is established and is allowing assessing occurrence of discrimination in practice of this institution. Those statistics are available and presented on annual basis to the main B&H Parliaments (at the State and Entities' level) and to the public. The interviewed CSO's recommend more of a "naming and shaming" actions of the B&H Ombudsperson against institutions responsible for the discrimination and, those that do not implement the recommendations. Publishing of the special reports on a form(s) of discrimination and regular reports on discrimination trends are recommended. Those actions could enhance the public respect and credibility of the B&H Ombudsperson but additionally, could have a preventive role, and raise public awareness on protection mechanisms from the LPD, etc.

The CSOs' reports indicate a lack of an internal policy and structures preventing the discrimination in the majority of institutions and the companies.<sup>141</sup> B&H Ombudsperson reported that only 23% of companies had internal regulation to deal with some forms of discrimination.<sup>142</sup> In cases, usually of discrimination at work, the institutions and companies have used existing the disciplinary procedures and structures established to handle the misconducts.<sup>143</sup> That type of the structure is inadequate to respond on the specificity of anti-discrimination complaint procedure, different forms of discrimination, etc.<sup>144</sup>

The lack of the efficient institutional protection in the case of discrimination was demonstrated by the 2013 research which showed that, out of a total number of victims of

<sup>138</sup> Special reports available at: <http://www.ombudsmen.gov.ba/Dokumenti.aspx?id=28&tip=4&l-ang=BS> (29.2.2016).

<sup>139</sup> Bosnia and Herzegovina/Institucija ombudsmena za ljudska prava B&H (2014) *Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina*, available at: [http://www.ombudsmen.gov.ba/documents/ombudsmen\\_doc2015052909224950eng.pdf](http://www.ombudsmen.gov.ba/documents/ombudsmen_doc2015052909224950eng.pdf) (6.3.2016).

<sup>140</sup> For more details on the Bosnia and Herzegovina Ombudsmen yearly budgets please refer to Annex 3 – Statistics of the Ombudsperson.

<sup>141</sup> Inicijativa I civilna akcija (2013) *Report:Response of institutions, institutes and companies in preventing discrimination of women in B&H*, available at: <http://icva-bh.org/wordpress/wp-content/uploads/2015/07/Izvjestaj.pdf> (6.2.2016).

<sup>142</sup> Bosnia and Herzegovina/Institucija ombudsmena za ljudska prava u B&H (2014) *Annual Report on Occurrences of Discrimination in B&H in 2013*.

<sup>143</sup> Inicijativa civilna akcija (2013) *Report:Response of institutions, institutes and companies in preventing discrimination of women in B&H*.

<sup>144</sup> E.g. victimization protection, confidentiality of data obtained during procedure particularly in sexual harassment cases, etc.

sexual harassment, only two victims reported the case and requested protection.<sup>145</sup> In both situations, the victims reported the case to a head of an institution, while only one reported a case to the B&H Ombudspersons. One respondent in the 2013 research, after reporting a case to a head of institution was subjected to a victimisation by the perpetrator, the colleagues and the employer. The respondents did not consider existing system of protection against the sexual harassment efficient.<sup>146</sup> The CSO's responded to the identified lack of institutional and companies response in the prevention and protection against the discrimination by developing a model of institutional policies and procedures in the case of discrimination.<sup>147</sup>

B&H adopted several affirmative action policies targeting persons with disability, minority (Roma), women, etc.<sup>148</sup> The development of the policy measures for those groups are selected due to B&H international human rights obligations deriving from the ratified UN or CoE conventions; and the initiative of the international organizations that run programs for vulnerable groups. In general, the policy objective for many of those documents is improvement in the status of the vulnerable groups by establishing and strengthening the mechanisms and instruments for the realization of equality within selected priority areas.<sup>149</sup>

The State has no unified and systematic methodology for drafting of the policy documents and monitoring the policy implementation. Several reports on the status of the vulnerable groups<sup>150</sup> and implementation of policies<sup>151</sup> showed some progress in establishing of mechanisms and adopting the written instruments (legislation) but, lacking a mechanism for monitoring and more comprehensive statistics to measure the policy impacts in achieving equal opportunities.<sup>152</sup> In most of the cases, the limited impact caused by the complicated

<sup>145</sup> Sexual harassment is a form of discrimination prohibited by the LPD and Bosnia and Herzegovina Gender Equality Law.

<sup>146</sup> Bosnia and Herzegovina/Ministarstvo za ljudska prava Agencija za ravnopravnost spolova (2013) *Research on Readiness of B&H Institution to Implement Obligations from the B&H Gender Equality Law*

<sup>147</sup> Inicijativai civilna akcija, PRAVA ZA SVE, Centar za ljudska prava, Zemlja djece (2014) *Guidelines for adoption of Anti-discrimination Regulation in Institutions and Regulation Model*; available at <http://rightsforall.ba/bs/wp-content/uploads/sites/5/2014/12/Smjernice-i-model-pravilnika-sa-naslovnom-1.pdf> (6.2.2016).

<sup>148</sup> E.g. Bosnia and Herzegovina/Gender Action Plan/2013-2017; Bosnia and Herzegovina/Revision of the Action Plan to solve problems of Roma in area of Employment, Housing and Health Protection/2013-2016; Bosnia and Herzegovina/Revision of the Action Plan on Educational Needs of Roma in B&H/2010; Republic of Srpska/Strategy for Improvement of Social Position of Persons with Disability in Republic of Srpska/2010-2015; Federation of Bosnia and Herzegovina/Strategy for Equal Opportunities of Persons with Disability in FB&H 2011- 2015/2011, etc.

<sup>149</sup> E.g. Bosnia and Herzegovina/Gender Action Plan 2013-2017/2013, available at: <http://arsbih.gov.ba/project/gender-action-plan-of-bosnia-and-herzegovina/> (10.1.2016.).

<sup>150</sup> Bosnia and Herzegovina/Ministarstvo ljudskih prava (2012), *Initial report on implementation of UN Convention on Rights of People with Disability*, available at: [http://www.mhrr.gov.ba/Javni\\_poziv/INI\\_CIJALNI%20%20IZVJESTAJ%20BIH.pdf](http://www.mhrr.gov.ba/Javni_poziv/INI_CIJALNI%20%20IZVJESTAJ%20BIH.pdf) (10.1.2016); Bosnia and Herzegovina/Agencija za ravnopravnost spolova, (2011) *Fourth and fifth periodical CEDAW report of B&H*, available at: [http://ars.gov.ba/wp-content/uploads/2014/02/110531\\_CEDAW\\_BiH\\_FINAL.pdf](http://ars.gov.ba/wp-content/uploads/2014/02/110531_CEDAW_BiH_FINAL.pdf) (10.1.2016.).

<sup>151</sup> E.g. Bosnia and Herzegovina/Ministarstvo ljudskih prava i izbjeglica (2014) *Report on implementation of Revision of the Action Plan on Educational Needs of Roma in B&H*, available at: [http://www.mhrr.gov.ba/PDF/djeca/Izvjestaj%20o%20provodjenju%20RAP%20BiH%20o%20obrazovnim%20potrebama%20Roma%202013\\_2014%20.pdf](http://www.mhrr.gov.ba/PDF/djeca/Izvjestaj%20o%20provodjenju%20RAP%20BiH%20o%20obrazovnim%20potrebama%20Roma%202013_2014%20.pdf) (10.1.2016.); Lj. Krnić-Zita (2010), *Evaluation of the National Action Plan for Resolving Roma Issues in Areas of Employment, Housing and Health Care*, BOSPO, available at: [http://www.bospo.ba/publikacije/Evaluacija\\_Romi.pdf](http://www.bospo.ba/publikacije/Evaluacija_Romi.pdf) (10.1.2016.).

<sup>152</sup> Bosnia and Herzegovina/Revision of the Action Plan on Educational Needs of Roma in B&H for school year 2013/14. godinu; O. Mastikosa, S. Malić, S. DobrijevićŠipka, T. MandićDokić (2014) *Analyses of Persons with Disability Policy Implementation 2008 – 2013*, Humanitarna organizacija Partner, available at:

state structures, poor policy planning and limited budgets for the policy implementation was reported. The role of the B&H Ombudspersons and other stakeholders in the implementation of the affirmative action measures differ among the policy documents, but depend on their competencies based on the respective legislation.

B&H has not adopted a national strategy or an action plan on anti-discrimination. With the participation of major national and international stakeholders, limited involvement of the national CSO's, MHRR organized an initial workshop to draft a National Strategy for Protection of Human Rights and Anti-discrimination in December 2015. After being heavily criticized, due to the frivolous approach to the drafting process by some expert, the CSO's at the workshop, MHRR announced the plan to draft a National Strategy against Discrimination in early 2016.





## Annexes

### Annex 1 - Glossary

**BD B&H** – Brčko District of Bosnia and Herzegovina

**B&H** - Bosnia and Herzegovina

**B&H CoM** - B&H Council of Ministers

**B&H Ombudsperson** - Institution of Human Rights Ombudsmen of Bosnia and Herzegovina

**CC** - Constitutional Court of B&H

**CEDAW** - UN Convention on the Elimination of All Forms of Discrimination against Women

**CEST FB&H** - Center for Judicial and Prosecutorial Training of FB&H

**CEST RS** - Center for Judicial and Prosecutorial Training of RS

**CFLA** - Centres for Free Legal Aid

**CMS** - System for automatic management of the cases

**CoE** – Council of Europe

**CSO** - Civil Society Organization

**DED** - Department for Elimination of All Forms of Discrimination

**DPA** - The Dayton Peace Agreement (the General Framework Agreement for Peace in Bosnia and Herzegovina)

**ECHR** – European Convention on Human Rights and Fundamental Freedoms

**ECtHR** – European Court of Human Rights

**ECJ** – European Court of Justice

**FB&H** – Federation of Bosnia and Herzegovina

**GCs** – Gender Centres of FB&H and RSGEA – Gender Equality Agency of Bosnia and Herzegovina

**GEL** – Gender Equality Law (B&H/ Gender Equality Law Bosnia and Herzegovina / Official Gazette of B&H 32/10)

**HJPC B&H** - High Judicial and Prosecutorial Council of Bosnia and Herzegovina

**ICCPR** - International Covenant on Civil and Political Rights

**ICESCR** - International Covenant on Economic, Social and Cultural Rights

**ILO** – International Labor Organization

**LCP** – Law on Civil Procedure (/Official Gazette of FB&H No. 53/03, 73/05, 19/06, 98/15)

**LMEB** - Law on Ministries and Other Executive Bodies of Bosnia and Herzegovina (Official Gazette of B&H 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 59/09 i 103/09)

**LPD** - Law on Prohibition of Discrimination (B&H/Law on Prohibition of Discrimination Bosnia and Herzegovina /Official Gazette of B&H 59/09)

**MHRR** – B&H Ministry for Human Rights and Refugees

**OMBL** – (B&H/Law on Ombudsman for Human Rights Bosnia and Herzegovina / Official Gazette of B&H 32/00, 19/02, 35/04 and 32/06)

**OMPROp** – (B&H/Rules of Procedures of the Institution of Ombudsman for Human Rights Bosnia and Herzegovina/Official Gazette of B&H 104/2011)

**OSCE** – Organization for Security and Cooperation in Europe

**OSF** – Open Society Foundation in B&H

**RS** – Republic of Srpska

**SAA** - Stabilisation and Association Agreement

**UN** – United Nations

**USAID** – United State Agency for International Development

## Annex 2 – Template for Good Practice Examples

### Example 1

<b>Area:</b>	2. Institutional Framework for Combating Discrimination 2.2. Stakeholders Putting Combating Discrimination into Practice
<b>Title (original language)</b>	Udruženje “Vaša prava BiH”
<b>Title (EN)</b>	Association “Your Rights B&H”
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Udruženje “Vaša pravaBiH”
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Association “Your Rights B&H” USAID and other foreign partners/donors/sponsors
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	CSO
<b>Internet link</b>	<a href="http://www.vasaprava.org/?page_id=19">http://www.vasaprava.org/?page_id=19</a>
<b>Type of initiative</b>	providing free legal aid in the field of human rights and fundamental freedoms
<b>Main target group</b>	individuals and groups of citizens
<b>Brief description (max. 1000 chars)</b>	<p>The Association “Your Rights B&amp;H” has successfully represented the victims of discrimination in several court proceedings for the protection against discrimination.</p> <p>The first individual cases have been finally determined. The Cantonal Court in Mostar has upheld the first instance judgment of the Municipal Court in Mostar in which it found discrimination of a child with special needs in the primary education.</p> <p>The other successful case before the court is case “Nun Katović”. The first instance verdict has determined discrimination of nun Katović caused by the municipality of Glamoč when the municipality refused to confirm the appointment of nun(s) for nursery director.</p> <p>The third successful case before court is “Two Schools Under One Roof”. It was a strategic litigation in order to eliminate segregation of children based on the nationality in the primary and thr secondary education. The Supreme court of FBiH has finally determined that practice as a discrimination but the judgment has still not been implemented</p> <p>The collective litigation (strategic litigation as well) which is still pending before the court is a case of discrimination of citizens of Serb nationality in Livno in employment.</p>
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes how? Reports to donors and sponsors; Public opinion</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes who? and how? Cooperation with other CSOs, BIH Ombudsperson, Courts, Social welfare centre, police.</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input checked="" type="checkbox"/> transferability</li> <li><input checked="" type="checkbox"/> sustainability</li> </ul>

**Example 2**

<b>Area:</b> <sup>153</sup>	2. Institutional Framework for Combating Discrimination 2.3. Mapping the Cooperation among Stakeholders
<b>Title (original language)</b>	Mreža za koordinaciju vladinih i nevladinih pružaoca besplatne pravne pomoći u Bosni i Hercegovini
<b>Title (EN)</b>	Free Legal Assistance Providers Network in Bosnia and Herzegovina
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Centri/zavodi za pružanje besplatne pravne pomoći u Republici Srpskoj i Federaciji BiH, Vaša prava BiH, <b>Centar za pravnu pomoć ženama Zenica, Fondacija lokalne demokratije, Centar za ljudska prava u Mostaru.</b>
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Centres for Free Legal Aid (Republic of Srpska, Federation of BiH), Vaša prava BiH, <b>Centar za pravnu pomoć ženama Zenica, Fondacija lokalne demokratije, Centar za ljudska prava u Mostaru.</b>
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Government/CSO UNDP
<b>Internet link</b>	<a href="http://mrezapravnepomoci.org/ba/o-nama/informacije-o-mrezi">http://mrezapravnepomoci.org/ba/o-nama/informacije-o-mrezi</a>
<b>Type of initiative</b>	Establishing a system of coordination and strengthening the cooperation among the governmental and CSOs to provide free legal aid
<b>Main target group</b>	Governmental and non-governmental organizations to provide free legal aid
<b>Brief description (max. 1000 chars)</b>	The most important activities undertaken in order to achieve the objectives of the Network are: Monitoring of the establishment and functioning of the legal aid system; Proposing measures for quality legal aid; Advocacy within the institutions/organizations for implementation of the adopted attitudes and opinions; Participation in the creating and developing of the promotional and educational publications in the field of providing free legal aid; Establishing an online system of access to free legal aid; Active participation in the institutions and organizations represented in the network in the respect, protection, use, promotion and development of the ethical and professional standards in line with the European and international standards; Raising the awareness of the professionals and the citizens in the field of the anti-discrimination; Exchange of experience and information. The network is open for access to new members.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes how? Reports to donors</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes who? and how? Cooperation with other institutions involved in combating against discrimination</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input checked="" type="checkbox"/> transferability</li> <li><input checked="" type="checkbox"/> sustainability</li> </ul>

<sup>153</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 3**

<b>Area:</b> <sup>154</sup>	2. Institutional Framework for Combating Discrimination 2.3. Mapping the Cooperation among Stakeholders
<b>Title (original language)</b>	Pravna klinika „Pristup pravdi“ (Kliničko obrazovanje pravnika za student Pravnog fakulteta Univerziteta „Džemal Bijedić“ u Mostaru I student Pravnog fakulteta Sveučilišta u Mostaru)
<b>Title (EN)</b>	Legal Clinic “Access to Justice” (Clinical education of lawyers for the students of the Faculty of law of the University of Džemal Bijedić of Mostar and Faculty of law of the University of Mostar)
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	<b>Centar za ljudska prava u Mostaru</b> Projekt <i>Efikasnije ostvarivanje prava na besplatnu pravnu pomoć za socijalno ugrožene građane (osobito žene) u Hercegovini kroz rad mobilnih timova, pravnu kliniku I referalni sistem upućivanja stranaka</i>
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	<b>Center for Human Rights in Mostar</b> Project <i>More Effective Exercise of the Right to Free Legal Aid for Vulnerable Citizens (especially women) in Herzegovina through the Mobile Teams, Legal Clinic and Referral System of the Parties</i>
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	CSO UNDP
<b>Internet link</b>	<a href="http://mrezaprapnepomoci.org/mostar/">http://mrezaprapnepomoci.org/mostar/</a>
<b>Type of initiative</b>	Establishing a system of coordination and strengthening the cooperation among the governmental and CSOs to provide free legal aid
<b>Main target group</b>	Students of Faculty of law of the University of Džemal Bijedić of Mostar and the Faculty of Law of the University of Mostar
<b>Brief description (max. 1000 chars)</b>	Legal Clinic selects students of the Law Faculty of the University "Džemal Bijedić" in Mostar and the Faculty of Law, University of Mostar. They have the opportunity to build their technical and professional capacity, improve specialized theoretical legal and practical legal knowledge and skills in the field of access to justice in various areas of law. One of the main focuses are the cases of discrimination. After the successful completion of attending the Legal Clinic participants are awarded certificates.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes      how? Reports to donors</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes      who? and how? Cooperation with other institutions involved in combating against discrimination</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input checked="" type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>154</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 4**

• <b>Area:</b>	Developing a culture of rights
• <b>Title (original language)</b>	<i>Izveštaj o rezultatima ispitivanja javnog mnjenja o percepciji i iskustvu diskriminacije</i> (2011)
• <b>Title (EN)</b>	Report on the Public Opinion Poll on Perception and Experiences of Discrimination
• <b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Fond otvoreno društvo Bosne i Hercegovine
• <b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Open Society Fund Bosnia and Herzegovina
• <b>Government / Civil society</b> Resp. for implementation Resp. for financing	International foundation
• <b>Internet link</b>	<a href="http://www.diskriminacija.ba/sites/default/files/Diskriminacija_izvjestaj_final.pdf">http://www.diskriminacija.ba/sites/default/files/Diskriminacija_izvjestaj_final.pdf</a> (22.2.2016)
• <b>Type of initiative</b>	Public opinion poll.
• <b>Main target group</b>	general public
• <b>Brief description (max. 1000 chars)</b>	The Public opinion poll covered a representative sample of 1500 citizens older than 18 years. The Poll assessed the experiences and perception of discrimination among the general population. The Respondent considered the discrimination as widespread; more present in the wider country than in the place where they live; the minorities & constituent people when in minority are affected more. The employment, judiciary and administration areas where the cases of discrimination appear the most. Discrimination based on a national minority or on an ethnic ground, sexual orientation or religion are considered predominant. The Respondent considered that the cases of discrimination are more present and spread then 5 years ago. When compared with a related research in EU show similar results, except in the case of discrimination on religious ground that considered more spread in BIH. The citizens are not familiar with the LPD, do not trust the Law could efficiently combat discrimination. Research should be repeated periodically to allow evaluation of citizens' awareness of the basic concepts of the discrimination, the AD legislation, stereotypes, prejudice, perception of discrimination, etc.
• <b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes      how? – research respected a social science research rules</li> </ul>
• <b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/></li> <li><input checked="" type="checkbox"/> yes      who? - Citizens and, how? – directly involved in the research</li> </ul>
• <b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact      <input type="checkbox"/> transferability</li> <li><input type="checkbox"/> innovation      <input type="checkbox"/> sustainability</li> </ul>

### Example 5

<b>Area:</b>	Developing a culture of rights
<b>Title (original language)</b>	<i>Istraživanje o spremnosti institucija BiH da provode obaveze iz Zakona o ravnopravnosti spolova u BiH (2013)</i>
<b>Title (EN)</b>	Research on Readiness of BiH Institution to Implement Obligations from the BiH Gender Equality Law (2013)
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Ministarstvo za ljudska prava BiH / Agencija za ravnopravnost spolova
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	BiH Ministry for Human Rights / Gender Equality Agency
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Government
<b>Internet link</b>	<a href="http://arsbih.gov.ba/wp-content/uploads/2014/04/Istra%C5%BEivanje-spremnosti-institucija.pdf">http://arsbih.gov.ba/wp-content/uploads/2014/04/Istra%C5%BEivanje-spremnosti-institucija.pdf</a>
<b>Type of initiative</b>	Survey.
<b>Main target group</b>	Civil servants working in BiH institutions.
<b>Brief description (max. 1000 chars)</b>	The Research on the readiness of the BiH institution to implement the obligations from the GEL, is based on a comprehensive questionnaire. The Report shows that out of 325 civil servants that participated in the research, every 10 respondent consider him/her self as a victim of gender/sex based discrimination; every 6 consider him/her self as a victim of a sexual harassment. The majority of the respondents have not taken any action against those acts, or if did, they were not satisfied with undertaken actions. The Respondent considered there is not an established efficient mechanism for prevention and protection against gender/sex based discrimination and sexual harassment. Only 40% of the respondents were familiar with the standards from the GEL; Deeper questions on the particularities from the Law showed even less concrete knowledge (range b/w 10-35% for some of the standards from the Law). When asked about experience in the implementation of the Law or policies only 9% of respondent participated in implementation of the GEL/relevant policies. The Research should be expanded on the LPD, and run periodically.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes how? - research respected a social science research rules</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes who? - Civil servants and how? – directly involved in the research</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

**Example 6**

<b>Area:</b>	Developing a culture of rights
<b>Title (original language)</b>	F. Vehabović, M. Izmirlija, A. Kadribašić (2010) Komentar Zakona o zabrani diskriminacije sa objašnjenjima I pregledom prakse u uporednom pravu
<b>Title (EN)</b>	F. Vehabović, M. Izmirlija, A. Kadribašić (2010) <i>Comments on the Law Prohibiting Discrimination with Explanations and Overview of Practice in Comparative Legislation</i>
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Centar za ljudska prava Univerziteta u Sarajevu
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Human Rights Centre of University in Sarajevo
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://civilnodrustvo.ba/files/docs/Komentar_zakona_o_zabrani_diskriminacije.pdf">http://civilnodrustvo.ba/files/docs/Komentar zakona o zabrani diskriminacije.pdf</a> (22.2.2016)
<b>Type of initiative</b>	practical tool guiding implementation of the antidiscrimination law (the LPD)
<b>Main target group</b>	relevant stakeholders (BIH Ombudsmen, judiciary, BIH Ministry for Human Rights) and potential victims of discrimination
<b>Brief description (max. 1000 chars)</b>	This book provided comments on the standards regulated by that time (2010) newly adopted with the LPD. The book provides a base for more efficient advocacy and promotion of equality, and highlights advantages of the court protection against the discrimination by using the LPD. The comments provide an overview of the practice of the international bodies such as UN Human Rights Committee, European Court of Human Rights CoE and EU European Court of Justice, covering a range of interpretations of the concepts and standards that are integral part of the LPD. The comments on the LPD are still only tools of that kind in BiH, and still correspond to a need of different stakeholders in implementation of the LPD. There is a need to develop new edition of this book that might be expanded with BIH and the regional court practice in cases of discrimination.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes      how? - Experts in antidiscrimination law developed this book.</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes      who? and how? - Experts in antidiscrimination law developed this book.</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input checked="" type="checkbox"/> innovation</li> <li><input checked="" type="checkbox"/> transferability</li> <li><input checked="" type="checkbox"/> sustainability</li> </ul>



# Example 7

<b>Area:</b>	Developing a culture of rights
<b>Title (original language)</b>	F. Idzakovic, V. Vukmanic (2010) <i>Vodic NE/DISKRIMINACIJA u institucijama u BiH- primjena Zakona o zabrani diskriminacije BiH</i> ; and F. Idzakovic, V. Vukmanic (2010) <i>Vodic: Ne/diskriminacija - Šta jeste a šta nije diskriminacija?</i>
<b>Title (EN)</b>	F. Idzakovic, V. Vukmanic (2010) <i>Manual: Non/Discrimination in BiH Institutions – Implementation of the Law on Discrimination in BiH</i> ; and F. Idzakovic, V. Vukmanic (2010) <i>Manual: Non-Discrimination for Citizens – What it is and what is not discrimination?</i>
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Inicijativa i civilna akcija (ICVA), and PRAVA ZA SVE BiH Fond otvoreno drustvo u okviru Antidiskriminacijskog programa (2009-2014)
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Initiative and Civil Action (ICVA) and PRAVA ZA SVE funded by BiH Fond Open Society's under Antidiscrimination Program (2009-2014)
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://www.diskriminacija.ba/sites/default/files/Vodi%25C4%258D%2520NEDISKRIMINACIJA%2520U%2520INSTITUCIJAMA_0.pdf">http://www.diskriminacija.ba/sites/default/files/Vodi%25C4%258D%2520NEDISKRIMINACIJA%2520U%2520INSTITUCIJAMA_0.pdf</a> ; and: <a href="http://www.diskriminacija.ba/sites/default/files/ICVA-BrosuraDISKRIMINACIJA_0.pdf">http://www.diskriminacija.ba/sites/default/files/ICVA-BrosuraDISKRIMINACIJA_0.pdf</a> (12.3.2016)
<b>Type of initiative</b>	practical tools guiding implementation of the LPD
<b>Main target group</b>	Citizens and institutions
<b>Brief description (max. 1000 chars)</b>	The manuals are targeting citizens, and institutions and are aiming for better understanding of the basic antidiscrimination standards such as the definition and the forms of discrimination with a number of practical examples; simplified tools to make distinctions b/w the discrimination and the violation of rights; introducing the antidiscrimination mechanisms from the LPD; list of possible steps to undertake if case of discrimination occurs, and contacts of the organizations providing legal aid and paralegal aid in discrimination cases. Both manuals are used for the awareness raising and capacity building of different target groups e.g. citizens, marginalized communities and CSOs; as well as institutions at different level of government in BiH. The manuals could be used and replicated for different antidiscrimination activities in BiH and region.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input type="checkbox"/> yes how?</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes who? and how? Citizens and institutions through awareness raising trainings/programs.</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input checked="" type="checkbox"/> transferability</li> <li><input type="checkbox"/> innovation</li> <li><input type="checkbox"/> sustainability</li> </ul>

**Example 8**

<b>Area:</b>	Developing a culture of rights
<b>Title (original language)</b>	Koalicija civilnog društva u borbi protiv diskriminacije “Jednakost za sve”
<b>Title (EN)</b>	Civil Society Coalition in Combat against the Discrimination “Equality for All”
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Koalicija OCD (osnovna grupa OCD: BiH Vaša prava, Analitika, Media centar, Prava za sve) Finansirano inicijalno od BiH Fonda otvoreno društvo u okviru Antidiskriminacijskog programa (2009-2014) BiH Fond otvoreno društvo i USAID u okviru “Jednakost za sve” (2015-trenutno)
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Coalition of CSO (core group of CSOs: BiH Vaša prava, Analitika, Mediacentar, Prava za sve) funded initially by BiH Fond Open Society’s under Antidiscrimination Program (2009-2014) funded by BiH Fond Open Society and USAID under “Equality for All” (2015-currently)
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://www.diskriminacija.ba/">http://www.diskriminacija.ba/</a>
<b>Type of initiative</b>	Comprehensive OCD antidiscrimination program
<b>Main target group</b>	Victims of discrimination, antidiscrimination stakeholders (BiH Ombudsmen, judiciary, BiH Ministry for Human Rights, intermediaries - CSOs), policy makers, general public
<b>Brief description (max. 1000 chars)</b>	Coalition “Equality for All” has been systematically supporting the implementation of the LPD from 2009 through antidiscrimination litigation (majority of all cases in the country on the LPD are run by this program); building capacities of CSOs, primarily, to use the LPD to advocate and litigate; implementing, with broader group of partner’s CSOs, range of awareness raising campaigns against prejudice and stereotypes, mobbing, discrimination of marginalized groups, as well as publicly advocating against cases of discrimination through e-media, particularly the web site, etc.; through the community of a practice sessions and policy papers supporting better implementation of the LPD with representatives of judiciaries, etc. “Equality for All” organizes an annual multi-stakeholders’ conference on the LPD implementation; produces policy documents and practical handbooks on the different aspects of the LPD; advocating for changes in the LPD and other antidiscrimination laws to provide more efficient protection to victims of discrimination.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes how? Survey of stakeholders targeted by activities, internal and external evaluation</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes who? – anti-discrimination stakeholders and how? – through direct involvement in activities.</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact</li> <li><input checked="" type="checkbox"/> innovation</li> </ul> <div style="text-align: right;"> <input checked="" type="checkbox"/> transferability  <input type="checkbox"/> sustainability         </div>

**Example 9**

<b>Area:</b>	5. Combating discrimination at universities 5.3. Legal and Institutional Structures Combating Discrimination
<b>Title (original language)</b>	Ured za podršku studentima s posebnim potrebama na Univerzitetu “Džemal Bijedić” u Mostaru
<b>Title (EN)</b>	Office for Support to Students with Special Needs of the University “Džemal Bijedić” of Mostar
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Univerzitet “Džemal Bijedić” u Mostaru Evropska komisija: TEMPUS project “Jednake mogućnosti za student s posebnim potrebama u visokom obrazovanju – EQOPP” (Project ID: 516939-TEMPUS-1-2011-1-BA-TEMPUS-SMHES),
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	“Džemal Bijedić” University of Mostar European Commission: Tempus project “Equal Opportunities for Students with Special Needs in Higher Education – EQOPP” (Project ID: 516939-TEMPUS-1-2011-1-BA-TEMPUS-SMHES),
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	/
<b>Internet link</b>	<a href="http://www.sus.ba/eqopp/">http://www.sus.ba/eqopp/</a> ; <a href="http://www.unmo.ba/eqopp.aspx">http://www.unmo.ba/eqopp.aspx</a>
<b>Type of initiative</b>	The Office for the support to the students with special needs (individual support of students; training of students and academic and non-academic staff for work with the students with special needs, information campaign, survey).
<b>Main target group</b>	students with special needs
<b>Brief description (max. 1000 chars)</b>	The Office for the support the students with the special needs has been established in April 2013 within the TEMPUS project EQOPP (see above). It is a coordinating body within the University “Džemal Bijedić” of Mostar which promotes the inclusive educational environment ready to provide support for a student with the special needs. The Office has made an Action plan for 2013-2016. It organised an Open day on 30 May 2014 with the main aim to introduce the academic and administrative staff, all students of the University and the entire local community with the goals and activities of the EQOPP project, and the existing and the possible forms of support for students with special needs at the University and beyond it. Until today the Support office has provided an individual assistance to four registered students with special needs who have demanded assistance. All of them were students with a physical impairment. They have demanded support to get easier access to the facilities, to modify the oral/written exams according to their impairment (an extra time to write an exam, classroom on the first floor etc.), They have also requested a prolongation of the deadline to write their master/PhD thesis etc. which was approved. The Support office has also informed these students recently about the possibility to apply for a scholarship from the Ministry of Education of Federation of Bosnia and Herzegovina and helped them to fulfil the applications.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> yes how? Monitoring visit by team of external evaluators (within the project); Self-evaluation report and SWOT analyses</li> </ul>



## Annex 3 – Statistics of the BIH Ombudsperson

	2010	2011	2012	2013	2014 <sup>155</sup>
<i>Budget in €</i>	1,391,815 <sup>156</sup>	1,358,277	1,267,483	1,231,801	1,258,291
<i>Number of staff (full time equivalent) (total number of staff)</i>	57	56	55	56	56
<i>Number of professional/legal staff (full time equivalent)</i>	11	11	<sup>157</sup>	-	-
<i>Complaints/queries received</i>	135	191	257	198	230
<i>Number of recommendations</i>	-	26	35	61	42
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	54	88	126	106	126
<i>Total number of cases (please break down according to different grounds)</i>	135 <sup>158</sup>	191	257	198	230
<i>Age</i>	<sup>159</sup>	7	-	-	-
<i>Belief</i>	-	5	14	8	5
<i>Disability</i>	-	-	-	-	-
<i>Ethnic origin</i>	-	43	26	15	22
<i>Gender</i>	6	5	-	14	25
<i>Gender identity</i>	-	3	-	4	11
<i>Religion</i>	-	5	-	1	2
<i>Sexual orientation</i>	--	-	-	-	-
<i>Mobbing</i>	32-	41	81	69	69
<i>Other grounds</i>	97	82	136	87	96
<i>Number of surveys</i>	-	-	-	-	-
<i>Number of research projects</i>	1	1	-	-	1
<i>Number of awareness initiatives</i>	-	7	5	5	6
<i>Number of training actions</i>	-	8	2	5	3
<i>Number of promotional initiatives to support good practice</i>	-	2	4	4	4

<sup>155</sup> The Report of the BIH Ombudsperson for the year 2015 is not published yet.

<sup>156</sup> Both budget approved expenditures for the current fiscal year and the expenditures approved by the later budget changes are taken into account when calculating the total budget of the BIH Ombudsman institution.

<sup>157</sup> The number of professional/legal staff is not available for the 2012, 2013 and 2014.

<sup>158</sup> The BIH Ombudsperson provides the analysis of the cases according to different grounds for the total number of the received complaints, but not for the completed cases only.

<sup>159</sup> The missing numbers for specific ground of discrimination do not mean that the BIH Ombudsperson did not receive the complaint for the discrimination on such ground, but that the BIH Ombudsperson does not provide specific numbers related to that ground of discrimination.

# **Legal Protection against Discrimination in Croatia**

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# Table of Contents

<b>Executive Summary.....</b>	<b>189</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>191</b>
1.1 Overview of Constitutional and Legal Provisions.....	191
1.2 Assessment of the Legal Framework .....	193
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>195</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	195
2.2 Stakeholders Putting Combating Discrimination into Practice .....	196
2.2.1 <i>Equality Body/Bodies</i> .....	197
2.2.2 <i>Ombud Institution(s)</i> .....	198
2.2.3 <i>Intermediaries</i> .....	198
2.2.4 <i>Police</i> .....	199
2.2.5 <i>Other Relevant Stakeholders</i> .....	199
2.3 Mapping the Cooperation among Stakeholders .....	200
2.3.1 <i>Equality Body/Bodies</i> .....	200
2.3.2 <i>Ombud Institution(s)</i> .....	200
2.3.3 <i>Intermediaries</i> .....	200
2.3.4 <i>Police</i> .....	200
<b>3. The Role of Courts in Combating Discrimination.....</b>	<b>201</b>
3.1 Capacities of Courts in Combating Discrimination.....	203
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	204
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	204
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>206</b>
4.1 Mediation .....	206
4.2 Evidencing Discrimination.....	206
4.3 Strategic Litigation.....	207
4.4 Class Action/Actio Popularis .....	207
4.5 Shifting of the Burden of Proof.....	208
4.6 Remedies.....	208
4.7 Follow-Up to Opinions and Recommendations .....	209
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>209</b>
5.1 Law Departments .....	209
5.2 Other Departments .....	211
5.3 Legal Clinics .....	212
5.4 Legal and Institutional Structures Combating Discrimination .....	213
<b>6. Developing a Culture of Rights .....</b>	<b>214</b>
6.1 Assessing the Levels of Awareness .....	214
6.2 Achievements in Awareness Raising .....	216
6.3 Preventing Future Discrimination .....	217
<b>7. References .....</b>	<b>219</b>



<b>Annexes .....</b>	<b>225</b>
Annex 1 – Glossary .....	225
Annex 2.1. – Template for Good Practice Examples: Toolkit for the implementation of anti-discrimination measures and diversity management.....	226
Annex 2.2. – Template for Good Practice Examples: Research Studies of the Ombudswoman on Gender Equality on Discrimination of Women in Employment and Labour Market .....	228
Annex 2.3. – Template for Good Practice Examples: Project for Roma and People with Disabilities of the Law Clinic at the Faculty of Law in Zagreb .....	230
Annex 2.4. – Template for Good Practice Examples: Monitoring the Implementation of the Legal Aid Act and the Anti-Discrimination Act .....	231
Annex 3.1. – Statistics Equality Body/Ombudswoman Institution .....	233
Annex 3.2. – Statistics Ombudswoman for Gender Equality.....	234
Annex 3.3. – Statistics Ombudswoman for Children .....	235
Annex 3.4. – Statistics Ombudswoman for Persons with Disability.....	236

## Executive Summary

The purpose of this report is not only to provide an overview of the national anti-discrimination law and its alignment with the European anti-discrimination standards, but also to critically assess the impact of the anti-discrimination law to the society and to evaluate the role of the courts and the role of the universities in combating discrimination, and, finally, to assess the culture of rights in Croatia. In preparing this report, the Office of the Ombudsman, the Office of the Ombudswoman for Gender Equality, the Office of the Ombudswoman for Persons with Disabilities and the Office of the Ombudswoman for Children, as well as the Judicial Academy, the Police Academy and the Law Faculties in the country, were consulted in order to either provide the number and structure of discrimination cases reported to these institutions or shed a light into the awareness on anti-discrimination law among relevant stakeholders of the anti-discrimination policy.

The equal treatment principle is enshrined in the Croatian Constitution. Although provisions civil, criminal and labour law, as well as legislation assuring protection of national minorities, contained the protection of dissemination guarantees, the EC Equality Directives have been systematically transposed through a general anti-discrimination legislation. Croatia has adopted an Anti-Discrimination Act (ADA), in force since January 2009, as the country was requested to align the national legislation with EU Anti-Discrimination Law in the course of EU accession negotiations. By joining the European Union in July 2013, Croatia was considered to have achieved legal alignment in the fields of anti-discrimination and equal opportunities. The ADA prohibits discrimination by all state bodies, local and regional governments, legal persons with public authorities and all companies and individuals in all areas of the private and the public sector. A variety of grounds have been introduced granting protection against discrimination: race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity and expression, sexual orientation. The Ombudsperson institution became a central Equality Body in 2009, in accordance with the ADA, and since 2010 it publishes the Report on the occurrence of discrimination. The reports continuously state that discrimination-based complaints most frequently cite ethnic or national origin as alleged ground and almost half relate to the employment field.

The results of the present research suggest that a more open and just society in which discrimination does not occur needs to be supported by numerous institutions and fought for with various tools: legislation implementation, education on anti-discrimination law, and awareness raising in a wider society. In conclusion, though the Croatian anti-discrimination legislation is in compliance with the Equality Directives, the culture of rights has not been fully achieved. For example, the effectiveness of the Equality Body is limited as it can only establish that discrimination took place but cannot award damages nor impose penalties. Concerned individuals need to address the courts where they reportedly still face limited understanding of the anti-discrimination standards, such as related to the reversion of the burden of proof. In order to strengthen the culture of rights, the free legal aid system should be more vigorously advertised in order to provide an equal access to judiciary for vulnerable groups and the right to free legal aid in the cases of discrimination. An effective free legal aid system also requires increased and continuous financial support allocated to the providers of the free legal aid. Finally, a more proactive promotion of the awareness of the anti-discrimination standards within the judiciary as well as within higher educational institutions that train the professions that are in charge of the implementation of ADA would likely result in an increased awareness of the affected individuals to apply the legal remedies available to them.



# 1. Legal Framework Prohibiting Discrimination

## 1.1 Overview of Constitutional and Legal Provisions

The prohibition of discrimination and the principle of equal treatment represent fundamental rights, i.e. the basic legal principles contained both in the primary and the secondary legislation of the Union. Their substantial distinctions make them immanent to common constitutional traditions of the member states and create a strong interpretative framework for activities at national levels, within the Union and its bodies, but also in the relations of the European Union with third countries.

The provisions of the Constitution of the Republic of Croatia are of primary importance, which, *inter alia*, denote freedom, equal rights, national equality and equality of genders, the rule of law and respect for human rights as the highest values of the constitutional order of the country and the ground for interpretation of the Constitution.<sup>1</sup> An open list of the legal bases for the prohibition of discrimination, i.e. the obligation to respect rights of every individual under equal conditions, is set forth in a separate provision of the Constitution<sup>2</sup> and it represents a constitutional framework for providing legal protection against unequal treatment in cases not anticipated by the national laws and regulations which specify fundamentals of the prohibition of discrimination most frequently as *numerus clauses* principle.

The Constitutional Act on the Rights of National Minorities<sup>3</sup> guarantees the protection of the rights of the national minorities and ethnic communities inhabiting the territory of the Republic of Croatia and ban the discrimination based on the minority status.<sup>4</sup> All ethnic communities living in the country are guaranteed the status of a minority by the Act concerned through a rather liberally subsumed definition of a national minority as “a group of Croatian citizens whose members have been traditionally inhabiting the territory of the Republic of Croatia and whose ethnic, linguistic, cultural and/or religious characteristics differ from the rest of the population, and who are motivated to preserve these characteristics”.<sup>5</sup>

The unequal treatment on the basis of race, ethnic origin, colour, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity,

<sup>1</sup> Article 3 of the Constitution of the Republic of Croatia, Official Gazette of Croatia 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

<sup>2</sup> Article 14 of the Constitution of the Republic of Croatia, Official Gazette of Croatia 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

<sup>3</sup> Constitutional Act on the Rights of National Minorities, Official Gazette of Croatia 155/02, 47/10, 80/10 and 93/11.

<sup>4</sup> Article 4(5) of the Constitutional Act on the Rights of National Minorities, Official Gazette of Croatia 155/02, 47/10, 80/10 and 93/11.

<sup>5</sup> Article 5 of the Constitutional Act on the Rights of National Minorities, Official Gazette of Croatia 155/02, 47/10, 80/10 and 93/11. The ethnic structure of the country is as follows: Croats make up the majority of the population with a 90% share. The most numerous minorities are Serbs (4.36%), Bosniaks (0.73%), Italians (0.42%), Hungarians (0.33%), Albanians (0.41%), Slovenians (0.25%), and Roma (officially 0.4%, but unofficial estimates suggest up to 40 000 or 0.9%).

expression or sexual orientation or other characteristics in the context of the denial, restriction or conditional right to acquire goods or receiving services, the right to conduct business, the right to employment and promotion, or distinction in order to provide benefits or preferential treatment to others, is identified by the provisions of the Penal Act as an offence liable to a penalty of up to three years.<sup>6</sup>

On a normative level certain provisions related to the prohibition of discrimination and equal treatment are provided for in the Act on Service in the Armed Forces,<sup>7</sup> Act on Civil Servants,<sup>8</sup> Labour Act,<sup>9</sup> Act on Vocational Rehabilitation and Employment of Persons with Disabilities<sup>10</sup> etc.

The Gender Equality Act<sup>11</sup> and the Same-Sex Cohabitation Act<sup>12</sup> were adopted in Croatia in 2003. Both of these Acts contained definitions of non-discrimination, but some of them differed, creating in this way confusion on the level of the horizontal dis/harmonisation of the Croatian legislation. Moreover, the Same-Sex Cohabitation Act was criticised as a kind of *contradictio in adjecto* by non-governmental organisations highlighting that its aim was to protect the rights of homosexual persons and prevent discrimination based on the sexual orientation, but it actually prevented the practical realisation of a series of rights (inheritance, rights arising from the pension fund and health insurance, property rights, etc.),<sup>13</sup> retaining only a declaratory character.<sup>14</sup> This practically unenforceable provision was replaced upon entry into force of the Same-Sex Civil Partnership Act in 2014.<sup>15</sup>

A fragmentary regulation of the prohibition of discrimination by means of numerous aforementioned sources made the providing of an efficient degree of legal protection in everyday practice fairly complicated and produced a certain level of legal insecurity. The lack of a sufficient level of procedural rules aimed at providing protection against discrimination within the aforementioned acts represented an additional problem, so that not only competent authorities but also regular courts were in two minds about the implementation of material legal norms. Motivated by those problems, the demands for efficient harmonisation of the national legislation, the need for necessary education of judges as to desirable effects of anti-discrimination legislation, and the practice of the European

<sup>6</sup> Article 125(1) of the Penal Act, Official Gazette of Croatia 125/11, 144/12, 56/15 and 61/15.

<sup>7</sup> Act on Service in the Armend Forces, Official Gazette of Croatia 73/13 and 75/15.

<sup>8</sup> Act on Civil Servants, Official Gazette of Croatia 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 1/15 and 138/15.

<sup>9</sup> Labour Act, Official Gazette of Croatia 93/14.

<sup>10</sup> Act on Vocational Rehabilitation and Employment of Persons with Disabilities, Official Gazette of Croatia 157/13 and 152/14.

<sup>11</sup> Gender Equality Act, Official Gazette of Croatia 116/03. Gender Equality Act followed an unusual path. It was adopted in 2003, but it was repealed on 16 January 2008 by the decision of the Constitutional Court (UI/2696/2003, Official Gazette of Croatia 14/2008) due to a failure in the procedure of its enactment provided for an organic law, i.e. the fact that it was not adopted by a qualified majority vote of all the members of the Croatian Parliament. It was put out of force on 15 July 2008, i.e. on the same day when a new Gender Equality Act (Official Gazette of Croatia 82/08) entered into force.

<sup>12</sup> Same-Sex Cohabitation Act, Official Gazette of Croatia. 116/03.

<sup>13</sup> The Act guaranteed only the right to mutual support and joint possession.

<sup>14</sup> M. Vinković (2010) 'New Croatian Anti-Discrimination Legislation – Harmonisation with the Acquis or even more?' in: K. Klima, G. G. Sander (eds.) *Grund- und Menschenrechte in Europa, Schriften zu Mittel- und Osteuropa in der Europäischen Integration*, Hamburg: Verlag Dr. Kovač p. 100-101.

<sup>15</sup> Same-Sex Civil Partnership Act, Official Gazette of Croatia 93/14.

Court of Justice and the European Court of Human Rights of the Council of Europe, the Government of the Republic of Croatia finally started to make a unique regulation. Being aware of the obstacles it would definitely come across, it did not abandon the idea of developing a legal framework to combat the discrimination in the fields of employment and occupation, education, science and sports, social security, social welfare, retirement and health insurance, unemployment insurance, health protection, judiciary and administration, housing, access to goods, services and information, as well as their provision/supply, membership and activity in unions, political parties and non-governmental organisations and access to participation in cultural and artistic creativity.<sup>16</sup>

The adoption of the Act for Combat of Discrimination, however, did not imply an automatic repeal of the provisions laid down in previously mentioned acts, but it imposed an additional level of responsibility on the national legislator. It is primarily reflected in the need for the necessary and prompt mutual harmonisation of the national regulations, repeal of interwoven, partly non-harmonised provisions from different national sources, i.e. an inevitable effort aimed at serious and responsible nomotechnical attempts at horizontal harmonisation of the national regulations as a *modus vivendi* of providing the efficient legal protection and raising the level of quality of national legal practice in this field.

## 1.2 Assessment of the Legal Framework

The 2008 Anti-Discrimination Act constitutes the legal basis for the protection against discrimination. The Anti-Discrimination Act enables protection and promotion of equality as the highest value of a constitutional order and develops prerequisites for achieving equal opportunities and regulating the protection against discrimination.<sup>17</sup> Provisions of the Act do not differentiate *expressis verbis* between formal and material equality, but the contents of other provisions clearly indicate differentiation of the equal treatment in the same or similar cases as well as a possibility of anticipating different social relations which place or which have historically placed a certain group in a more unfavourable position, so that it is *pro futuro* necessary to correct earlier discriminatory effects and inequalities.<sup>18</sup> The list of the legal bases for the prohibition of discrimination is rather extensive and it comprises: racial or ethnic origin or skin colour, language, religion, political or other belief, national or social origin, property, union membership, education, social status, marital or family status, age, health condition, disability, genetic inheritance, birth identity, and expression and sexual orientation.<sup>19</sup>

From a conceptual point of view, the legislator was not burdened by various semantic considerations of the concepts of equality and non-discrimination, but by efforts to view realisation of the equal opportunities through a discourse of what Connolly denotes as behaviour that has a desirable or undesirable harmful effect on the protected group or an individual.<sup>20</sup> By such approach he easily accepted and formed conceptual definitions of direct and indirect discrimination, and for the first time in Croatian legislation he developed the concept of multiple discrimination committed on the grounds of several legal bases, repeated discrimination committed several times and prolonged discrimination that was committed through a longer

<sup>16</sup> Proposal of Anti-Discrimination Act with Explanations, Ministry of Family, Veterans' Affairs and Intergenerational Solidarity, Zagreb, May 2008, p. 8.

<sup>17</sup> Article 1(1) of the Anti-Discrimination Act.

<sup>18</sup> Article 9(2)2 of the Anti-Discrimination Act.

<sup>19</sup> M. Bell (2003), 'The Right to Equality and Non-discrimination' in: T. K. Harvey and J. Kenner (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights*, Oxford, p. 92-94.

<sup>20</sup> M. Connolly (2006), *Discrimination Law*, London: Sweet and Maxwell, p. 1.

period of time or that severely affects the victim.<sup>21</sup> A significant novelty is that the segregation is considered discrimination by the Act, but in our opinion the most significant and substantial error crept into the definition of segregation as “forced and systematic separation of persons on the basis of the prohibition of discrimination”.<sup>22</sup> Diction of the related provision suggests cumulative existence of two elements necessary for identification of segregation as a form of discrimination, i.e. “force” and at the same time and together with that “systematic separation” on the basis of the prohibition of discrimination. The existing material and legal framework has thereby left significantly less room for manoeuvres as to interpretation of competent bodies and courts in situations when the two elements are not present, i.e. when the segregation is a result of the indirect discrimination. It has to be admitted that the provision subsumed even in this way represents a certain step forward in relation to the practice of the European Court of Justice and the secondary legislation of the Community. However, it ensures quite unsafely and insufficiently the path to protection in cases of segregation that is not a result of force, but rather of social behaviour and prejudice conditioned by acceptance of a certain practice as usual and normal, but that undoubtedly has discriminatory consequences.

The definition of “harassment” and “gender harassment” follows the relevant provisions of the secondary sources of the Union and the definitions laid down in earlier national legislation (Labour Act and Gender Equality Act), but it repeats the persistent etymological and substantial mistakes of the legislator that translates “sexual harassment” as “gender harassment”. Such approach entirely recklessly narrows down the range of protection, since it is the behaviour predetermined by affiliation to a certain gender that is taken as the basis of harassment, and not the sexual behaviour/harassment which does not have to be initiated by a person of a different gender, but also by a person of the same gender.<sup>23</sup> In other words, the current diction of the law, even according to the grammatical interpretation, would suggest that by gender harassment the essential element of determination is the gender of a harassment recipient or the gender of a harasser, and not unwanted sexual, verbal, nonverbal or physical conduct of the harasser towards the harassment recipient, that causes fear, hostile, humiliating or offending environment. Nuancing referred to above, is a result of sometimes incomprehensible efforts aimed at achieving linguistic purity of regulations and imprudent insistence on terms that are allegedly immanent to the Croatian language, even in cases when their usage may significantly change the meaning of certain institutes or restrict their interpretative potential. Trying to justify such linguistic approach, Potočnjak observes the given situation through a discourse of the prohibition of harassment based on sex, which places stress on the gender of a recipient or a harasser, while by sexual harassment stress is put on sexuality.<sup>24</sup> However, the aforementioned cannot be clearly read from the relevant provisions. In the corresponding provision the legislator adopted criticism of the legal science<sup>25</sup> that by harassment and sexual harassment “unwanted” conduct must be involved, so that this was also incorporated into a legal definition.<sup>26</sup>

<sup>21</sup> See Article 6(1) of the Anti-Discrimination Act.

<sup>22</sup> See Article 5(1) and (2) of the Anti-Discrimination Act.

<sup>23</sup> S. Vasiljević (2003), ‘Spolno uznemiravanje’ in: Siniša Rodin, (ed.), *Jednakost muškarca i žene, pravo i politika u EU i Hrvatskoj*, Zagreb: IMO, p. 134.

<sup>24</sup> Ž. Potočnjak (2007), ‘Zabrana diskriminacije, uznemiravanja i spolnog uznemiravanja u radnim odnosima’, in: Ž. Potočnjak, (ed.), *Radni odnosi u Republici Hrvatskoj*, Zagreb: Faculty of Law Zagreb, p. 71.

<sup>25</sup> Ž. Potočnjak (2007), ‘Zabrana diskriminacije, uznemiravanja i spolnog uznemiravanja u radnim odnosima’, in: Ž. Potočnjak, (ed.), *Radni odnosi u Republici Hrvatskoj*, Zagreb: Faculty of Law Zagreb, p. 70.

<sup>26</sup> M. Vinković (2010) ‘New Croatian Anti-Discrimination Legislation – Harmonisation with the Acquis or even more?’ in: K. Klima, G. G. Sander (eds.) *Grund- und Menschenrechte in Europa, Schriften zu Mittel- und Osteuropa in der Europäischen Integration*, Hamburg: Verlag Dr. Kovač, p. 105-106.

The Anti-Discrimination Act came under a justified criticism because of a large number of reasons for the exclusion of the illegality principle that the European Commission warned about,<sup>27</sup> and its amendments of 2012 provided that after the Croatia's accession to the EU those provisions will no longer be applied that made it possible, by the rules of actuarial mathematics and statistical evaluation, to contract various insurance premiums based on age and gender.<sup>28</sup> Exceptions to the prohibition of discrimination refer to treatments specified by the law and are oriented towards health protection and prevention of offences and misdemeanours, but only under the condition that the applied means are appropriate and necessary for the goals to be achieved.<sup>29</sup> Positive measures of *in favorem* improvements of the position of the religious, linguistic, ethnic or other minorities and groups of citizens also create an exception to the prohibition of discrimination,<sup>30</sup> as well as favouring pregnant women, the children, the young, the elderly, dependent persons and persons with disabilities, in case this is based upon the law, a by-law, a measure or an adopted programme.<sup>31</sup> In the field of employment discrimination is excluded in cases in which the foundations of the prohibition of discrimination represent an actual and deciding condition for doing work, with the legitimate objective and the proportionate requirement.<sup>32</sup> The same standard is also present with respect to getting employment, joining a membership and acting in accordance with the nature and mission of the church and a religious community that is recognised as such in the Republic of Croatia and recorded accordingly in a corresponding register, as well as other public and private organisations whose activities do not oppose the Constitution, it is in accordance with positive regulations of the country and represents requirements of the religious doctrine, beliefs or goals.<sup>33</sup>

## 2. Institutional Framework for Combating Discrimination

Implementation of the Anti-Discrimination Act in the previously specified fields covers all state bodies, local and regional self-government bodies, legal persons with public authorities as well as all legal and natural persons.<sup>34</sup>

### 2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination

Upon the entry into force of the Anti-Discrimination Act the position of the Ombudsman of the Republic of Croatia,<sup>35</sup> that becomes the central body competent to combat discrimination, has been redefined *mutatis mutandis*. Pursuant to constitutional provisions, the Ombudsman certainly operates as a plenipotentiary of the Croatian Parliament, i.e. the highest legislative body,<sup>36</sup> and protects the legal and the constitutional rights of the citizens before the bodies of

<sup>27</sup> M. Vinković (2010) 'New Croatian Anti-Discrimination Legislation – Harmonisation with the Acquis or even more?' in: K. Klima, G. G. Sander (eds.) *Grund- und Menschenrechte in Europa, Schriften zu Mittel- und Osteuropa in der Europäischen Integration*, Hamburg: Verlag Dr. Kovač, p. 105-106.

<sup>28</sup> Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>29</sup> Article 9(2)1 of the Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>30</sup> Article 9(2)2 Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>31</sup> Article 9(2)3 Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>32</sup> Article 9(2)4 Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>33</sup> Article 9(2)5 Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>34</sup> Article 6 Amendments to the Anti-Discrimination Act, Official Gazette of Croatia. 112/12.

<sup>35</sup> See at <http://ombudsman.hr/en/> (05.03.2016).

<sup>36</sup> See also Ombudsman Act, Official Gazette of Croatia 76/12.



public administration and other bodies with public powers.<sup>37</sup> The new anti-discrimination legislation extends its jurisdiction substantially within formerly specified constitutional frameworks and the mission of human rights protection. Provision of appropriate protection against discriminatory treatment and fulfilment of newly-defined obligations will definitely have an influence on the increase in the volume of work at the Office of the Ombudsman and necessitate its additional professional and scientific equipping.

All bodies as well as the natural and legal persons that the provisions of the Act apply to are obliged under the explicit norm to report a reasonable suspicion of discrimination to the Ombudsman of the Republic of Croatia, or when discrimination refers to their field of activity, to the Gender Equality Ombudsperson,<sup>38</sup> the Ombudsperson for Persons with Disabilities<sup>39</sup> and the Ombudsperson for Children.<sup>40</sup> However, filing a discrimination report is possible only with the consent of the person who is allegedly a victim of discrimination.<sup>41</sup> We fear that the provision stipulating prior consent of the victim subsumed in this way leaves open the possibility of abuse in cases when the competent authorities, the natural and the legal persons fail to carry out their duties and when it *de facto* derogates from the fundamental mission of the law – protection against discrimination and permanent combat against discrimination. In addition, in a number of cases it can be expected that victims of discrimination will deny their consent due to fear of further stigmatisation, attempt to protect their workplace, keep their jobs and protect their family members or the right to intimacy and privacy of their family life. A special problem is represented by discrimination cases in which victims are children, since they leave open a whole set of issues. Giving consent in the aforementioned cases might be impeded, primarily if there exist opposing interests of a child and a parent or if the case must be conducted in secrecy to protect child's privacy and respect the international standard in "the best interest of the child" set forth in the Convention on the Rights of the Child of 1989. Situations like these would require additional activities by social welfare centres and the Ombudsperson for Children as to finding a legal framework of activities that will satisfy both formal assumptions and interests aimed at protecting the psycho-physical integrity of the child and his/her legal position.<sup>42</sup>

## 2.2 Stakeholders Putting Combating Discrimination into Practice

As a central national body, the Ombudsman carries out a two-fold function: the prevention and research and is proactively directed toward bringing legal actions by all natural and legal persons, providing necessary information with respect to rights and obligations of victims as well as possibilities of their court and any other protection.<sup>43</sup> In case the court proceedings have not been initiated yet, the Act gives him/her the possibility to examine the individual reports and take actions falling within the scope of his/her competence required for *in favorem* elimination of discrimination and protection of rights of discriminated persons. With the parties' consent, he/she can conduct mediation with a possibility of reaching an out-of-court settlement and file criminal charges related to discrimination cases to the competent

<sup>37</sup> Article 92 of the Constitution of Republic of Croatia, Official Gazette of Croatia 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

<sup>38</sup> See at <http://www.prs.hr/index.php/english> (05.03.2016).

<sup>39</sup> See at [http://www.posi.hr/index.php?option=com\\_content&view=category&layout=blog&id=128&Itemid=191](http://www.posi.hr/index.php?option=com_content&view=category&layout=blog&id=128&Itemid=191)

<sup>40</sup> See at <http://www.dijete.hr/websites/dijete.hr/index.php/hr/english/documents.html> (06.03.2016)

<sup>41</sup> Article 10(1) of the Anti-Discrimination Act.

<sup>42</sup> M. Vinković (2010) 'New Croatian Anti-Discrimination Legislation – Harmonisation with the Acquis or even more?' in: K. Klima, G. G. Sander (eds.) *Grund- und Menschenrechte in Europa, Schriften zu Mittel- und Osteuropa in der Europäischen Integration*, Hamburg: Band 10, Verlag Dr. Kovač, p.109-110.

<sup>43</sup> Article 12(2) 1 and 2.

state attorney's office.<sup>44</sup> For that purpose, all bodies and natural and legal persons shall, on penalty of a fine and within 15 days, provide all the information and requested documents pertaining to discrimination cases at the request of the Ombudsman or the Gender Equality Ombudsperson, the Ombudsperson for Persons with Disabilities and the Ombudsperson for Children.<sup>45</sup>

In the capacity of the Equality Body, the Office of the Ombudsman of the Republic of Croatia is increasingly trusted across the country. Its outreach has been improved, including through the opening of regional offices in Rijeka, Osijek and Split.

According to his/her prevention and research function, the Ombudsman shall warn the public about the occurrence of discrimination, inform the Parliament on the occurrence of discrimination in his/her annual and special reports, collect and analyse statistical data on discrimination cases and conduct surveys concerning discrimination as well as give recommendations suggesting appropriate legal and strategic solutions to the Government of the Republic of Croatia. The latter clearly implies the possibility of the legislative initiative attributed to the executive power, whereby the Office, *pro futuro* and with consideration of competent authorities, might gain more importance and achieve better active profiling into not only the central body for combat against discrimination, but also in the instance that based upon the observed problems, proposes creation of new frameworks for further activity aimed at protection of the equality of every individual and group. Thus the substance of the said provisions has the potential of permanent profiling of a broad proactive role of the Office of the Ombudsman. However, its activity would be significantly aggravated and made technically unfeasible without defining the obligations of the other national authorities. In this way all judicial bodies shall keep records of the court cases related to discrimination and of the discrimination grounds for conducting the proceedings.

The Office of the Ombudsman of the Republic of Croatia is located in Zagreb, but disposes three staffed regional offices in the cities of Osijek, Rijeka and Split. The above is particularly important due to the availability of office and providing the necessary legal assistance in all parts of Croatia, and especially in the cases examining citizens' complaints concerning the conduct of the relevant bodies, because the Ombudsman promote and protect human rights and freedoms and the rule of law by examining the complaints of the existence of unlawful practices and irregularities, with respect to the work of the governmental bodies, bodies of local and regional self-government units, legal persons vested with public authority and legal and natural persons in accordance with special law.<sup>46</sup>

### 2.2.1 Equality Body/Bodies

Special Ombudspersons for gender equality, for persons with disabilities and for children, shall keep records and statistical data on the discrimination cases falling within their competence, and when drawing up regular annual reports, opinions and recommendations on the occurrence of discrimination, the Ombudsman of the Republic of Croatia shall consult social partners and non-governmental organisations dealing with the protection of human rights, the organisations dealing with the protection of groups exposed to a high risk of discrimination, as well as churches and religious organisations entered in the Register of Religious Congregations of the Republic of Croatia and the National Minorities Council.<sup>47</sup>

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<sup>44</sup> Article 12(3), (5) and (6).

<sup>45</sup> Article 10(2) and 27(1) and (2).

<sup>46</sup> Article 4 of the Ombudsman Act.

<sup>47</sup> Cf. Articles 14 and 15.

The experience gained by those organisations will have a significant influence on the quality of the work and of the annual reports submitted by the Ombudsman, offering legitimacy to their substance and witnessing the necessity of a broader social activity as to identification of risky discriminatory behaviour and practice, which either implicitly or explicitly deviates from the principle of equal treatment. Moreover, because of the numerous legal bases for the prohibition of discrimination, that are at the same time followed with great difficulty, co-operation with the civil sector, social partners, religious organisations and representatives of the national minorities will save resources and facilitate the work of the Office of the Ombudsman, providing thereby specific data and emphasising the observed particular problems.

### 2.2.2 Ombud Institution(s)

Disability Ombudsman's Office of the Republic of Croatia was established on 1 July 2008 as an independent state institution reporting to the Parliament. The office has a broad mandate which involves the following main functions: 1) dealing with the complaints of persons with disabilities and children with developmental difficulties on all matters and in all areas towards both government agencies and private entities, 2) monitoring the compliance of the acts and regulations with legally binding international documents in the field of protection of rights of persons with disabilities primarily UN Convention on the Rights of Persons with Disabilities, and 3) proposing amendments to the acts and regulations pertaining to the rights of persons with disabilities.<sup>48</sup> In 2014 the Ombudsman for Persons with Disabilities had 1713 complaints (individual objects, various requests and complaints by telephone and e-mail) in order to protect the human rights of persons with disabilities 2314 procedures (making recommendations, opinions, warnings, advising, search statements and other interventions).<sup>49</sup>

According to the Croatian Law, the responsibilities of the Gender Equality Ombudsperson include: 1) receiving complaints from any natural persons or legal entities regarding discrimination in the area of gender equality; 2) providing assistance to natural and legal persons who filed a complaint of sexual discrimination when instituting legal proceedings; 3) taking steps to investigate individual complaints prior to the legal proceedings; 4) conducting, with the consent of the parties involved, a mediation process with a possibility to reach an out-of court settlement; 5) collecting and analyzing statistical data on cases of sexual discrimination; 6) conducting independent surveys concerning discrimination, publishing independent reports and exchanging available information with corresponding European bodies.<sup>50</sup> However, the Croatian Government established the Office for Gender Equality as an official professional state service for carrying out tasks relating to the realization of gender equality (coordination of all activities, the approval of the plan of action for relevant legal persons and bodies, development of a national policy of gender equality etc.).

### 2.2.3 Intermediaries

By defining the Ombudsman as a central body for combat against discrimination, defining the scope of its activity and necessary co-operation with judicial authority bodies, non-governmental sector, religious organisations, national minorities and social partners, the legislator has fulfilled all requirements following from the EU secondary legislation with regards of setting up of a special body,<sup>51</sup> and in terms of organisation, he has tried to

<sup>48</sup> Disability Ombudsman Act, Official Gazette of Croatia 107/07.

<sup>49</sup> Croatia/Pravobraniteljica za osobe s invaliditetom, *Izvešće o radu 2014*, pp. 10-11.

<sup>50</sup> Article 19 of the Gender Equality Act.

<sup>51</sup> See for example Article 13 of the Council Directive 2000/43/EC.

constitute an efficient platform for the operation of bodies with a broadly defined range of tasks aimed at the combat against the unequal treatment. He has taken care of not only the necessary horizontal co-operation among related bodies, whose activity in the area under consideration overlaps and who have common points of reference, but also respect for the organisational principles based upon the “*top down*” and the “*bottom up*” principle. The latter is manifested best in the part in which the combat against discrimination surpasses the framework of the Ombudsman and goes into the sphere of judicial authority.

#### 2.2.4 Police

The Police on the basis of the Croatian legislation has sufficient legal framework for action in cases of discrimination, incitement to hatred and intolerance, hate speech, etc. Recently, we can conclude that the projects are encouraged to strengthen the cooperation between the police and citizens in a variety of topics,<sup>52</sup> including the application of the various forms of violence and unlawful treatment of citizens, but we do not have reliable data about the success of such cooperation. Cooperation between the police and non-governmental organizations needs to be continuously strengthened. Police regularly issues indictments for violations of the Anti-Discrimination Act.

#### 2.2.5 Other Relevant Stakeholders

In recent years the Croatian Trade Unions were successfully involved in various projects and researches on discrimination in the labour market and the results of the survey were regularly introduced to the public. Some studies have been financed thanks to the financial support of the ILO, as well as some of the Member States of the European Union. Thus, the Independent Croatian Trade Union, ten years ago, thanks to the Government of Belgium and the International Labour Organization (ILO) participated in the survey on the situation of women in the labour market of the countries of Central and Eastern Europe.<sup>53</sup> The Alliance of Independent Croatian Unions published an extensive guide “How to recognize gender discrimination in practice - and how to be protected?”.<sup>54</sup>

Tourism and Services Trade Union of Croatia and a number of other trade unions, together with the Associations of the young, the volunteer network and the volunteer centers, focused on the situations of the young workers and their discrimination in the labour market. Together they organized series of workshops and trainings intended to associations of the young in order to successfully fight against the discrimination on the labour market.<sup>55</sup>

The role of NGOs in the promotion and the protection of the LGBT people, including the protection against discrimination in the labour market, is extremely important from the standpoint of a functional assistance through the legal and psychological counselling, systematic support and promotion of rights of the LGBT people, monitoring of violence and especially sensitising of the public that only in the recent years does not approach the subject as a taboo.<sup>56</sup> In this regard, relevant associations act through the Centre for LGBT Equality

<sup>52</sup> See at <http://www.mup.hr/224906.aspx> (25.03.2016).

<sup>53</sup> See at [http://www.nhs.hr/onama/odbor\\_zena/diskriminacija/](http://www.nhs.hr/onama/odbor_zena/diskriminacija/) (10.03.2016).

<sup>54</sup> See at [http://www.sssh.hr/upload\\_data/site\\_files/vodic\\_prs\\_knjizni\\_blok\\_prijelom\\_2.pdf](http://www.sssh.hr/upload_data/site_files/vodic_prs_knjizni_blok_prijelom_2.pdf) (15.03.2016).

<sup>55</sup> See at <http://www.stuh.hr/novosti-detelji/diskriminacija-mladih-na-radnom-mjestu/1009> (11.03.2016).

<sup>56</sup> At the end of 2012, with the assistance of the Embassy of the United Kingdom, the Gender Equality Ombudsman of the Republic of Croatia organised a round-table discussion entitled “The position of same-sex unions - a new legal framework” as a sort of introduction to identify the problems that LGBT people face in the exercise of their rights due to the deficiencies of the then legal framework and unequal treatment of same-sex unions, i.e., their members, as family members in the realisation of their

such as an activist alliance that works to achieve equality for LGBT people in Croatia, the Regional Lesbian Network and the Women's Network of Croatia.

## 2.3 Mapping the Cooperation among Stakeholders

### 2.3.1 Equality Body/Bodies

Strengthening the cooperation between the Ombudsman and the civil society is evident through the inclusion of the civil society representatives in the National Preventive Mechanism against Torture and Other Cruel and Degrading Treatment, as well as in the work of the Human Rights Ombudsman Council. Cooperation with the Civil Sector is mainly related to the organization of various events, initiatives and projects in the field of combating discrimination.

### 2.3.2 Ombud Institution(s)

Annual reports of the Croatian Ombudsperson, the Ombudsperson for Gender Equality, the Ombudsperson for the Disabled and the Ombudsperson for Children provide accurate information on the cooperation with the civil society, the police and other stakeholders. No less important, from these annual reports submitted to the Parliament the public and in particularly scientific and professional community get the most accurate insight into the number of cases they have faced, scope of work, the protection of human rights, statistics, discrimination on racial and ethnic origin, discrimination in labour and employment, discrimination against the elderly, discrimination in education, as well as discrimination on the public space and the media.

The cooperation between the Ombudsman and the Special Ombudsman generally refers to a joint work on individual cases and the referral of cases under the jurisdiction of a Special Ombudsman. To issues of common interest is paid particular attention, because they are organizing joint meetings, visits to relevant institutions and the like.<sup>57</sup>

### 2.3.3 Intermediaries

Thanks to the financial assistance provided by the European Union and in cooperation with the Independent Trade Union of Croatia, the associations “Kontra” and “Iskorak” have developed a guide “Together for LGBT Equality in the Workplace” as a practical and comprehensive guide that aims to strengthen the capacity of the trade unions, employers and local authorities to promote equality and combat discrimination against the LGBT people in the workplace, including practical information on the legal sources, institutions and a way to enjoy institutional protection.<sup>58</sup> A manual for the trade unionists entitled “Invisible workers – how to protect LGBT individuals in the workplace” was also published within the framework of the same the same project, and according to which only 17.2% of LGBT employees are members of the Croatian Trade Unions.<sup>59</sup>

### 2.3.4 Police

Cooperation of the Ombudspersons with the police is important because of the complaints of violations of the right to equal treatment, hate speech, violence-related discriminations, violence at sporting events, which is motivated by discrimination and the like. Such cases the police regularly reports to the Office of the Ombudsman.

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health, pension and social security rights. Available at: <http://www.prs.hr/index.php/suradnja/ocd-3/512-okrugli-stol-polozaj-istospolnih-zajednica-novi-pravni-okvir> (01.03.2016).

<sup>57</sup> Croatia/Pučka pravobraniteljica (2014) *Izveštaj o radu za 2014*.

<sup>58</sup> Available at: [http://kontra.hr/cms/documents/Vodic\\_layout.indd.pdf](http://kontra.hr/cms/documents/Vodic_layout.indd.pdf) (01.02.2016).

<sup>59</sup> M. Vinković (2015) ‘Sexual orientation in the Croatian labour market’, in: *Pecsi Munkajogi Közlemények*, Vol. VIII, No. I-II, p. 113-128.

### 3. The Role of Courts in Combating Discrimination

The general and the special jurisdiction of the national courts are stipulated in the Judiciary Act and other special laws (e.g. the Civil Procedure Act (CPA) and Criminal Procedure Act). The judicial power in the Republic of Croatia is exercised by the regular and the special courts.<sup>60</sup> Regular courts include the municipal courts and the county courts. The highest judicial authority is the Supreme Court of the Republic of Croatia. The municipal courts are vested with a general and broad open-ended catalogue of competences. In the civil proceedings, they adjudicate in the first instance in the disputes relating to civil, family, labour, housing and other areas of law, which are not in the first instance the jurisdiction of other courts in accordance with the special laws.<sup>61</sup> Pursuant to the ADA, the municipal courts have subject-matter jurisdiction in litigation based on the special legal action for protection against discrimination.<sup>62</sup> County courts adjudicate first-instance disputes prescribed by law and decide on the appeals against decisions of the municipal courts. In the field of equality law, county courts have a subject-matter jurisdiction for joint legal actions (representative actions) for protection against discrimination. The Supreme Court is the highest judicial authority, whose task is to ensure the uniform application of laws and the equality of all before the law.<sup>63</sup> In the civil proceedings, its authorities include deciding on appeals against first-instance decisions of county courts and revisions as extraordinary legal remedies against (final and binding) second-instance decisions, in cases prescribed by law. The Constitutional Court of the Republic of Croatia decides on the compliance of the laws with the Constitution, compliance of other regulations with the Constitution and with laws, and on constitutional claims against individual decisions taken by government agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.<sup>64</sup>

The competences of the Constitutional Court of the Republic of Croatia are, among others: to decide on the conformity of laws with the Constitution; to decide on the conformity of other regulations with the Constitution and laws; to decide on the constitutional complaints against individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms or the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia; and to ensure that constitutionality and legality are observed and to notify the Croatian Parliament when instances of unconstitutionality and illegality are observed.<sup>65</sup>

A victim of discrimination can seek protection through judicial proceedings – civil and/or criminal (both adjudicated by ordinary courts) and/or misdemeanor (for less serious offences adjudicated by misdemeanor courts). In the civil proceedings a victim of discrimination can file a claim seeking protection of his/her individual rights claiming that a right has been violated on account of discrimination (incidental anti-discrimination protection) or a claim seeking a ruling on the existence of discrimination as the main issue (special individual anti-discrimination action). In the latter case the victims can ask for: - determination of the existence of discrimination

<sup>60</sup> Article 14(1) and (2) of the Judiciary Act.

<sup>61</sup> Article 34(2) of the Civil Procedure Act.

<sup>62</sup> Article 17(1) and Article 18(1) of the Anti-Discrimination Act.

<sup>63</sup> Article 116 of the Constitution of the Republic of Croatia.

<sup>64</sup> Article 125 of the Constitution of the Republic of Croatia, Official Gazette of Croatia 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014.

<sup>65</sup> Article 1 of the Constitution of the Republic of Croatia, Official Gazette of Croatia 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014.

(declaratory anti-discrimination claim); and/or - prohibition of discrimination (prohibitive anti-discrimination claim); and/or - elimination of discrimination or its effects (restitutional anti-discrimination claim); and/or - damages for the harm caused by discrimination (reparational anti-discrimination claim); and/or - publication of the decision determining the existence of discrimination (publicational anti-discrimination claim).<sup>66</sup>

The Anti-discrimination Act does not provide any rules on compensation and the general rules of the Civil Obligations Act and its tort provisions (i.e. its provisions on damage and compensation) are to be applied. Under these rules, in the event of a violation of personality rights the court shall, when it finds that this is justified by the seriousness of the violation and circumstances, award fair compensation. When deciding on the amount of a fair pecuniary compensation, the court shall take into account the degree and the duration of the physical and mental distress and fear caused by the violation, the objective of this compensation and the fact that it should not encourage expectations that are not compatible with its nature and social purpose. The rule makes no difference between the private or the public employment and the fields outside employment. Criminal offences of discrimination are prosecuted *ex officio*. If the State Attorney's Office decides not to prosecute, a victim is authorised to take over the prosecution of the case as a subsidiary prosecutor. The sanction is imprisonment for up to three years. The ADA specifies misdemeanor liability for harassment, sexual harassment and victimisation. A fine is imposed on natural persons, responsible persons in legal entities, craftsmen and persons performing independent business activities and legal persons, while different levels of fine are set for different categories (from EUR 684.93 to EUR 41 095.89 for harassment and from EUR 684.93 to EUR 47 945.20 for sexual harassment).<sup>67</sup>

A victim of discrimination can file a complaint with the Ombudsman as the central body responsible for anti-discrimination. If a person faces discrimination by an administrative act he/she can file a complaint with the Administrative Court of the Republic of Croatia, which is authorised to review the legality of the administrative acts. An organisation, institution, association or another person that, within its scope of activities deals with the protection of the right to equal treatment in relation to groups whose rights are decided upon in the proceedings, is entitled to act on the behalf or in support of the victims of discrimination. According to the Anti-discrimination Act a person bringing an anti-discrimination claim (in civil and administrative proceedings) has to prove that discrimination has probably occurred. It is then up to the defendant to prove that it did not. The Act does not exclude this rule in cases of harassment and victimisation.<sup>68</sup>

The national law is silent in respect of the use of situation testing. It does not explicitly permit the use of situation testing; it does not define it or establish procedural conditions for or limitations to the admissibility of such evidence in court. However, there are no obstacles, in anti-discrimination law or in civil procedural legislation, to the use of the testing. National law does not explicitly permit the use of statistical evidence; therefore, it does not define it nor establish procedural conditions for the admissibility of such evidence in court or any

<sup>66</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-ln-final> (30.03.2016).

<sup>67</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-ln-final> (30.03.2016).

<sup>68</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-ln-final> (30.03.2016).

limitations. However, there are no obstacles, in anti-discrimination law or in civil procedural legislation, to the use of statistical evidence.<sup>69</sup>

In misdemeanor cases the sanctions imposed by the courts are neither effective nor proportionate nor dissuasive. Misdemeanor judges, as a rule, mitigate sentences set up by law so the usual sentence is between EUR 40 and 400. The severity of the offence, circumstances and consequences are often ignored. Sanctions are mitigated even when the act of discrimination is done publicly (e.g. through a social network or at a public meeting), when there are more victims and when the victim is especially vulnerable. Victims of discrimination are reluctant to use the anti-discrimination remedies for several reasons. The chances of success are very low. In 2014, 22 civil anti-discrimination cases were closed and in none of them discrimination was found. Proceedings before the Croatian courts rarely satisfy the standards of fairness in respect of the reasonable time principle. The proceedings usually last so long that remedies cannot be considered effective. For example, although the law clearly states that employment disputes should be decided in the first instance in six months, as a rule such proceedings in courts in bigger cities last for several years. Claimants face difficulties in proving discrimination since the rule on burden of proof is not always implemented. The case law of municipal and county courts, the main source of judicial interpretation of often very wide legal provisions, is not published and therefore unavailable to potential claimants. The case law is still not clear regarding the issue of intent as an element of discrimination and judges are reluctant to find discrimination if the discriminator did not show any intention to violate a victim's right.<sup>70</sup>

In spite of the provision of the ADA that in anti-discrimination cases appeal on points of law (*revizija*) is always admissible, the Supreme Court has in 2014 decided in six cases (and the total number of anti-discrimination cases in that period before that court was seven) in which the appeals on points of law were filed, that appeals on points of law were inadmissible because they did not fulfill the criteria for the extraordinary appeal on points of law (*izvanredna revizija*), the remedy being admissible rarely and only in exceptional situations, and, according to the Supreme Court, the only appeal to the Supreme Court admissible in anti-discrimination cases is when the value of the case is above the statutory threshold for lodging an appeal on points of law.<sup>71</sup>

### 3.1 Capacities of Courts in Combating Discrimination

Nada Bodiřoga-Vukobrat and Adrijana Martinović assess that “[t]he level of knowledge of EU anti-discrimination case law is relatively low, and so is the perception that it is indispensable for interpreting those rules. The primary hurdle is that the purposive or teleological interpretation applied by the CJEU differs from the traditional rule-based approach to interpretation inherent to the Croatian legal system. In this connection, Article 4 GEA appears especially important for the future development and application of the anti-discrimination legislation in Croatia. It explicitly stipulates that the provisions of that Act shall not be interpreted nor applied in a manner that would limit or reduce the content of the guarantees of gender equality arising from the general

<sup>69</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-In-final> (30.03.2016).

<sup>70</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-In-final> (30.03.2016).

<sup>71</sup> L. Kušan (2015) *Country report Non-discrimination Croatia Reporting period 1 January 2014 – 31 December 2014*, available at: <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-In-final> (30.03.2016).



rules of international law, the *acquis Communautaire*, the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Conventions on civil and political, as well as economic, social and cultural rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.”<sup>72</sup>

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

All judicial bodies are obliged to keep records of the court cases related to discrimination and discrimination grounds for conducting the proceedings, and submit them to the Ministry of Justice which is then obliged to forward them to the Ombudsman.<sup>73</sup> For this purpose the Ministry made special forms for keeping statistical records of the court cases related to discrimination and discrimination grounds based on which these proceedings are being conducted (hereinafter: forms). However, problems in collecting statistical data gathered through these forms and insufficiency thereof was noticed, what resulted in a development of a new statistical model as of 1 January 2012. The data on the number of court cases and final court decisions from 2010 to 2015 that can be traced in the Ombudsman Annual Reports that shows a visible increase of the number of misdemeanor proceedings related to the discrimination. Whereas the number of civil proceedings at first grew and later started to decline, the number of criminal proceedings has remained constantly low.<sup>74</sup> Despite the increasing number of judicial proceedings, the underreporting of discrimination remains a serious problem. According to the experts, lack of rights awareness, lack of trust in institutions and fear of further victimisation are the main reasons for underreporting. Insufficient access to free legal aid for the most disadvantaged members of the society continues to substantially limit the willingness of affected individuals to address the courts, as does the fact that the costs of the other party have to be covered by the plaintiff in a case of non-success.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

Systematic training programmes of judges, state attorneys and judicial advisors are organised by the Judicial Academy. The Act on Courts provides that judges should respond to the invitation of the Judicial Academy to participate as lecturers, workshop hosts and participants in the professional development programmes and that such engagement should be taken into account in evaluations and the promotions. Similar provisions exist for the State Attorneys. The Judicial Academy was established in 2004 as the institution within the Ministry of Justice in charge of the initial and continuous judicial training. It obtained the status of a public institution independent of the Ministry of Justice with the entering into force of the Judicial Academy Act on 1 January 2010. The Croatian Judicial Academy is the central national judicial training institution in charge of the following: (i) judicial training of trainees in judicial bodies (as a preparation for the Bar Exam); (ii) initial training of future judges and state attorneys (i.e. attendants of the State School for Judicial Officials which is

<sup>72</sup> N. Bodiřoga-Vukobrat, A. Martinović (2013) ‘Croatia’s Accession in the Light of Gender Equality’, in: *European Gender Equality Law Review* Vol. 1, 5-16, p. 8.

<sup>73</sup> Article 17 of the Anti-Discrimination Act.

<sup>74</sup> Pučki pravobranitelj (2015) *Izveřće pučke pravobraniteljice za 2014. godinu*, available at: [http://ombudsman.hr/hr/component/jdownloads/send/60-2014/668-izvjee-puke-pravobraniteljice-za-2014-godinu?option=com\\_jdownloads](http://ombudsman.hr/hr/component/jdownloads/send/60-2014/668-izvjee-puke-pravobraniteljice-za-2014-godinu?option=com_jdownloads) (30.03.2016.).

Pučki pravobranitelj (2016) *Izveřće pučke pravobraniteljice za 2015. godinu*, available at: <http://ombudsman.hr/attachments/article/789/IzvjecjeC5%A1%C4%87e%20pu%C4%8Dke%20pravobraniteljice%20za%202015.%20godinu.pdf> (30.03.2016.).

an integral part of the Judicial Academy); (iii) continuous judicial training of judges and state attorneys; and, (iv) judicial training of judicial advisors.

In 2012 the European Commission against Racism and Intolerance (ECRI) recommended that the authorities should increase their efforts to ensure appropriate initial and continuous training to judges, prosecutors, lawyers and police on applying, *inter alia*, the Anti-Discrimination Act. However, the ECRI considered that its recommendation on the continuous training of judges, prosecutors and lawyers on non-discrimination has been only partially implemented.<sup>75</sup> The issue of anti-discrimination is, according to the data delivered by the Judicial Academy, part of the continuous judicial training of judges, state attorneys and judicial advisors (*profesionalno stručno cjeloživotno usavršavanje*). It delivered through training activities organized for the judicial officials in form of workshops, seminars, round tables and conferences, and sometimes the professional training took the form of study visits and exchanges. The Judicial Academy offers education on anti-discrimination since 2009, either through training activities provided for judges and state attorneys (*Program stručnog usavršavanja pravosudnih dužnosnika*), or through international projects and cooperation activities. The data provided by the Judicial Academy disclose that in the period 2010-2015 a total of 202 judicial officials in the framework of the Lifelong Professional Training of Judicial Officials took part in the activities involving education on anti-discrimination law. In the period 2010-2015 a total of 60 judicial officials participated in international activities that involved education on anti-discrimination law.

The following training activities were delivered: in 2015 a round table for judges on the right to recognition of gender identity and sexual orientation (*Ostvarivanje prava na priznanje rodnog identiteta i spola*) (19 participants); in 2014 six workshops on the Anti-Discrimination Act and the Act on Gender Equality (*Zakon o suzbijanju diskriminacije i Zakon o ravnopravnosti spolova*) (72 participants) and one round table on the implementation of Anti-Discrimination Act in Croatia (*Primjena Zakona o suzbijanju diskriminacije u Hrvatskoj*) (11 participants); in 2013 one workshop for judges on the suppression of hate crime (*Suzbijanje zločina iz mržnje*) (6 participants) and in 2013 and in 2012 four workshops for judges on implementation of the Anti-Discrimination Act (*Provedba Zakona o suzbijanju diskriminacije*) (in total 68 participants); in 2011 one workshop for judges and state attorneys on suppression of hate crimes against LGBT persons (*Zajedno protiv diskriminacije LGBTIQ osoba*) (26 participants); in 2009 three seminars on implementation of the Anti-Discrimination Act (*Primjena Zakona o suzbijanju diskriminacije*) were held for judges and state attorneys (58 participants) and four seminar for judges on the capacity building and awareness raising on anti-discrimination legislation (*Izgradnja kapaciteta i podizanje svijesti sudaca i državnih odvjetnika o antidiskriminacijskom zakonodavstvu*) (19 participants). The aforementioned courses were dealing with the European and the domestic anti-discrimination legislation, provided information on discrimination related cases in order to develop a comprehensive understanding of the application of the standards by the various courts, expanded the understanding of certain provisions of the ADA (for instance, the shifting of the burden of proof), and informed about the means of the suppression of hate crimes against LGBT persons. The educators and lecturers providing the training on anti-discrimination legislation was either judges or attorneys specialized in anti-discrimination law, but also representatives from the Ombudsman institutions as well as representatives of academic institutions and experts from specialized CSOs. The data provided by the Judicial Academy suggests that

<sup>75</sup> ECRI (2015) *Conclusions on the Implementation of the Recommendations in Respect of Croatia subject to Interim Follow-up* available at: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-IFU-IV-2015-22-ENG.pdf>.

several handbooks were developed for the participants of the workshops, seminars, round tables and conferences as a tool for providing basic guidance to judges on anti-discrimination legislation and case law.

Although they acknowledge that the education of judges on anti-discrimination law is organised by the Judicial Academy, Nada Bodiřoga-Vukobrat and Adrijana Martinović argue that “[c]orresponding education of other participants and stakeholders in the judicial and administrative system is lacking.” They claim that “[g]reat responsibility lies on lawyers (attorneys at law) as well. It is precisely education of the latter which can contribute to the development and recognisability of protection against discrimination and compliance with the EU law and CJEU case law. Their education, however, primarily depends on individual ambition and assessment, although they are [...] capable of providing important incentive for the development of case law, by demanding the court to recognise international and European legal standards of protection in the course of representing their clients. Until this awareness is raised, the clients, even when represented by attorneys, often will only assert discrimination as a last resort in later stages of the proceedings, when submission of evidence and establishment of factual background is no longer possible (appellate proceedings, revision). Lacking proper advice, victims of discrimination might even refrain from initiating proceedings. Crucial for a proper understanding of EU anti-discrimination case law is a basic knowledge of the EU legal system. Croatian judges and other lawyers are still not quite familiar with the functioning of this system and consider it as an ‘intruder’ in the national legal order. Of special importance are the occasional conferences and workshops on specific aspects of judicial anti-discrimination protection, organised in academic circles and by civil society organisations.”<sup>76</sup>

## 4. Procedural Aspects in Discrimination Cases

### 4.1 Mediation

The Anti-discrimination Act grants the Ombudsperson the authority to carry out a mediation procedure, with the consent of the parties, with the possibility of an out-of-court settlement.<sup>77</sup>

### 4.2 Evidencing Discrimination

According to the standard principles of procedural law, the person that needs to prove the fact that is in his/her favour has the burden of proof (*onus probandi*), which means that she/he is obliged to prove the critical fact to a level of certainty. If this does not occur, the court will, applying the principles of the burden of proof, assume the rule that the fact that has not been proven does not exist. This can lead to the loss of the litigation (*actore non probante, reus absolvitur*). However, a person bringing an anti-discrimination claim (in civil and administrative proceedings) has to prove that discrimination has probably occurred. It is then up to the defendant to prove that it did not.<sup>78</sup> The claimant has to prove the probability of facts, on which the right to equal treatment and its violation depend. These facts need not be proven with the degree of certainty normally required from the party who bears the burden of proof.

<sup>76</sup> N. Bodiřoga-Vukobrat, A. Martinović (2013) ‘Croatia’s Accession in the Light of Gender Equality’, in: *European Gender Equality Law Review* Vol. 1, 5-16, p. 9-10.

<sup>77</sup> Article 12(2)5 of the Anti-Discrimination Act.

<sup>78</sup> Article 20 of the Anti-Discrimination Act.

### 4.3 Strategic Litigation

Associations, bodies, institutions or other organisations set up in accordance with the law and having a justified interest in protecting the collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment.<sup>79</sup> For example, in 2010, civil society organizations LORI, Domino, Zagreb Pride and the Center for Peace Studies, together with the Ombudsperson, filed class actions for discrimination against LGBT people - first such lawsuits in the history of the Croatian judiciary. The first class action was filed against the former president of the Croatian Football Federation Vlatko Marković, the second against the former vice president of Football Club Dinamo, Zdravko Mamić.<sup>80</sup> In the case against Marković the first instance judgment considered that he merely explained the established selection criteria and was not personally establishing them himself. Discrimination in this case was established only during the appeal process, after UEFA took action following the report of LGBTIQ CSOs, and imposed a 10,000 EUR fine on Marković. The Supreme Court ruled that by his statements Vlatko Marković discriminated against homosexuals, forbade him to make any statement to the media which could discriminate homosexual people in the same way and ordered him to publicly apologize. This judgment annulled the first instance judgment. In the case against Zdravko Mamić, the Supreme Court confirmed the first instance judgment that did not find discrimination in Mamić's statements. Strategic litigation in a form of a joint action represents a form of a collective protection of rights. Since discrimination was determined in one of the court proceedings, the court ruling has affected not only the parties in the proceeding but for all members of the group discriminated against.

### 4.4 Class Action/Actio Popularis

Alan Uzelac explained that “according to the general procedural regulations, a lawsuit can be filed jointly by several plaintiffs or against several defendants if the formal and subject-matter conditions for co-litigation have been met.”<sup>81</sup> In case a claim is made against discrimination of a wider scale, with a great number of potential plaintiffs, the ADA provides for an alternative – the possibility of bringing a class action for protection against discrimination.<sup>82</sup> Until the ADA was passed the institution of the class action only existed as an instrument for the protection of the consumer rights. Now this model has been extended to the anti-discrimination actions, which significantly enhanced the range of possibilities for the collective protection of rights (so-called abstract judicial protection), and, for human rights organisations, it opened up a new space for the promotion of the anti-discrimination protection through conducting of a strategic litigation.<sup>83</sup> However, “[t]he plaintiff has to have a legitimate interest in the protection of the rights of the members of this group, which means that the association or organization initiating the proceedings needs to prove that one of its goals is either the protection of the rights and interests of the group in question (for instance,

<sup>79</sup> Article 24(1) of the Anti-Discrimination Act.

<sup>80</sup> M. Juričić (ed.) (2013) *Pink Megaphone From Anti-Discrimination Act to the Constitutional Ban on Same-Sex a Report of Zagreb Pride on the Human Rights of LGBTIQ Persons in Croatia 2010-2013*, available at: <http://www.zagreb-pride.net/new/wp-content/uploads/2015/02/report2014.pdf> (30.03.2016.), p. 32. See also L. Kušan (2013) *Croatia - Decision on homophobic statements*, available at: <http://www.equalitylaw.eu/downloads/1548-hr-5-croatian-new-case-law-on-homophobic-statements> (30.03.2016.).

<sup>81</sup> Article 196 of the Civil Procedure Act.

<sup>82</sup> A. Uzelac (2009) ‘Proceedings before the court’, in T. Šimonović (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb : Ured za ljudska prava Vlade RH, p. 95-109, p. 103-104, p. 102.

<sup>83</sup> A. Uzelac (2009) ‘Proceedings before the court’, in T. Šimonović (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb : Ured za ljudska prava Vlade RH, p. 95-109, p. 103-104, p.105-106.

the protection of the rights of HIV patients in a dispute over their potential discrimination) or that, within the scope of its activities, it is generally engaged with anti-discrimination, including the protection of the right of the group in question to equal treatment.”<sup>84</sup>

#### 4.5 Shifting of the Burden of Proof

Alan Uzelac explained that “[o]nes of most significant instruments aimed at increasing the efficiency of court anti-discrimination protection is the provision on the shift of the burden of proof. It is one of the norms explicitly prescribed by EU directives. [...] Seeing as in the context of anti-discrimination protection it is exceptionally difficult to prove with certainty that unequal treatment took place on one of the bases of discrimination, the ADA differs from standard claims for the presentation of evidence for particular facts. According to Article 20, the party bringing an anti-discrimination claim is not obliged to prove discrimination to a level of certainty, but only has to “make it probable that discrimination has taken place”. If this condition is met, it is up to the respondent (the alleged discriminator) to prove that there was no discrimination. If the respondent does not prove to a level of certainty that there was no discrimination, the court is obliged to rule that the right to equal treatment was violated. The standard of probability which needs to be proven should be interpreted within the meaning of EU directives as so-called *prima facie* evidence. In other words, the person bringing an anti-discrimination claim should prove that he/she was put in a less favourable position and that it could be possible (according to regular principles of experience and based on the evidence in the specific case) that this is the result of a direct or indirect discrimination. If no conclusive evidence is produced that the plaintiff was put in a less favourable position on account of other reasons, and not the prohibited discriminatory ones, the court will have to rule that discrimination took place. The principle of the shift of the burden of proof is one of the rare principles (along with the principle of urgency from Article 16(3)) which are not to be used only in the judicial proceedings. That is, this norm will apply “in court and other procedures “(Article 20(1) of the ADA), which indicates that the principle of the shift of the burden of proof applies to administrative proceedings as well. On the other hand, this principle does not apply to all judicial proceedings, since according to Article 20(2), its application is ruled out in misdemeanor and criminal proceedings. This is to protect the constitutional rights of the defendant, wherein the principle of the so-called presumption of innocence (*in dubio pro reo*) applies. EU directives rule out the application of the shift of the burden of proof in criminal cases as well.”<sup>85</sup>

#### 4.6 Remedies

There are several reasons because of which the victims of discrimination are avoiding using the anti-discrimination remedies. Lovorka Kušan argues that “the chances of success are very low. In 2014, 22 civil anti-discrimination cases were closed and in none of them discrimination was found. Proceedings before the Croatian courts rarely satisfy the standards of fairness in respect of the reasonable time principle. The proceedings usually last so long that the remedies cannot be considered effective. For example, although the law clearly states that employment disputes should be decided in the first instance within six months, as a rule such proceedings in the courts in bigger cities last for several years. Claimants face difficulties in proving discrimination since the rule on burden of proof is not always implemented. Case law of the municipal and county courts, the main source of judicial interpretation of often very wide legal provisions, is not published and therefore unavailable

<sup>84</sup> A. Uzelac (2009) ‘Proceedings before the court’, in T. Šimonović (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb : Ured za ljudska prava Vlade RH, p. 95-109, p. 103-104, p. 106.

<sup>85</sup> A. Uzelac (200) ‘Proceedings before the court’, in T. Šimonović (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb: Ured za ljudska prava Vlade RH, p. 95-109, p. 103-104.

to potential claimants. The case law is still not clear regarding the issue of intent as an element of discrimination and judges are reluctant to find discrimination if the discriminator did not show any intention to violate a victim's right."<sup>86</sup>

#### 4.7 Follow-Up to Opinions and Recommendations

The recommendations made by the Ombudsman Institutions are, as a rule, not properly addressed by the Government's bodies and Institutions. Consequently, citizens do not perceive Ombudsman Offices as Institutions that can effectively protect their rights. Therefore, in order to enhance the effectiveness of the Ombudsman Office in fighting discrimination its recommendations should be taken into account. In addition, since the Offices of the Ombudsman remain underfunded in terms of both human and financial resources and have repeatedly requested an increase of the budget, it is necessary to increase the financial and expert capacities of the Equality Body and other Ombudsman Institutions.

## 5. The Role of Universities in Combating Discrimination

### 5.1 Law Departments

There are four public law faculties in the Republic of Croatia: in Zagreb, Rijeka, Osijek and Split. In spite of the fact that anti-discrimination legislation has been in force since January 2009, the public law faculties rarely offer mandatory courses on international, European and national legal provisions prohibiting discrimination. As a rule, the anti-discrimination matter is being integrated into other previously established mandatory or elective courses.

The **Faculty of Law in Zagreb** offers seven different types of study programme - three in law, three in social work and one in public administration. The 5-year master-level programme in law at the University of Zagreb provides education on anti-discrimination and equality laws in the curricula of the following mandatory courses: Sociology, Constitutional Law, European Public Law, Public International Law, Criminal Law, Criminal Procedural Law, Labour and Social Law. A number of elective courses tackling anti-discrimination in both the Croatian and English languages are offered to law students in Zagreb: Fundamental Rights in the EU, EU Migration Law and Policy, Fundamental Rights and Freedoms in Comparative Constitutional Law, etc. The Centre for Social Work is an integral part of the Faculty of Law in Zagreb, and the only programme for education of social workers in the country. The programme in Social Work at the University of Zagreb provides education on anti-discrimination and equality laws in the curricula of the following mandatory courses: Sociology, Marginalized groups, European Social Policy, Social Work and Human Rights, Poverty and Social Exclusion, as well as in following elective courses: Comparative Social Policy and Discrimination and Anti-discrimination Policy. The elective inter-departmental course on Discrimination and Anti-discrimination Policy is being conducted by teachers from the Chair of Labour Law, European Public Law and Chair on Social Policy but is offered only to the students of the social work programme. The Centre for Public Administration is also an integral part of the Faculty of Law in Zagreb, and it offers following courses that relate to anti-discrimination and equality laws: European Anti-Discrimination Law, Fundamental Issues of Constitutional Law, Constitutional Law of the Republic of Croatia, and Human Rights.

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<sup>86</sup> L. Kušan (2015) *Country report Non-discrimination Croatia*, <http://www.equalitylaw.eu/downloads/3683-2015-hr-country-report-ln-final> (30.03.2016), p. 10.

The **Faculty of Law in Rijeka** was founded in 1976. Two undergraduate programs and three postgraduate programs are offered to 2000 students. With regards to the undergraduate programmes that are offered there is a university master's degree in law (which is a 5-year study program) and undergraduate bachelor's degree in administrative law (which is a 3-year study program). It also offers a postgraduate education: three postgraduate specialist university courses and a postgraduate doctoral study in the field of law. The teaching of anti-discrimination law is provided through obligatory course on Constitutional Law which is taught at the first year of studies, European Law I, taught at the second year of studies, Labour and Social Law, taught at the fourth year of studies as well as in an elective course European Labour and Social Law taught at the fifth year of studies. The International Law Department of the Rijeka Law Faculty includes teaching of Anti-discrimination Law in the majority of the courses it teaches both at graduate and post-graduate levels: in the mandatory course on International Law (taught in Croatian and in English for Erasmus students) and non-elective courses International Law of Human Rights (taught in English only), International Humanitarian Law (taught in Croatian and in English for Erasmus students) and European Convention for Human Rights (taught in Croatian and in English for Erasmus students, taught jointly with the Theory of Law and State Department). The latter course has been taught since 2008 as the Faculty of Law in Rijeka is first law faculty in Croatia to include a specific course on human rights. At the postgraduate level (specialized professional study) the International Law department offers two elective courses: European Convention for Human Rights and Protection of Minorities. Rather marginally, the issues of anti-discrimination are also dealt within the mandatory course on Private International Law, European Private International Law and Intellectual Property Law.

The **Faculty of Law in Osijek** was founded in 1975 and is a part of the Josip Juraj Strossmayer University of Osijek. The Faculty of Law in Osijek conducts integrated undergraduate and graduate law studies, as well as four postgraduate specialist studies (one of them in Human Rights Law, in which Anti-discrimination Law is being taught as a curricula of the courses General Protection of Human Rights and Protection of Human Rights in Croatia) and a postgraduate doctoral study in the field of law. The Faculty of Law in Osijek provides education on Anti-discrimination Law in the obligatory courses (e.g. Sociology, Constitutional Law, European Public Law, Public International Law, Criminal Law, Criminal Procedural Law, Labour and Social Law) as well as in elective courses EU's Internal Market Law and European Labour Law and European Social Security Law.

The **Faculty of Law in Split** was established in 1960 as a Legal Study - branch unit of the Faculty of Law in Zagreb, and since 1974 it has been a constituent of the University of Split. The Law Faculty in Split has two undergraduate programs: on law, on administration, and one specialist graduate course on professional administration. Currently it conducts postgraduate courses on Maritime Law and the Law of the Sea, on Medical Law and on Sports Law. Anti-discrimination Law is being taught as curricula of mandatory courses of Constitutional Law, Employment and Social Welfare Law, International Law; as well as within elective courses Protection of Human Rights in European and Comparative Perspective, International Legal Protection of Human Rights, and European Employment Law.

In conclusion, Anti-discrimination Law and Equality Law are part of legal curricula in a number of mandatory courses at law faculties in the country: Sociology, Constitutional Law, European Public Law, Public International Law, Criminal Law, Criminal Procedural Law, Labour and Social Law, etc. Anti-discrimination and Equality Laws are also part of the curricula of a number of elective courses such as European Labour Law and European Social Security Law (taught at the Faculty of Law in Osijek), Fundamental Rights in the EU, EU Migration Law and Policy,

Fundamental Rights and Freedoms in Comparative Constitutional Law (taught at the Faculty of Law in Zagreb), Discrimination and Anti-discrimination Policy, Human Rights (taught at the Centre for Social Work of the Faculty of Law in Zagreb), International Law of Human Rights, International Humanitarian Law, European Convention for Human Rights, and Protection of Minorities (taught at the Faculty of Law in Rijeka), Rights in European and Comparative Perspective, International Legal Protection of Human Rights, European Employment Law (taught at the Faculty of Law in Split).

## 5.2 Other Departments

Anti-discrimination issues are partially and non-systematically implemented in the curricula of several other higher educational institutions in the country. At the Faculty of Humanities and Social Sciences in Zagreb, that offers more than 100 study programs in humanities and social sciences, two models of study programs are offered: either single major (all courses belong to one program) or double majors (student studying two equally important programs for equal degrees in both of them). Programs such as Psychology, Sociology, Pedagogy, Ethnology and Cultural Anthropology, etc. are being taught. The Department for Sociology offers an elective course on Ideas and Theories of Multiculturalism (*Ideje i teorije multikulturalizma*), at the Department for Pedagogy following mandatory courses tackling anti-discrimination are offered: Introduction to Intercultural Pedagogy (*Osnove interkulturalne pedagogije*), Interculturalism and Education (*Interkulturalizam i obrazovanje*), and Intercultural Curriculum (*Interkulturalni kurikulum*).

At the Faculty of Teacher's Education in Zagreb, that provides university education of teachers and preschool teachers, an elective subject Education for Democratic Society (*Obrazovanje za demokratsko društvo*) is being taught. At the Faculty of Political Science, at the Journalism department, an obligatory course on Intercultural Communication and Mediation (*Interkulturalna komunikacija i medijacija*) is taught.

Several social science research institutes are producing research that can be, in a widest sense, related to the issue of discrimination. Social science research entities based in Zagreb, the Institute for Social Research, the Ivo Pilar Institute of Social Sciences, the Institute for Migration and Ethnic Studies, and the Institute of Ethnology and Folklore Research are research entities that conduct research that might be deployed for appropriate development of anti-discrimination measures and policies.<sup>87</sup>

In order to tackle the potential prejudice of police officers against certain groups and to acquaint them with the fact that any discrimination on any grounds is unacceptable, it is necessary that a training of police officers with the curriculum of the Police Academy includes courses with improved human rights dimension, more in-depth knowledge about the Constitution, and the ethics of the police profession.<sup>88</sup> For the time being, the Police Academy does not offer any

<sup>87</sup> Following projects were financed by the Ministry of Science in the period 2007-2011: "Interkulturalni pristup etničkoj različitosti i identitet: Hrvatska – Europa", Jadranka Čačić-Kumpes, Institut za migracije i narodnosti, Zagreb; "Nacionalne manjine u Hrvatskoj i eurointegracijski procesi", Dragutin Babić, Institut za migracije i narodnosti, Zagreb; "Zaštita prava manjina u međunarodnom pravu i nacionalnim zakonodavstvima", Mira Lulić, Pravni fakultet, Osijek; "Ljudska prava i manjinska prava u europskom pravnom prostoru", Vesna Crnić-Grotić, Pravni fakultet, Rijeka; "Interkulturalni kurikulum i obrazovanje na manjinskim jezicima", Neven Hrvatić, Filozofski fakultet, Zagreb. Available at <http://zprojekti.mzos.hr/page.aspx?pid=6&lid=1>.

<sup>88</sup> M. Juričić (ed.) (2013) *Pink Megaphone From Anti-Discrimination Act to the Constitutional Ban on Same-Sex a Report of Zagreb Pride on the Human Rights of LGBTIQ Persons in Croatia 2010-2013*, available at: <http://www.zagreb-pride.net/new/wp-content/uploads/2015/02/report2014.pdf> (30.03.2016.), p. 72



special courses on international, European and national legal provisions prohibiting discrimination. However, teaching of the Anti-discrimination Law is integrated into other courses. Mandatory courses on Constitutional Law, Police Powers and Human Rights, Introduction to Substantive Criminal Law, Basics of Criminal Procedure Law, Socio-Communication Skills – Practicum, Police Ethics are being taught at the Police College. Through these courses key concepts, developments and relevant case law concerning anti-discrimination law are introduced to students. The courses should increase students' understanding of and sensitivity to the human rights, nondiscrimination on the basis of sex, gender identity, intersex status, disability, age and race and peaceful conflict resolution. The Police Academy is employing a law-based human rights approach to preventing and fighting discriminatory attitudes and behavior. In each academic year, 60 full-time students and 60 part-time students attended these special courses.<sup>89</sup>

### 5.3 Legal Clinics

The Free Legal Aid Act<sup>90</sup> was adopted to ensure the provision of legal assistance to economically and socially vulnerable categories of citizens, and authorised NGOs, legal clinics or state administrative offices to serve as legal aid providers. NGOs and legal clinics that are registered with the Ministry of Justice are authorised to provide primary legal aid.<sup>91</sup> The law distinguishes legal aid into a primary and a secondary aid, depending on whether or not the provider of free legal aid is allowed to represent the client before the court. Legal clinics, under the Free Legal Aid Act, are organizational units of law faculties that in accordance with their own by-laws provide primary legal aid. The Legal Clinics are authorized to provide merely primary legal aid, i.e. the students who work there cannot represent clients before the court. Legal clinics, as separate units of the law faculties, must be compulsorily insured by an insurance company. Students who are doing their practical aspect of legal education by volunteering in legal clinics assist in advice, interviews and other case work. The target population of the Legal Clinics comprises of people on low income and socially vulnerable groups of the society. On the basis of these basic parameters, the triage of clients that address the Legal Clinic for help is performed. The Legal Clinics that provide legal aid are located at the Faculties of Law in Zagreb, Rijeka, Split and Osijek. Legal Clinics serve a dual purpose: students gain direct experience and practical skills and help those who need this kind of help the most.

**The Civil Law Legal Clinic** has been taught at the Faculty of Law in Rijeka since academic year 1994/1995 as the first such form of teaching students in Croatia. The form chosen is based on the internship of students in law offices and courts. During their stay in duration of one semester (60 hrs) the students learn practical legal skills monitored by their hosts (judges or private attorneys). At present, students are also included in an NGO authorized for providing legal help to women and victims of violence. The emphasis is on “hands-on” teaching methods and the students have a chance to work with “live clients” and real cases at the same time learning the rules of professional conduct. Sometimes students are faced with cases dealing with the problem of discrimination.<sup>92</sup>

**The Legal Clinic at the Faculty of Law in Zagreb** was established in the fall of 2010, and is included in the curriculum of the Faculty of Law, representing an elective form of teaching

<sup>89</sup> Information provided by the Police Academy.

<sup>90</sup> Free Legal Aid Act, Official Gazette of Croatia 143/13.

<sup>91</sup> List of authorized associations and legal clinics for providing free legal aid, available at: <https://www.gov.hr/UserDocsImages/Moja%20uprava/Popis%20ovla%C5%A1tenih%20ureda%20i%20pravnih%20klinika.pdf> (30.03.2016.).

<sup>92</sup> Data provided by Prof.Dr. Vesna Crnić Grotić, Faculty of Law in Rijeka.

in the final fifth year of the study program.<sup>93</sup> Through the activities of the Zagreb Law Clinic legal aid is provided to the citizens not only in the headquarters of the Law Clinic in Zagreb, but also outside the City of Zagreb, under the so-called outreach projects, during which students visit various cities across the country in cooperation with civil society organizations, thus allowing citizens in more remote areas, whose circumstances might not allow convenient travel to Zagreb, to obtain the much-needed legal advice. Within the Legal Clinic in Zagreb a special Group for Elimination of Discrimination and Protection of Minority Rights is established, with an aim to deal with cases involving discrimination. The Group does not receive very many cases dealing with discrimination because the Ombudswoman receives majority of the discrimination claims. The cases dealing with discrimination by the Legal Clinic were based on the ethnic affiliation or national origin (e.g. Roma), religion and health condition (HIV). The Group for Elimination of Discrimination and Protection of Minority Rights collaborates with the Disability Ombudsman's Office as well as with the Gender Equality Ombudsman's Office. These collaborations give the students the opportunity to volunteer and study cases from the jurisdiction of the aforementioned Offices, under the supervision of the employees-legal experts.

**The Legal Clinic at the Faculty of Law in Split** was established in 2009 following the adoption of the Free Legal Aid Act. It closed down after two years after its establishment, but in 2014 reopened due to a student initiative. The clinic nowadays collaborates with a number of civil society and student organizations.<sup>94</sup>

**The Legal-Economic Clinic in Osijek** was established in February 2014, at the initiative of the Department of Commercial Law at the Faculty of Law in Osijek and the UNESCO Chair for Entrepreneurship at the Faculty of Economics in Osijek.<sup>95</sup>

#### 5.4 Legal and Institutional Structures Combating Discrimination

The university statutes or ethical codes provide for the prohibition of discrimination by, for example, prescribing that the Constitutional principle of non-discrimination (on the ground of race, sex, language, religion, political or other opinion, national or social origin, property, birth, social status, disability, sexual orientation and age and other) are to be respected at the University.<sup>96</sup> For example, the Ethical Codex of the University of Rijeka prescribes that each member of the university's community should act in accordance with the principle of equality and justice in a manner that excludes any discrimination, abuse, harassment or exploitation. Moreover, the university is obliged to ensure conditions for the realization of the principle of equality and justice.<sup>97</sup> University Senates are bodies which take care of the

<sup>93</sup> Legal Clinic at the Faculty of Law in Zagreb, available at: <http://klinika.pravo.unizg.hr/> (30.03.2016.).

<sup>94</sup> Legal Clinic at the Faculty of Law in Split, available at: <http://pravnaklinika.unist.hr/> (30.03.2016.).

<sup>95</sup> Legal-Economic Clinic in Osijek, available at: <http://www.efos.unios.hr/pravno-ekonomska-klinika/> (30.03.2016.).

<sup>96</sup> The Statute of the University of Zagreb – consolidated version (in Croatian), available at: [http://www.unizg.hr/fileadmin/rektorat/O\\_Sveucilistu/Dokumenti\\_javnost/Propisi/statut\\_2016.pdf](http://www.unizg.hr/fileadmin/rektorat/O_Sveucilistu/Dokumenti_javnost/Propisi/statut_2016.pdf) (30.03.2016.). The Statute of the University of Osijek (in Croatian), available at: <http://www.unios.hr/uploads/50Statut13.pdf>. *Pravilnik o stegovnoj odgovornosti nastavnika i suradnika Sveučilišta Josipa Jurja Strossmayera u Osijeku* (Rules on disciplinary responsibility of teachers and associates University of Osijek), available at: [http://www.unios.hr/uploads/50pravilnik\\_2013-03-29.pdf](http://www.unios.hr/uploads/50pravilnik_2013-03-29.pdf) (30.03.2016.).

<sup>97</sup> The Ethical Codex of the University of Rijeka (in Croatian), available at: [http://www.biotech.uniri.hr/files/Dokumenti/Eticki\\_kodeks\\_Sveucilista\\_u\\_Rijeci.pdf](http://www.biotech.uniri.hr/files/Dokumenti/Eticki_kodeks_Sveucilista_u_Rijeci.pdf) (30.03.2016.). The Statute of the

complaints related to discrimination. The Senate members are representative of faculties that are forging the university. This role of the Senate is insufficiently known among the teaching staff and the students and such function does not effectively contribute to combating discrimination at the universities. Several universities have established offices for students with disabilities. Support services for students with disabilities are still in development and support for students with disabilities depend largely on organisations (NGOs) that perform these services.

The IPA 2008 project “Improving the Capacity of the University System to Create a Framework for battling Discrimination and Corruption aimed at Improving Academic Integrity” was implemented in 2011 and 2012. During the first stage (first 12 months) the project was implemented at the faculties and academies at the University of Zagreb. In the second phase (second 12 months), segments of the project were implemented at four of the largest Universities in Croatia (Zagreb, Split, Rijeka and Osijek) with a focus on policy advocating and awareness raising actions. The objective of this project was to develop progressive techniques to directly combat corruption and discrimination throughout the academic community in Croatia. Secondly, to create a legal framework, to enable sustained preventive anti-corruption and anti-discrimination measures. The planned project goal was the establishment of a central office for coordination and implementation of a nationwide anti-discrimination and anti-corruption policy. In addition, the project aimed at development of a legal framework, in line with EU and International standards, which would be applied to all Universities to prevent and battle corruption and discrimination.<sup>98</sup> A survey on the occurrences of discrimination and inappropriate practices at the four universities involved in the project was conducted in 2011.<sup>99</sup>

## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

Upon the entry into force of the Anti-Discrimination Act, the Ombudsman became a central Equality Body for suppression of discrimination, and one of his obligations foreseen by the law is to submit an annual report on occurrence of the discrimination. The Ombudsman’s annual Reports contribute to the raising of awareness among the politicians, the judiciary and the citizens on the occurrence of discriminatory activities in Croatia and confirm the preventive role of the Ombudsman. On the other hand, a reactive role in actual cases of discrimination is played by the courts, the state attorneys, and the non-governmental organizations.<sup>100</sup> In addition to the reactive role of the courts, the Ombudsman and the Special Ombudsman act reactively due to the character of the out-of-court legal protection provided for by the Ombudsman based on the complaints of discrimination filed by

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University of Rijeka (in Croatian), available at: [http://www.uniri.hr/files/staticki\\_dio/propisi\\_i\\_dokumenti/STATUT%20PROCISCENI%202008-%20final.pdf](http://www.uniri.hr/files/staticki_dio/propisi_i_dokumenti/STATUT%20PROCISCENI%202008-%20final.pdf) (30.03.2016.).

<sup>98</sup> Project website ‘Uspostava pravnog okvira za suzbijanje pojava diskriminacije i korupcije s ciljem unapređenja akademskog integriteta’ (Improving the Capacity of the University System to Create a Framework for Preventing Discrimination and Corruption aimed at improving Academic Integrity), available at: [http://e-disco.ufzg.hr/\(30.03.2016.\)](http://e-disco.ufzg.hr/(30.03.2016.)).

<sup>99</sup> Results of survey on employees’ and students’ perception on illegal behaviours at universities, available at: <http://e-disco.ufzg.hr/index.php/istrazivanje> (30.03.2016.).

<sup>100</sup> T. Šimonović Einwalter (2009) ‘Anti-Discrimination Legislation and the Anti-Discrimination Act’ in T. Šimonović et Einwalter al. (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb: Ured za ljudska prava Vlade RH, pp. 9-21, p. 18.

citizens.<sup>101</sup> Furthermore, in order to harmonize the efforts in the implementation of the anti-discrimination policy, the Government adopted the National Plan for the Suppression of Discrimination 2008-2013, and the Action Plan for the implementation of the National Plan for the Suppression of Discrimination 2008-2009.<sup>102</sup>

Raising awareness among citizens about the manners in which they can protect themselves from discrimination, as well as about the necessity to file complaints on discrimination and lawsuits for determining discrimination was set as a goal of a number of campaigns that were conducted in Croatia that aimed at creating a climate receptive for combating discrimination upon any of discriminatory grounds. However, the victims of discrimination often have doubts whether to file a discrimination complaint or not, particularly in the area of work and employment, because of fear of losing the job or trouble with the employer. Thus, under-reporting of discrimination has remained as a systemic difficulty in the system of protection against discrimination. The reasons for citizen's reluctance in reporting the discrimination are: "(i) victims' lack of awareness on their rights and prohibition of discrimination; (ii) unfamiliarity with anti-discrimination system and available protection mechanisms; (iii) lack of trust in the protection mechanisms; (iv) citizens are convinced that nothing will change after they report discrimination; - people accept circumstances as they are; (v) discriminatory actions are perceived as normal and they therefore should not be reported; and (vi) fear of negative consequences, secondary victimisation and fear that this might provoke inconvenient situations."<sup>103</sup> According to the 2010 Ombudsman Report on the Occurrence of Discrimination "many victims of discrimination fear for their economic and sometimes even physical existence, which results in accepting the situation and failure to report the behaviour which is normally forbidden by law. Furthermore, feeling of dependency or subordination contributes to a passive attitude. Apathy and acceptance of injustice are particularly widespread among the most vulnerable victims of discrimination."<sup>104</sup> The situation has slightly changed since the inauguration of the anti-discrimination legislation, and the increase of the awareness is supported by the fact that the number of judicial proceedings under the Anti-discrimination Act increased, which proves the rise of individual awareness on discriminatory matters. In addition, the number of complaints received by the Office of the Ombudsman has been significantly increasing in the course of last years. According to the Office, this is due to enhanced awareness among citizens as well as to the economic crisis and an increasingly difficult social situation. Furthermore, in order to increase the capacities of the judges, state attorneys, and police officials in combating discrimination, training and awareness-raising activities on anti-discrimination legislation and on discriminatory practices have been organized for the judiciary, police and public servants.

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<sup>101</sup> T. Šimonović Einwalter (2009) 'Anti-Discrimination Legislation and the Anti-Discrimination Act', in T. Šimonović et Einwalter al. (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb : Ured za ljudska prava Vlade RH p. 18.

<sup>102</sup> T. Šimonović Einwalter (2009) 'Anti-Discrimination Legislation and the Anti-Discrimination Act', in T. Šimonović et Einwalter al. (ed.) (2009) *A Guide to the Anti-Discrimination Act*, Zagreb : Ured za ljudska prava Vlade RH p. 18.

<sup>103</sup> Croatia/Pučki pravobranitelj (2010) *Report on report on occurrence of discrimination* <http://ombudsman.hr/en/reports/send/66-ombudsman-s-reports/732-pucki-pravobranitelj-en-2010> (30.03.2016.), p. 50.

<sup>104</sup> Croatia/Pučki pravobranitelj (2010) *Report on report on occurrence of discrimination* <http://ombudsman.hr/en/reports/send/66-ombudsman-s-reports/732-pucki-pravobranitelj-en-2010> (30.03.2016.), p. 50-51.

## 6.2 Achievements in Awareness Raising

After the Anti-discrimination Act came into force, due to public campaigns, educating the professional and general public and submitting of reports on discriminatory practices, the society's perception of discrimination has started to change. The Office of the Ombudsman, in cooperation with CSOs, lead several public campaigns and other activities targeted the public at large in order to inform on the provision from the ADA, its role as the Equality Body and legal protection possibilities in case of discrimination. An information campaign on the Anti-Discrimination Act and on basic terms in the area of protection against discrimination was launched and undertaken in 2009 in order to familiarize the citizens with discrimination and let them know whom to turn to for protection. The campaign aimed at encouraging a preventive action through informing different stakeholders on provisions of the ADA.<sup>105</sup>

The Centre for Peace Studies, a Zagreb based NGO, in cooperation with the Office of the Ombudsperson, has conducted three surveys so far on the attitudes and awareness on discrimination and on discrimination grounds.<sup>106</sup> The survey conducted in 2013, for example, inquired the importance of the national and religious identity, the general level of xenophobia and the attitudes towards a multicultural society. Secondly, it studied the attitudes towards granting citizenship to immigrants, the discrimination and attitudes towards the foreigners. In the end, it surveyed the xenophobic attitudes towards certain ethnic, religious and political groups. It was conducted with the aim to enhance existing anti-discrimination policy.<sup>107</sup>

The research and the complaints of LGBTIQ persons to CSO organizations reveal the existence of discrimination and harassment of this societal group and discrimination against LGBTIQ persons has not declined since the enactment of the Anti-Discrimination Act in 2008. For example, the CSO "Zagreb Pride" conducted in 2013 an extensive field research among the LGBTIQ population. The research included interviews with 690 LGBTIQ persons from various regions in Croatia, including Zagreb, Rijeka, Split, Osijek, and Istria, as well as a small number of LGBTIQ people who had immigrated to Croatia over the last six years. To date, this field research has the largest sample size of LGBTIQ persons in Croatia. The assumption of the research, that the positive legislative changes have not significantly improved the lives of LGBTIQ people in the Republic of Croatia, has been confirmed.<sup>108</sup> The

<sup>105</sup> Centre for Peace Studies (2009) *Kampanja o suzbijanju diskriminacije*, available at: <http://www.cms.hr/hr/suzbijanje-diskriminacije/kampanja-o-suzbijanju-diskriminacije> (30.03.2016.).

<sup>106</sup> Ured za ljudska prava Vlade RH, Ured pučkog pravobranitelja i Centar za mirovne studije (2009), *Istraživanje o stavovima i razini svijesti o diskriminaciji i pojavnim oblicima diskriminacije*, available at: <http://www.antidiskriminacija.com/wp-content/uploads/2013/07/Istra%C5%BEivanje-o-stavovima-i-razini-svijesti-o-diskriminaciji-i-pojavnim-oblicima-diskriminacije.pdf> (30.03.2016.); Ured pučkog pravobranitelja (2012) *Istraživanje o stavovima i razini svijesti o diskriminaciji i pojavnim oblicima diskriminacije*, available at: <http://www.antidiskriminacija.com/wp-content/uploads/2013/07/Istraziva-nje-o-stavovima-i-razini-svijesti-o-diskriminaciji-i-pojavnim-oblicima-diskriminacije-2012.pdf> (30.03.2016.); Centar za mirovne studije (2013) *Zastupljenost i indikatori diskriminacijskih i ksenofobičnih stavova u Republici Hrvatskoj*, available at: <http://www.antidiskriminacija.com/istravanje-o-diskriminaciji/> (30.03.2016.).

<sup>107</sup> Centar za mirovne studije (2013) *Zastupljenost i indikatori diskriminacijskih i ksenofobičnih stavova u Republici Hrvatskoj*, available at: <http://www.antidiskriminacija.com/istravanje-o-diskriminaciji/> (30.03.2016.).

<sup>108</sup> M. Juričić (ed.) (2013) *Pink Megaphone From Anti-Discrimination Act to the Constitutional Ban on Same-Sex a Report of Zagreb Pride on the Human Rights of LGBTIQ Persons in Croatia 2010-2013*,

data indicated that as many as 73 % of the participants experienced some form of violence (of which approximately 17% is related to physical violence) because of their sexual orientation, sexual/ gender identity and/or gender expression. There was also an extremely high percentage – 38% of the participants – who reported experiencing sexual violence at least once, if not repeatedly, due to their sexual orientation. The data also demonstrated that approximately a third of the respondents experienced some form of discrimination. The majority of these respondents indicated experiencing discrimination in the form of unequal treatment in the family, followed by access to goods and services (mostly access to food and beverage services or rental housing market), then at school or university and, finally, at work or during a job search. Discrimination often occurred in contact with public servants such as police and medical staff.

### 6.3 Preventing Future Discrimination

A more open and just society in which discrimination does not occur need to be supported by numerous institutions and fought for with various tools: legislation implementation, education on anti-discrimination law, awareness raising amongst society and within the judiciary. After the anti-discrimination legislation was put in place in 2009, elimination of discrimination should forcefully and systematically be fought against through judicial means but also through social policies which aim at reducing inequalities or levelling out divergent interests of social groups. Therefore, the anti-discrimination policy needs to be implemented hand in hand with other social policies. In all those policy areas special attention needs to be paid to the specific needs and the situation of the marginalized social groups (such as people with disabilities, national minorities, asylum seekers, LGBT community). The fight against poverty and social exclusion, for example, is an important policy that contributes in combating discrimination against marginalized groups in the society. In order to effectively put into practice legal protection against discrimination all social services must counter discrimination against marginalized social groups in the planning and delivery of their services.

The awareness of both the population and the practitioners about the existence of anti-discrimination framework in national legislation remains worryingly low. It is therefore necessary to enact more efficient legal protection from discrimination in Croatian legal system. The data on the number of court cases and final court decisions from 2010 to 2015 show a visible increase of the number of civil and misdemeanor proceedings related to discrimination, but the under-reporting of discrimination remains as the major problem of the discrimination protection system. It is therefore essential to carry on with public campaigns that would enhance the general knowledge about available discrimination protection instruments. In order to maximize the outcomes of the litigation brought under the Anti-Discrimination Act, an effective legal remedy could be prescribed in the event of a failure of the courts to act on the anti-discrimination complaints in an urgent manner. Another aspect for achieving more efficient legal protection from discrimination would be not to insist in requesting the Ombudspersons and civil society organizations to prove the legal interest when intervening in anti-discrimination litigation. The training of judicial staff (judges and State Attorney's) through informal seminars offered by the Judicial Academy seems still inadequate as it tackles very narrow number of the judicial staff. For the time being, the impact of educational programmes and trainings on anti-discrimination legislation in higher educational institutions is still limited and would require a more substantive improvement and more systemic approach. The Faculty of Law in Zagreb has contributed the most in the

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Zagreb: Zagreb Pride, <http://www.zagreb-pride.net/new/wp-content/uploads/2015/02/report2014.pdf> (30.03.2016.).

curricula development in the field of anti-discrimination law by offering several (mostly elective) courses that comprehensively cover anti-discrimination legislation. Teaching on anti-discrimination law is also integrated into several mandatory and a few elective courses at other law faculties in the country. Besides at the Law Faculties in the country, anti-discrimination and diversity trainings should be more systematically delivered to the employees of the public services at all levels of governance (both central, regional and local), as well as in the educational programmes of the Judicial and Police Academies, in order that they understand how to avoid discrimination when delivering public services among service users.

In order to enhance the culture of rights, it is necessary to continue with the awareness raising among the citizens about the discrimination and the Anti-discrimination Act, and protective mechanisms which the Act provides. Finally, the fostering of the culture of rights requires an enhanced coordination between the bodies competent for combating discrimination; both state institutions, civil society organizations, and educational institutions.

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## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from the particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviors of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, Labor Inspectorates, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination. Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counselors, etc.)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination

## Annex 2.1. – Template for Good Practice Examples: Toolkit for the implementation of anti-discrimination measures and diversity management

• <b>Area:</b>	Tools for guiding implementation of relevant laws, Cooperation of stakeholders
• <b>Title (original language)</b>	Poticanje ravnopravnosti na hrvatskom tržištu rada
• <b>Title (EN)</b>	Supporting Equality in the Croatian Labour Market
• <b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Hrvatski zavod za zapošljavanje
• <b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Implementation: Croatian Employment Service (lead partner) in partnership with: Office for Human Rights, Government of the Republic of Croatia, L&R Social Research, Austria, Institute of Social Sciences Ivo Pilar, Croatia, CESI - Center for Education, Counseling and Research, Croatia and Selectio, Croatia. Financing: Progress programme component Diversity and combating discrimination
• <b>Government / Civil society</b> Resp. for implementation Resp. for financing	Croatian Employment Service Progress programme component Diversity and combating discrimination
• <b>Internet link</b>	<a href="http://www.cesi.hr/en/news/1343-partnership-of-cesi-and-croatian-employment-service-supporting-equality-in-croat/">http://www.cesi.hr/en/news/1343-partnership-of-cesi-and-croatian-employment-service-supporting-equality-in-croat/</a> <a href="http://www.hzz.hr/UserDocsImages/HR_Toolkit.pdf">http://www.hzz.hr/UserDocsImages/HR_Toolkit.pdf</a>
• <b>Type of initiative</b>	training, information campaign
• <b>Main target group</b>	employers
• <b>Brief description (max. 1000 chars)</b>	The goal of the project was to contribute to the development and successful implementation of the national policy to combat discrimination on the labour market on the grounds of disability, race and ethnic origin, age and religion. The project contributed to the development of a national policy to combat discrimination on labour market and it should have ensured a sustainable support for employers to manage diversities in their companies by establishing a help desk for permanent assistance to employers in dealing with discrimination issues. The project resulted in a Toolkit for the implementation of the anti-discrimination measures and diversity management (Praktični alati za suzbijanje diskriminacije i upravljanje raznolikošću za poslodavce iz privatnog, javnog i civilnog sektora u RH). The aim of the Toolkit was to give practical guidance to the employers on the implementation of anti-discrimination measures and diversity policies in their companies. Training of trainers in the implementation of a Toolkit for implementation of anti-discrimination measures and diversity management was as well conducted.

	The project started on December 30, 2009 and lasted for 12 months. Total amount of the project was €149.835 out of which 80% was financed by Progress programme component Diversity and combating discrimination and 20% is co-financed by Croatian Employment Service.	
• <b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes</li> </ul>	how?
• <b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes</li> </ul>	
• <b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input type="checkbox"/> effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> </ul>	<input type="checkbox"/> transferability <input type="checkbox"/> sustainability



## Annex 2.2. – Template for Good Practice Examples: Research Studies of the Ombudswoman on Gender Equality on Discrimination of Women in Employment and Labour Market

• <b>Area:</b>	Procedural aspects (evidencing discrimination)
• <b>Title (original language)</b>	Istraživanja o zastupljenosti žena i muškaraca na upravljačkim pozicijama u trgovačkim društvima, 2014. Istraživanje o položaju trudnica i majki s malom djecom na tržištu rada, 2012. Zastupljenost žena i muškaraca na rukovodećim i upravljačkim pozicijama, 2011. Istraživanje uzroka jaza u plaćama, 2010.
• <b>Title (EN)</b>	Research on women and men in management positions of trade companies, in 2014. Research on the situation of pregnant women and mothers with young children in the labour market, in 2012. The representation of women and men in leadership and managerial positions, in 2011. Research on the causes of the pay gap, in 2010.
• <b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Pravobraniteljica za ravnopravnost spolova
• <b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Ombudswoman on Gender Equality
• <b>Government / Civil society</b> Resp. for implementation Resp. for financing	
• <b>Internet link</b>	<a href="http://www.prs.hr/index.php/analize-i-istrazivanja/analize-rada-i-zaposljavanja">http://www.prs.hr/index.php/analize-i-istrazivanja/analize-rada-i-zaposljavanja</a>
• <b>Type of initiative</b>	study, survey
• <b>Main target group</b>	general public, potential victims of discrimination, policy makers, employers
• <b>Brief description (max. 1000 chars)</b>	The Ombudsperson for Gender Equality has produced and published several studies on discrimination occurrences. She conducted in 2014 two research studies on the representation of women and men in managerial positions in business entities. Research goals were to establish the proportion of women and men at the management level. The research was funded by the Progress project “Removing Glass Ceiling - Equality of Opportunity in Access to Positions of Economic Decision-Making”. The Ombudswoman conducted in 2012 in cooperation with the Croatian Employment Service and the Parental Association ‘Roda’ research on situation of pregnant women and mothers with young children in the labor market. The aim of this research was to provide an insight into the experience of women who are trying to actively participate in the labor

	market during their pregnancy, and during the maternity period. The Ombudsperson conducted in 2011 the research on the representation of women in management positions, and of the management and supervisory bodies of business entities operating in the Croatian market. The Ombudsperson conducted in 2010 a survey of the pay systems in several prominent Croatian companies. The study was motivated by the very low attention being paid to the problem of the public pay gap that women and men achieve for work of equal value.
• <b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes how?</li> </ul>
• <b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes who? and how?</li> </ul>
• <b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input type="checkbox"/> effectiveness and impact <input type="checkbox"/> transferability</li> <li>• <input type="checkbox"/> innovation <input type="checkbox"/> sustainability</li> </ul>

## Annex 2.3. – Template for Good Practice Examples: Project for Roma and People with Disabilities of the Law Clinic at the Faculty of Law in Zagreb

• <b>Area:</b>	Tools for guiding implementation of relevant laws, Combating discrimination at universities, Developing a Culture of Rights
• <b>Title (original language)</b>	Mehanizam pomoći za učinkovitu socijalnu integraciju Roma i osoba s invaliditetom
• <b>Title (EN)</b>	Assistance mechanism for effective social integration of Roma and people with disabilities
• <b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Pravna klinika Veleposlanstvo Finske Centar za ljudska prava Hrvatski zavod za zdravstveno osiguranje
• <b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Law Clinic at the Faculty of Law in Zagreb Embassy of Finland Human Rights Center Croatian Health Insurance Fund
• <b>Government / Civil society</b> Resp. for implementation Resp. for financing	
• <b>Internet link</b>	<a href="http://klinika.pravo.unizg.hr/assistance-mechanism-effective-social-integration-roma-and-people-disabilities">http://klinika.pravo.unizg.hr/assistance-mechanism-effective-social-integration-roma-and-people-disabilities</a>
• <b>Type of initiative</b>	training, information campaign
• <b>Main target group</b>	potential victims of discrimination
• <b>Brief description (max. 1000 chars)</b>	The project encompassed field visits of representatives of the Legal Clinic of the faculty of Law in Zagreb to Roma settlements and institutions in which people with disabilities live. This experience allowed representatives of the Legal Clinic to get an insight into the real situation and in the problems of the users. In addition, it provided the opportunity for a direct contact with legal experts to beneficiaries of the project. The students from the Legal Clinic lectured on legal aid to the beneficiaries (Roma, and people with disabilities) and within a project organized collection of material and financial assistance for the residents of the Roma settlement in Slavonski Brod who live in very difficult living conditions.
• <b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes how?</li> </ul>
• <b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>▪ <input checked="" type="checkbox"/> yes who? and how? Various NGOs and state institution (Croatian Health Insurance Fund).</li> </ul>
• <b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> effectiveness and impact <input type="checkbox"/> transferability</li> <li>• <input type="checkbox"/> innovation <input checked="" type="checkbox"/> sustainability</li> </ul>

## Annex 2.4. – Template for Good Practice Examples: Monitoring the Implementation of the Legal Aid Act and the Anti-Discrimination Act

• <b>Area:</b>	Tools for guiding the implementation of the relevant laws, Cooperation of stakeholders,
• <b>Title (original language)</b>	Izveštaj o praćenju provedbe Zakona o besplatnoj pravnoj pomoći u suzbijanju diskriminacije za 2011. godinu. Koliko jednakosti? Izveštaj o praćenju provedbe Zakona o besplatnoj pravnoj pomoći i Zakona o suzbijanju diskriminacije. Policy dokument “Kišobranom protiv diskriminacije – Analiza dizajna Nacionalnog plana za borbu protiv diskriminacije u Hrvatskoj od 2008. do 2013. i preporuke za poboljšanja. “
• <b>Title (EN)</b>	Monitoring the implementation of the Legal Aid Act in Fight Against Discrimination for 2011. How much Equality? Monitoring the Implementation of the Legal Aid Act and the Anti-discrimination Act for 2012. <i>Umbrella against Discrimination (The analysis of design of the National Plan for Combating Discrimination in Croatia between 2008 and 2013 and Proposals for Improvement).</i>
• <b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Centar za mir, nenasilje i ljudska prava – Osijek Centar za mir, pravne savjete i psihosocijalnu pomoć Vukovar Srpski demokratski forum, Zagreb Centar za mirovne studije, Zagreb
• <b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Center for Peace, Nonviolence and Human Rights - Osijek Center for Peace, Legal Advice and Psychosocial Assistance – Vukovar Serbian Democratic Forum, Zagreb Center for peace Studies, Zagreb
• <b>Government / Civil society</b> Resp. for implementation Resp. for financing	IPA project 2008 “Inicijativa organizacija civilnoga društva za promjene u anti-diskriminacijskoj politici“  IPA PROJECT 2008 “Initiative of Civil Society Organisations for Changes of Anti-discrimination Policy”
• <b>Internet link</b>	<a href="http://www.centar-za-mir.hr/antidiskriminacija/">http://www.centar-za-mir.hr/antidiskriminacija/</a>
• <b>Type of initiative</b>	training, monitoring provedbe zakona, izrada izvješća s preporukama i zagovaranje za promjene
• <b>Main target group</b>	Free legal aid users, CSO active in human rights promotion, CSOs registered for free legal aid
• <b>Brief description (max. 1000 chars)</b>	The purpose of the project was to increase the availability of the free legal aid to the marginalized groups and to contribute in reducing discrimination and to strengthen the capacity of the civil society organizations for greater participation in the legislative initiatives and the development of anti-discrimination policies. The project was implemented in eight cities: Osijek, Beli Manastir, Vukovar, Vinkovci, Ilok, Glina, Petrinja i Vojnić. As a result of this project 5874 legal aid recipients were consulted, forty CSO activist enhanced their capacities, a methodology for monitoring the implementation of the Legal Aid Act and the Anti-discrimination Act was delivered. As a result of this project the recommendations put forward by the project partners were taken into account when amendments to the Legal Aid Act were discussed.



### Annex 3.1. – Statistics Equality Body/Ombudswoman Institution

	2010	2011	2012	2013	2014	2015
<i>Budget in €</i>	1.067.206	1.249.752	1.387.020	1.210.918	1.167.068	1.306.209
<i>Number of staff (full time equivalent)</i>	-	-	-	4	7	9
<i>Number of professional/legal staff (full time equivalent)</i>	-	-	-	4	7	8
<i>Complaints/queries received</i>	144	147	202	248	263	284
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative<sup>109</sup></i>	-	-	-	3	17	22
<i>Total number of cases (please break down according to different grounds)<sup>110</sup></i>	144	147	202	248	263	284
<i>Age</i>	10	10	18	16	25	28
<i>Belief</i>	-	5	11	6	14	16
<i>Disability</i>	9	4	9	7	7	7
<i>Ethnic origin</i>	60	51	60	57	49	68
<i>Gender</i>	6	11	19	11	11	7
<i>Gender identity</i>	1	1	1	-	1	1
<i>Religion</i>	4	10	5	5	14	12
<i>Sexual orientation</i>	5	2	-	4	1	2
<i>Other grounds</i>	49	53	79	142	141	143
<i>Total number of cases (please break down according to different forms)<sup>111</sup></i>						
<i>Direct discrimination</i>	48	21	8	18	44	78
<i>Indirect discrimination</i>	15	7	2	5	11	10
<i>Harassment</i>	20	7	3	8	2	6
<i>Victimization</i>	-	-	-	-	-	-
<i>Other forms</i>	4	3	-	3	-	1
<i>Number of surveys</i>	-	-	2	-	1	-
<i>Number of research projects</i>	-	2	2	2	2	2
<i>Number of awareness initiatives</i>	-	-	1	-	1	-
<i>Number of training actions</i>	-	-	6	2	7	2
<i>Number of promotional initiatives to support good practice</i>	-	-	1	1	-	-

<sup>109</sup> The Office of the Ombudswomen began to monitor complaints from 2013 on according to this parameter.

<sup>110</sup> Information on a number of received complaints and grounds of discrimination might be found in the Annual Report on discrimination for 2010, 2011, 2012 and in the Annual Report of the Ombudsman for 2013, 2014 and 2015. The reports are available on the official website of the Ombudsman at <http://ombudsman.hr/hr/>.

<sup>111</sup> Forms of discrimination are determined only in those cases which are completed and in which discrimination has been established. In the rubric "Other forms" are those in which complaints have been established forms of discrimination in accordance with the ADA, but not included in the above sections.

## Annex 3.2. – Statistics Ombudswoman for Gender Equality

	2010	2011	2012	2013	2014	2015
<i>Budget in kuna</i>	2.417.338	2.753.351	2.811.626	2.644.062	2.795.638	3.355.579
<i>Number of staff (full time equivalent)</i>	12	13	11	11	11	11
<i>Number of professional/legal staff (full time equivalent)</i>	7	7	7	7	7	7
<i>Complaints/queries received</i>	665	1359	1425	1666	2588	2467
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	-	-	-	-	-	-
<i>Total number of cases (please break down according to different grounds)</i>	323	308	368	375	394	404
<i>Age</i>						
<i>Belief</i>						
<i>Disability</i>						
<i>Ethnic origin</i>						
<i>Gender</i>	176	236	287	291	314	364
<i>Gender identity</i>	0	1	1	4	2	5
<i>Religion</i>						
<i>Sexual orientation</i>	12	16	25	20	18	18
<i>Other grounds</i>	135	55	55	60	14	17
<i>Total number of cases (please break down according to different forms)</i>	323	308	368	375	394	404
<i>Direct discrimination</i>	187	176	317	324	345	401
<i>Indirect discrimination</i>	20	12	0	0	3	3
<i>Harassment</i>	31	61	76	39	51	44
<i>Victimization</i>						
<i>Other forms</i>						
<i>Number of surveys</i>	8	10	10	9	10	9
<i>Number of research projects</i>	5	4	7	9	7	7
<i>Number of awareness initiatives</i>	29	25	37	36	19	31
<i>Number of training actions</i>	0	5	22	8	8	8
<i>Number of promotional initiatives to support good practice</i>	5	5	18	19	22	17

### Annex 3.3. – Statistics Ombudswoman for Children

	2010	2011	2012	2013	2014	2015
<i>Budget in kuna<sup>112</sup></i>	6.209.680	5.406.902	5.312.000	5.330.888	4.996.538	4.996.000
<i>Number of staff (full time equivalent)<sup>113</sup></i>	–	–	–	–	–	19
<i>Number of professional/legal staff (full time equivalent)</i>	–	–	–	–	–	16
<i>Complaints/queries received</i>	6	6	15	24	24	17
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	0	1	1	1	0	3
<i>Total number of cases (please break down according to different grounds)</i>	6	7	16	25	24	20
<i>Age</i>		1	1			1
<i>Belief</i>				2	1	
<i>Disability</i>			1	4		
<i>Ethnic origin</i>			7	4	2	1
<i>Gender</i>	–	–	–	–	–	–
<i>Gender identity</i>	–	–	1	–	–	–
<i>Religion</i>	1	3		4	12	7
<i>Sexual orientation</i>	1	–	–	–	–	–
<i>Other grounds</i>	4	3	6	11	9	11
<i>Total number of cases (please break down according to different forms)</i>	6	7	16	25	24	20
<i>Direct discrimination</i>	4	3	11	21	17	11
<i>Indirect discrimination</i>	2	4	1	1	5	3
<i>Harassment</i>			1			6
<i>Victimization</i>	–	–	–	–	–	–
<i>Other forms</i>	–	–	3	3	2	–
<i>Number of surveys</i>	0	0	0	0	0	0
<i>Number of research projects</i>	0	0	0	0	0	0
<i>Number of awareness initiatives</i>	0	0	2	5	3	4
<i>Number of training actions</i>	0	3	8	2	2	0
<i>Number of promotional initiatives to support good practice</i>	0	0	0	0	0	0

<sup>112</sup> The Ombudsman for Children has no special funds for the implementation of anti-discrimination activities.

<sup>113</sup> The Ombudsman for Children has neither a special department responsible for combating discrimination, nor full-time employees who perform merely tasks related to combating discrimination and the implementation of anti-discrimination law.



## Annex 3.4. – Statistics Ombudswoman for Persons with Disability

	2010	2011	2012	2013	2014	2015
<i>Budget in kuna</i>	3.225.436	3.364.748	3.125.000	2.970.849	3.119.337	3.379.000
<i>Number of staff (full time equivalent)</i>	11	11	12	12	12	13
<i>Number of professional/legal staff (full time equivalent)<sup>114</sup></i>	1+5	1+5	1+5	1+5	1+5	1+5
<i>Complaints/queries received<sup>115</sup></i>	1474/51	1446/25	1625/37	1185/48	1450/125	1745/97
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	10	33	26	53	178	117
<i>Total number of cases (please break down according to different grounds)</i>	16	4	6	7	24	16
<i>Age</i>						
<i>Belief</i>						
<b><i>Disability</i></b>	16	4	6	7	24	16
<i>Ethnic origin</i>						
<i>Gender</i>						
<i>Gender identity</i>						
<i>Religion</i>						
<i>Sexual orientation</i>						
<i>Other grounds</i>						
<b><i>Total number of cases (please break down according to different forms)</i></b>	16	4	6	7	24	16
<i>Direct discrimination</i>	2	2	2	1	5	1
<i>Indirect discrimination</i>	13		1	1	7	3
<i>Harassment</i>		1			2	1
<i>Victimization</i>						
<i>Other forms (reasonable accommodation)</i>	1	1	3	4	10	11
<i>Number of surveys</i>	9	4	24	11	12	12
<b><i>Number of research projects</i></b>	2	2	8	4	7	16
<b><i>Number of awareness initiatives</i></b>	23	17	34	78	53	65
<b><i>Number of training actions</i></b>	/	/	5	3	4	4
<b><i>Number of promotional initiatives to support good practice</i></b>	2	1	3	2	2	2

<sup>114</sup> One member of the professional staff is a permanent employee working in the field of combating discrimination, and other staff becomes involved depending on the area of discrimination.

<sup>115</sup> The total number of complaints received throughout the year is enlisted here. Complaints received by citizens who explicitly argued discrimination took place or cases noticed by the Office as constituting discrimination during the procedure.

# **Legal Protection against Discrimination in Kosovo\***

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Prishtina, March 2016

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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# Table of Contents

<b>Executive Summary.....</b>	<b>241</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>243</b>
1.1 Overview of Constitutional and Legal Provisions.....	243
1.2 Assessment of the Legal Framework .....	247
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>248</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	248
2.2 Stakeholders Putting Combating Discrimination into Practice .....	254
2.2.1 Ombudsperson Institution (OI) .....	254
2.2.2 Intermediaries .....	257
2.2.3 Police .....	258
2.3 Mapping the Cooperation among Stakeholders .....	259
2.3.1 Equality Body/Bodies.....	259
<b>3. The Role of Courts in Combating Discrimination .....</b>	<b>260</b>
3.1 Capacities of Courts in Combating Discrimination.....	260
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	264
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	265
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>266</b>
4.1. Mediation .....	266
4.2 Evidencing Discrimination.....	267
4.3 Strategic Litigation.....	268
4.4 Class Action/Actio Popularis .....	269
4.5 Shifting of the Burden of Proof.....	269
4.6 Remedies.....	270
4.7 Follow-Up to Opinions and Recommendations .....	271
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>272</b>
5.1 Law Departments .....	272
5.2 Legal and Institutional Structures Combating Discrimination .....	275
<b>6. Developing a Culture of Rights .....</b>	<b>276</b>
6.1 Assessing the Levels of Awareness .....	276
6.2 Achievements in Awareness Raising .....	277
6.3 Preventing Future Discrimination .....	278
<b>7. References .....</b>	<b>281</b>
<b>Annexes .....</b>	<b>283</b>
Annex 1 – Glossary .....	283
Annex 2 – Template for Good Practice Examples .....	284
Annex 3 – Statistics Equality Bodies/Ombud Institutions.....	286



## Executive Summary

The present Country Study/Report is the result of a three months research on the situation of discrimination in the Republic of Kosovo,\* within the regional project **“Legal Protection against Discrimination in SEE”** launched by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. The aim of this research is to identify the good practices as well as the challenges and the systemic obstacles for the effective legal protection against discrimination in Republic of Kosovo.\* The study covers a legal framework analysis, the institutions/bodies responsible as well as the main challenges in implementation of applicable laws governing discrimination in Republic of Kosovo.\* It looks into the implementation of the anti-discrimination provisions by stakeholders mandated under the legal framework governing anti-discrimination in Kosovo,\* including the Ombudsperson Institution (OI), Office for Good Governance of the Prime Minister Office (OGG), Agency for Gender Equality (AGE), Judiciary, Human Rights Units (HRUMs), Kosovo\* Police (PK), Intermediaries, NGOs and other actors involved in the promotion, prevention and combating discrimination. In addition, Separate Sections covers the issues of the awareness raising, prevention and promotion of non-discrimination, and contribution of Universities in awareness raising and promotion of non-discrimination, through the inclusion in education and other teaching programs aiming at deepening the level of knowledge on human rights issues, including discrimination.

The methodology of this study includes:

- desk research of the relevant legal framework, various reports of the stakeholders, NGOs and other actors involved, as well as various surveys and studies on discrimination;
- expert interviews with the Ombudsperson as equality body, representatives of OGG, AGE, KP, Human HRUMs, Courts, Kosovo\* Judicial Council, Prosecutors and other actors involved;
- expert interviews with the representatives of the teaching staff, the students and the bodies dealing with the issue of discrimination within the education system in Kosovo.\*

Considering the limitations in terms of timeframe and writing space allowed by agreed Template, we do not pretend to present this Study as comprehensively covering all issues related to discrimination in Kosovo,\* having that the problems and challenges in this area in Kosovo\* are considerable; however, we hope that it will appropriately highline the main such challenges and will duly serve as a basis for further steps in the improving of the overall situation.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*



# 1. Legal Framework Prohibiting Discrimination

## 1.1 Overview of Constitutional and Legal Provisions

Under this heading it will be assessed what constitutional guarantees are provided by the Kosovo\* Constitution on prohibition of the discrimination and how those constitutional guarantees are further regulated and defined through the primary legislation.

Kosovo\* adopted its Constitution in 2008 which, in large, was designed within the parameters set forth in the Ahtisaari Plan.<sup>1</sup> The Constitution follows the patterns of a modern constitution in terms of the institutional structures premised upon the separation of powers but also in a context of individual constitutional guarantees through a catalogue of constitutional rights and freedoms entrenched in Chapter 2. The Kosovo\* Constitution devotes a special chapter promoting the rights and freedoms of the non-majority communities, which are specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in chapter 2 of the Constitution. There are three important avenues in the Kosovo\* Constitution which contain substantive guarantees in terms of prohibition of discrimination.

Article 7 of the Kosovo\* Constitution states the constitutional values and principles, which serve as a broad definition of the aims and purposes of government. These constitutional principles serve as the symbolic embodiment of a society's commitment to an idea, value, or way of life. Pursuant to Article 7 of the Constitution:

"1. The constitutional order of the Republic of Kosovo\* is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy. 2. The Republic of Kosovo\* ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life".

As it can be observed, the prohibition of discrimination along with constitutional embodiment of the equal opportunities for female and male participation in the political, economic and cultural areas of societal life constitute one of the core principles of Kosovo's\* constitutional order.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>1</sup> Marko, Joseph. "New Kosovo Constitution in a Regional Comparative Perspective, The." *Rev. Cent. & E. Eur. L.* 33 (2008): 437; Dren Doli and Fisnik Korenica. "Calling Kosovo's Constitution: A Legal Review." *Denning LJ* 22 (2010): 51; Tunheim, John. "Rule of law and the Kosovo constitution." *Minn. J. Int'l L.* 18 (2009): 371.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*



The constitutional value on prohibition of discrimination guides the decisions and actions of governmental institutions and officials of the executive and legislative branches, but also informs the interpretation of the constitution by members of the judiciary. Sometimes, constitutional values are the only basis on which to understand the demands and requirements of the Constitution in a given situation.

The Kosovo\* Constitution has also domesticated the most important international human rights acts, which are directly applied by the Kosovo\* public authorities and do not require ratification in order to become executable. Article 22 of the Constitution provides that human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, and are directly applicable in the Republic of Kosovo\* and, in the case of conflict, have priority over provisions of the laws and other acts of public institutions:

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (3) International Covenant on Civil and Political Rights and its Protocols;
- (4) Council of Europe Framework Convention for the Protection of National Minorities;
- (5) Convention on the Elimination of All Forms of Racial Discrimination;
- (6) Convention on the Elimination of All Forms of Discrimination against Women;
- (7) Convention on the Rights of the Child;
- (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

It should be noted that almost all of the instruments listed under Article 22 of the Kosovo\* Constitution provide substantive and procedural guarantees regarding the equality and prohibition of discrimination. For example, article 2 of the ICCPR is the central provision dealing with non-discrimination, which prohibits discrimination with regard to all rights and benefits recognized by the Law.

More extensive elaboration of the guarantees regarding non-discrimination is provided by the International Convention on the Elimination of All Forms of Racial Discrimination, which is directly applicable in Kosovo.\* Its principal provision dealing with anti-discrimination is Article 1(1) where the protection is limited to the specified grounds of ‘race, color, descent, or national or ethnic origin.’ Article 5 provides for ‘equality before the law’ and the general wording of Article 1(1) suggests that the Convention is free standing in that it covers all forms of discrimination in any field.

As discussed above, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is also directly applicable by the Kosovo\* Constitution. This Convention was adopted in 1979 and entered into force in 1981. It should be noted that the protection against discrimination in CEDAW is merely limited to discrimination against women. Article 1(1) refers to only one ground of discrimination, sex discrimination, but also

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

explicitly prohibits sex discrimination to the extent that it may occur by way of discrimination on grounds of the marital status.

The constitutional provision that most directly address non-discrimination issues is Article 24 [Equality before the Law].

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

### **The Law on the Protection from Discrimination (LPD)**

As can be observed, the Constitution drafters have opted for a negative approach in terms of the constitutional guarantees for the prohibition of discrimination. The Constitution has mainly focused primarily on protecting the individuals from the abuse by the public authorities through a negative obligation not to discriminate. However, Article 24(3) enables a positive approach in terms of non-discrimination by providing that certain measures can be imposed to protect and to advance the rights of the individuals and groups who are in an unequal positions. The Kosovo\* Constitution is one of the most advanced constitutions which extend positive obligations on the state authorities in order to strengthen the status of the vulnerable groups, particularly of the non-majority communities in the political, societal and cultural aspect.

Law No. 05/L-021 on Protection from Discrimination (LPD) has established a general framework for prevention and combating discrimination in Kosovo.\*<sup>2</sup> The Law prohibits any discrimination based on nationality or in relation to any community, social origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds.<sup>3</sup>

This Law has abolished the previous Law on Anti-Discrimination from 2004 and has therefore introduced significant improvements in the context of the institutional and legal protections against discrimination. The Law is also in compliance with the Council Directive 2000/43/EC of 29 June 2000 on the implementing of the principle of equal treatment between persons regardless of racial or ethnic origin of the Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation of the Council of the European Union, Council Directive 2004/113/EC of 13 December 2004 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>2</sup> The Law is available online at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10924>.

<sup>3</sup> Article 1.

of the Council of the European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on implementation of the principle of equal opportunities and equal treatment of men and women related to employment and occupation (amended) of the European Parliament and the Council of the European Union.

This Law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to

- conditions for access to employment, self-employment and occupation, including employment conditions and selection criteria, regardless of activity and at all levels of the professional hierarchy, including promotions;
- access to all types and levels of vocational guidance, vocational training, advanced vocational training and re-qualifications, including internship experience;
- conditions of employment and working conditions, including discharge or termination of the contract and salary;
- membership and involvement in organizations of workers or employers or any organization whose members exercise a particular profession, including the benefits provided for by such organizations;
- social protection, including social assistance scheme, social security and health protection;
- social advantages social amenities, including but not limited to humanitarian aid;
- education; access to housing, which is available to the public, and the access to other forms of property (movable and immovable);
- access to and supply of goods and services which are available to the public;
- fair and equal treatment in court proceedings and all other authorities administering justice;
- access and participation in science, sports, art, services and cultural activities;
- personal insurance.

### **Law on Gender Equality (LGE)**

This Law protects and promotes equality between genders as a basic value of the democratic development of society in Kosovo.\* Gender Equality in terms of the law means an entire and equal exercise of women and men, of their human rights, and denotes the non-presence of gender based discrimination, in opportunities, sharing of resources or benefits, as well as in access to services. For this purpose, LGE determines the general and specific measures to ensure and protect the equal rights of men and women, and defines the Institutions responsible and their competencies. It should be noted that LGE is entirely in accordance with:

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Directive on establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC);
- Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC);

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

- The Directive on the progressive implementation of the principle of equal treatment for men and women on issues of social security (Council Directive 79/7/EEC, of 19 December 1978);
- Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Directive 2010/41/EU, of 7 July 2010);
- Directive on the implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Directive 2004/113/EC).

## 1.2 Assessment of the Legal Framework

The Kosovo\* legal framework, as shown above, contains adequate constitutional and legal guarantees for an effective prohibition of discrimination. At constitutional level, the Kosovo\* Constitution has defined the “principle of equality” as one of the key constitutional values of the society. Moreover, the Constitution has enabled a direct application of most of the relevant international human rights instruments, which prohibit discrimination on explicit grounds. And finally, the Constitution has introduced the constitutional right to equality as a subjective right, which entitles everyone to be treated equally. It’s important to mention that the Constitution foresees the possibility of enforcing the constitutional right on equality before the Kosovo\* Constitutional Court through the so-called individual constitutional complaint. Anyone who considers himself as a victim of discrimination and unequal treatment by public authorities is entitled to refer violations of his/her individual rights and freedoms guaranteed by the Constitution before the Constitutional Court after all available legal remedies have been exhausted.

The adoption of the new Anti-Discrimination Law in 2015 is considered as an important legal tool in combating all forms of discrimination in Kosovo.\* There are three key advantages that new LPD seeks to bring for the prevention of the discrimination. First, the Law strengthens the legal protections against discrimination in Kosovo\* by conforming it to international and European anti-discrimination standards. Second, the Law defines a variety of forms of discrimination in a very broad context and by covering all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, which violate, violated or may violate the rights of any person or of the natural and legal entities in all areas of life. And third, the Law has given the Ombudsperson and the courts an important role in protecting the individuals against unequal treatments and various forms of discrimination. The Ombudsperson is entitled to receive and investigate submissions of persons and can address directly to investigation and prosecution bodies with a request to initiate an investigation of criminal offenses and requires initiating the applicable disciplinary proceeding. The legal protections against any form of discrimination are further strengthened through the right of persons or group of persons entitled to submit a lawsuit in the competent in civil law procedure. Furthermore, the Law has introduced various amounts of fines, which can be introduced against the state institutions or bodies and state officials who perform, call for or instigate discrimination and assist in discriminatory activities.<sup>4</sup> A positive assessment of the legal framework against discrimination was also given by the European Union

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

<sup>4</sup> Article 23.

Progress Report for Kosovo\* (2015). The Report states that the adoption of the Law on the Protection from Discrimination (in May 2015) is a major step forward and states further that “some progress has been made with the adoption of the package of human rights laws (the laws on the Ombudsperson, gender equality and protection from discrimination). This strengthened the institutional set-up and clarified the roles of various civil and public institutions (e.g. the Ombudsperson's Office and the Agency for Gender Equality)”.<sup>5</sup>

## **2. Institutional Framework for Combating Discrimination**

### **2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination**

Legal framework containing legal provisions determining stakeholders combating discrimination consists of the following main pieces of legislation:

Law on Protection from Discrimination (Law No. 05/L-021)

Law on Gender Equality (Law No. 05/L -020)

Law on Ombudsperson (Law No. 05/L -019)

In addition, the Kosovo\* Law on Free Legal Aid (Law No. 04/L-017) provides legal provisions for free legal aid to persons who fulfill the criteria prescribed by the Law; however there are no specific criteria which provide the rights to free legal aid based on the claim for discrimination.

Therefore, for purpose of this writing and in order to identify the main stakeholders combating discrimination, the above-mentioned three Laws will be referred below.

#### **Law on Protection from Discrimination (LPD)**

The current Law on Protection from Discrimination was adopted by Kosovo\* Assembly on 28 May 2015.

LPD Article 8 sets a general obligation for all Kosovo\* institutions to act in accordance with the principles contained therein while exercising their duties and drafting the policies and legislation. Although this provision is a general principle, it is important in terms of posing the obligation for all institutions to consider the principle of equality in execution of their competences as provided for by the respective legal framework which determines their mandates.

However, besides of the general obligation from Article 8, LPD specifies the following main stakeholders responsible for dealing with discrimination:

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>5</sup> [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_kosovo.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_kosovo.pdf)

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

## **Kosovo\* Ombudsperson**

In its Article 9, the Law places the Ombudsperson Institution as the sole equality body mandated to address human rights concerns, including those related to equality, promotion and protection from discrimination.

Under Article 9(2) (2.1-2.14) the Law provides in details the responsibilities of the Ombudsperson in terms of identifying, addressing and combating discrimination.

The purpose, structure, competencies, procedures and all other details on functioning of the Institution are provided for in the Law on Ombudsperson<sup>6</sup> and will be described in details below under 2.2.

## **Office for Good Governance within the Office of the Prime Minister (OGG)**

LPD's Article 10(1), assigns responsibilities related to human rights to the Office for Good Governance within the Office of the Prime Minister. These responsibilities are mostly related to the advocacy, monitoring, reporting and legislation, actions plans and policy drafting.

Based on the legal mandate assigned to OGG, it is promotional type of body. The structure, the role and the functioning of the OGG are closely regulated by Article 40 of the Regulation on Organisational Structure of the Prime Minister Office.<sup>7</sup>

Based on the mentioned Regulation, the OGG have duties and responsibilities to provide advice to the Prime Minister (PM) and to the respective units within the Office of Prime Minister, among others, on human rights, equal opportunities and anti-discrimination issues; to oversee and provide advice to Ministries and to prepare the policies and strategies<sup>8</sup> in the areas of, among others, human rights, equal opportunities and anti-discrimination; to review actions policies, draft legislation prepared by the Government Bodies; to assists in the development and the implementation of the public communication campaigns and other promotional projects to raise the awareness of the population on the international standards on human rights, equal opportunities and anti-discrimination; to perform processes of coordination, ensures strengthening of cooperation, partnerships and inclusion of civil society in the drafting and implementing of the public policies; the exercise monitoring activities.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>6</sup> Law No. 05/L -019, 2015.

<sup>7</sup> Regulation No.16/2013 on the Structure of the Prime Minister Office.

<sup>8</sup> Up to date, OGG has drafted a considerable number of strategies related to protection of human rights, including non-discrimination. However, the practical effect of these strategies remains at very low level. In this regards, the Ombudsperson prepared a recommendation which requires compiling of over 12 strategies in a sole document to be titled "Human Rights Strategy" and to include concretely assigned responsibilities, time-frames and measurement of achieved results. Also, the recommendation includes the duty of Prime Minister to report at least once a year at Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Assembly on the work of the Government in protection of human rights, which would increase the level of accountability of governmental institutions towards Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Assembly. It is encouraging the readiness of OGG to implement these recommendations through initiation of drafting of a technical plan which, among other, provides the obligation of the Government to, at least every two month, at Government meetings discuss the implementation of Ombudsperson's recommendations. This initiative is formally supported also by all international organizations which has mandate in human rights area.

As indicated by the feedback from the interview with OGG,<sup>9</sup> the OGG is actively engaged in awareness raising activities.

As of April 2014, OGG is co-implementing partner of Twining Project against Homophobia and Trans-phobia.<sup>10</sup> This project aims to address the violence, prejudice and discrimination against LGBT in Kosovo,\* through providing the capacity building and awareness raising and professional approach of Kosovo authorities, in particular, of police, judiciary, education system and media towards the members of LGBT community.

### Non-Governmental Organisations (NGOs)

Under Article 10(2), the Law provides for cooperation between the Government and the Civil Society Organisations (CSOs) which are involved in the activities aiming to promoting, monitoring and protecting the principle of equality in the enjoyment of human rights. The level of such cooperation will be described below. Among most active CSOs dealing with human rights and, specifically, with discrimination are:

*Civil Rights Program Kosovo\** - CRP/K is a human right-based NGO<sup>11</sup> that provides a free legal assistance and counseling for returnees, refugees, asylum-seekers, IDPs, persons at risk of statelessness and to persons who are considered to be vulnerable in realization of their human rights. Such support is provided without discrimination of any kind. CRP/K is UNHCR's implementing partner in all legal protection programs and in each implementation activity non-discrimination is as a core principle. Working with the most vulnerable categories requires a particular attention to be placed on their treatment by authorities while providing services aimed to solve their various legal and other problems. The most cases of different treatment, which often constitute discrimination in the access to the rights, are evidenced with regards to access to the documentation, the access to education, the access to property rights, the right to use and to be served in own language, and the access to other basic human rights and freedoms which are guaranteed by Kosovo\* applicable laws and international standards on human rights. Based on the contributions received from CRP/K officials,<sup>12</sup> CRP/K regularly identifies and addresses situations which constitute direct<sup>13</sup> or

<sup>9</sup> Interview with Ms. Sadete Demaj, OGG Coordinator, 25.02.2016.

<sup>10</sup> EU Project "Fight against Homofoby and Transfoby", implemented by EU Office in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.), OGG, Austrian Institute Ludwig Boltzmann and Finnish National Institute for Health and Welfare.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>11</sup> CRP/K is the main free legal aid provider in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) and one of the largest in the region. It is the member of several regional networks (ECRE, WeBLAN, ENS) and is the co-partner of few regional projects.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>12</sup> Papers received by Reintegration Section Coordinator Ms. Gloriosa Hisari and Statelessness Prevention Section Coordinator Mr. Mentor Seferi, 18.03.2016.

<sup>13</sup> As example, there were several cases when the birth or other certificates where issues in Albanian language for persons of Serbian or other communities whose mother tongue is Serbian language. In fact, the functionalization of the electronic system of civil registry in some of Kosovo This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.)(municipalities did not include the use of Serbian language while issuing civil status documents. After interventions made by CRP/K and other actors involved, the system was repaired so to include Serbian language.

indirect discrimination<sup>14</sup> and pays particular attention to such cases. Having that CRP/K has capable human and other capacities.<sup>15</sup> It proceeds and follows-up such cases through advocacy activities with the respective stakeholders, through assistance and representation of PoCs in the initiation of due processes at competent bodies. In doing so, CRP/K cooperates with all stakeholders dealing with discrimination, in particular, with the Ombudsperson, HRUMs, OGG, Police and other responsible authorities.

*Center for Legal Aid and Regional Development* – CLARD is a NGO with a to provide of free legal aid, promotion of human rights and, in the specific cases, representation of beneficiaries at courts litigations (strategic litigation). The mandate for its functioning derives from the Law on NGOs.<sup>16</sup> As a current focus, CLARD is running legal clinics through which it identifies the cases of human rights violations and represents the alleged victims at the courts and other authorities. CLARD is among the first organizations that challenged a competent institution related to the implementation of the LPD. As from 2008, CLARD initiated few discrimination cases<sup>17</sup> which challenged the implementation of LPD and which served well as introduction of a such practice in the Kosovo\* judiciary. These cases, as the rare examples of a strategic litigation in Kosovo,\* will be described under section 4.3 (Strategic Litigation). Referring to the interview with the CLARD Project Coordinator,<sup>18</sup> the legal framework on discrimination is advanced comparing to the previous one, particularly in the context of the legal remedies and the competences granted to the Ombudsperson Institution. However, the main challenge remains in the implementation of the legal framework where the gaps are very evident, especially within the judicial system which lacks the sufficient capacities to identify and to handle the discrimination cases. CLARD cooperates with most of the actors involved in the human rights issues, especially with the Ombudsperson Institution with which it has partnership agreement.

*NORMA* – is human rights based NGO which main mission is to treat the issues of gender equality, with a particular focus on the rights of women. Thematic issues include domestic violence, women inheritance, women participation and other gender issues which tend achievement of gender equality at the level as provided for by Kosovo\* applicable laws and international standards on human rights. The interview performed with NORMA<sup>19</sup> indicates that this organizations' current focus is on Law on Family and the issues tackling women equality therein. NORMA provides free legal advices for the victims of domestic

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<sup>14</sup> As example, the Law on Civil Status provides for criteria which a person should fulfil in order to be registered as Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) citizen. Such criteria include, for instance, obtaining of the proof of residence, which in case of Internally Displaced Persons (IDPs) is almost impossible to provide due to their temporary status. The respective legal provision, although seemed to be neutral, indirectly discriminated a large number of IDPs. Through continual advocacy activities, meetings with stakeholders at central and local levels and other forms of interventions, CRP/K made to achieve a flexible approach of authorities in implementation of such criteria in case of IDPs.

<sup>15</sup> Currently CRP/K employs 30 full staff members of which 24 are lawyers with long-term experience in provision of free legal assistance.

<sup>16</sup> Law on Freedom of Association in Non-governmental Organizations, 2011/04-L-057, 2011.

<sup>17</sup> Case *Gorani v Ministry of Education, Science and Technology*, case *Arjeta Halimi v. Kuvendi i Lezhës*; case *Bahadır Troshupa v. Education Directorate Gjakovë/Djakovica*.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>18</sup> Interview with CLARD Project Coordinator, Mr. Anton Nrecaj, 7.03.2016.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>19</sup> Interview with NORMA Executive Director, Ms. Valbona Salihu, March 8<sup>th</sup> 2016.



violence, discrimination and other violation of women rights and, if necessary, refers cases to institutions and authorities that are mandated to treat such cases.

### **Institutional mechanisms for protection from discrimination in the Ministries and Municipalities – Units or Officials**

Article 11(1) of LPD obliges all Kosovo\* Ministries and Municipalities to assign Units or Officials with the task to coordinate and report on the implementation of the Law on Protection from Discrimination. Since the Units within the Ministries are directly connected with the OGG and their activities are in line with the overall strategy of the Office of Prime Minister in the area of human rights, the focus in this writing will be put on the Municipal Human Rights Units (HRUMs) which are supposed to be closer to the citizens in terms of their concrete human rights concerns, including discrimination. The structure of Units is clearly defined by the Administrative Instruction (AI) issued by the Ministry of Administration of Local Government (MALG).<sup>20</sup> AI provides for full-time positions without any other additional duties or responsibilities for the assigned officers. It prescribes the duties and responsibilities of HRUM which consists of assessing and ensuring the compliance of policies, legislation and activities of the municipality with the highest human rights standards, monitoring and advising on human rights issues, identifying, drafting and developing the needs for capacity building in HR area, implementing laws, plans and strategies adopted by the Government and Assembly of Republic of Kosovo,\* cooperation and coordination of activities with other municipal structures and NGOs in the field of protection and promotion of human rights; and cooperation with external institutions and agencies, including the Ombudsperson Institution.

For the purpose of this writing, the interviews were conducted with six (6) HRUMs.<sup>21</sup> The main findings from these interviews lead to the following conclusions:

- the number of the officials and composition in terms of the issues covered in HRUMs differs in various municipalities and most of them does not cover all areas provided for by AI;
- in the most of the municipalities the HRUM's officials have additional duties and responsibilities apart of those provided for by AI, what is in contradiction with Article 3(5) of AI;
- With regards to the number of received complains for human rights breaches, including discrimination, in the period between 2010-2015, the interviews reveals the following: Mitrovica – 0; Pris(h)tina – 50; Gjilan/Gnjilane – 75; Peja/Pec - 2; Prizren - 0; Istog – 0;<sup>22</sup>
- Concerning the awareness raising activities and information of citizens, the interviews indicate that such activities are performed in all municipalities, mostly through various leaflets, roundtables, media campaigns, various events marking human rights jubilees (Human Rights Day, Children Rights Day, etc.);

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>20</sup> Administrative Instruction 2011/04, Article 3, para 4.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>21</sup> Interviews were conducted with HRUMs in Pris(h)tina, Mitrovica, Gjilan/Gnjilane, Peja/Pec, Istog and Prizren.

<sup>22</sup> It should be noted that there are no specific evidences on discrimination cases and all complains are rather marked as 'human rights violations'. This indicates that HRUMs Officers are not familiar with the basic concepts of discrimination and therefore not able to identify the situations of different treatments which may constitute discrimination.

- In regards to the organisations and/or bodies that HRUMs considered to be their allies in combating the discrimination, the Ombudsperson is mentioned to be the main partner by all respondents, while among other allies are OGG, Kosovo\* Police, Centres for Social Welfare, NGOs, courts, prosecutors, etc.

### **Law on Gender Equality (LGE)**

In its Article 1, the LGE declares its aim to guarantee, protect and promote the equality between genders<sup>23</sup> and to determine the general and specific measures to ensure and protect the equal rights of men and women and to define responsible institutions and their competencies.<sup>24</sup>

### **Agency for Gender Equality (AGE)**

Under Article 7, the LGE foresees the establishment of the Agency for Gender Equality as an executive body within the Office of the Prime Minister (OPM).

Under Article 8 the LGE provides in details the functions and the responsibilities of the Agency, which, among others include the activities aiming to promote, support, coordinate and implements the provisions of LGE; to prepare reports on the implementation of the Convention for Elimination of All Forms of Discrimination against Women (CEDAW); to cooperate and coordinate with the public institutions and officials at both central and local levels to ensure the implementation of the LGE; to analyze the status of gender equality in Kosovo\* and to provide recommendations to the relevant authorities; to take the measures aiming at raising of awareness on gender equality; to prepare annual reports for the Government on the implementation of the LGE. Based on the interview performed at AGE,<sup>25</sup> this body is of a promotional type and aims to ensure gender mainstreaming in the policies. For potential complaints that are related to discrimination, the AGE advises the interested parties to reach out Ombudsperson Institution in Kosovo, referring to Article 13 of the LGE. Concerning the opinion of the AGE on the legal framework for combating discrimination, they consider that the legal framework enshrines high degree of international standards. LGE provides for 50% participation of women at all institutional levels.<sup>26</sup> However, AGE considers that the implementation of the legal framework ensuring equality between genders still faces considerable challenges in women participation, women inheritance, and other aspects which should be duly addressed.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>23</sup> Law on Gender Equality, Article 1, paras 1&2.

<sup>24</sup> Law on Gender Equality, Article 1, para. 2.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>25</sup> Interview with Ms. Edona Hajrullahu, the Chief Executive of AGE, February 24<sup>th</sup> 2016.

<sup>26</sup> However, 30% of all seats in the Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Assembly is reserved for women, what indicates that the aim of the Law is not achieved even in the highest representation body in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Article 6 of the LGE under special measures, paragraph 8 states that: 'equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies'.

## **Officials for Gender Equality (OGE) in Ministries and Municipalities**

In Article 12(1), the LGE obliges the Ministries and Municipalities to appoint relevant officials for gender equality. Further, the same provision foresees the allocation of the budget for the purpose of implementation of the LGE.

## **Ombudsperson**

Article 13 of LGE confirms the Ombudsperson's authorization as equality body to deal with the cases involving gender discrimination, as provided by the Law on Ombudsperson.

## **Political parties**

Article 14 of the LGE provides an obligation for Political Parties to implement the measures to promote an equal participation of men and women in the authorities and bodies of the Parties in accordance with the provisions of Article 6 of the LGE.

## **Law on Ombudsperson (LO)**

### **Ombudsperson Institution**

The Law on Ombudsperson sets up the framework for establishing and functioning of the Ombudsperson Institution, including, among others, the purpose, composition of the Institution, the procedure for election of the Ombudsperson and the Deputy Ombudspersons, dismissal of the Ombudsperson and his/her deputies, powers and responsibilities of Ombudsperson, complaints reviewing procedures, and other provisions related to the technical issues necessary for the functioning of the Institution.

In the LO Article 17(2)(2) provides that Ombudsperson Institution will act as a National Preventive Mechanism against torture and other cruel, inhuman and degrading treatment. As informed by OI, the Mechanism is established in January 2016 and it is functional.

## **2.2 Stakeholders Putting Combating Discrimination into Practice**

Under this section the main focus will be put on the Ombudsperson's Institution which has a role in combating discrimination centrally based on the Law on Protection against Discrimination and other respective Laws governing human rights area. Other institutions/bodies will also be mentioned in the context of their involvement in discrimination issues, whether in promotion and prevention of anti-discrimination or in any other respective form, as provided by their legal mandates.

### **2.2.1 Ombudsperson Institution (OI)**

The Ombudsperson Institution in Kosovo\* was established in 2000 by UNMIK Regulation no. 2000/38, which provided the institution with a mandate to investigate complaints against the UNMIK administration and the Local Public Administration. Next UNMIK Regulation 2006/6 (y. 2006) superseded the Regulation 2000/38 and according to it, the Ombudsperson Institution had a mandate to investigate the complaints filed against the local authorities or other bodies of the Provisional Institutions of Self-Government of Kosovo\* (PISG), but it

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

had no longer the mandate to investigate the complains against the international administrative bodies in Kosovo.\*

UNMIK Regulation no. 2007/15 was adopted in 2007 amending the Regulation no.2006/6 on the Ombudsperson Institution in Kosovo.\* This Regulation brought several novelties in terms of denomination of the Institution (from “The Institution of the Ombudsperson” into “The Ombudsperson Institution of Kosovo”\*), the internal structure of the Institution, as well as the mandate of the Ombudsperson and its Deputies.

The Constitution of the Republic of Kosovo,\* adopted on 15 June 2008, provides the Ombudsperson Institution as a constitutional category.<sup>27</sup>

On July 22<sup>nd</sup> 2010, the Law on the Ombudsperson was adopted, repealing the UNMIK Regulations no. 2000/38, 2006/6 and 2007/15.

Finally, in 2015 the new Law on the Ombudsperson was approved by Kosovo\* Assembly which defines the mandate of OI as it is currently.

### **Legal framework/mandate:**

The Constitution of the Republic of Kosovo,\* in its Chapter XII (Independent Institutions), under Articles 132 – 135 determines the role and competencies of the Ombudsperson, office of the Institution, qualifications, election and dismissal of the Ombudsperson and Ombudsperson reporting.

The Law on Protection against Discrimination, under Article 9, clearly states the mandate and competencies of Ombudsperson as a body for equality, protection and promotion of human rights.<sup>28</sup>

The Law on the Ombudsperson<sup>29</sup> (LO) regulates in details all issues related to the mandate, competencies, structure, functioning and procedural and other issues important for the establishment and functioning of the Institution.

The Ombudsperson Institution is an equality body established as a mechanism for protection, monitoring and promotion of the human rights<sup>30</sup> and equal treatment of all, without any discrimination on the grounds protected by the LPD and LGE.

The LO determines the structure of the Ombudsman Institution<sup>31</sup> which is composed by:

- Ombudsman – elected for the term of five (5) years by Kosovo\* Assembly, under the conditions provided for in Article 6;

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

<sup>27</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence).Constitution 2008, Chapter XII, Independent Institutions, Article 132.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>28</sup> Law on Protection from Discrimination, Article 9, paragraphs 1&2 (2.1-2.14).

<sup>29</sup> Law No. 05/L-019, May 28<sup>th</sup> 2015.

<sup>30</sup> LO, Article 1, paras 1&2, Purpose.

<sup>31</sup> Law on Ombudsperson, Article 5.

- Five (5) Deputy Ombudspersons – elected for five (5) years by Kosovo\* Assembly, upon the proposal of Ombudsperson; and
- Staff of the Ombudsperson Institution.

Article 16<sup>32</sup> of LO determines a wide range of powers of the Ombudsperson in investigation of the complaints for violation of the human rights, including the scope of its competences (entire Kosovo\* territory, outside the territory), the right to initiate procedures on own initiative (*ex officio*), the power to refer matters to competent bodies in case of a criminal offence, the power to provide general recommendations on the functioning of the judicial system, the right to appear as *amicus curiae* in the judicial processes involving human rights, equality and protection from discrimination, the power to initiate human rights matters at the Constitutional Court, the possibility to exercise competences through mediation and conciliation and the power to publish reports and to make recommendations on policies and practices in fighting of discrimination and in promoting the equality.

The LO also empowers the Ombudsman to act as a National Preventive Mechanism against torture and other cruel, inhuman and degrading treatment and punishment (NPM) and sets its obligations in accomplishing of this duty.<sup>33</sup>

Responsibilities of the Ombudsperson Institution are in details provided for in Article 18 of the LO.<sup>34</sup> The responsibilities include, among other:

- the duty to investigate alleged violations of human rights and acts of discrimination,
- to draw attention to institutions which are in violation of human rights and to require cease of such practices,
- to report and to combat all forms of discrimination through awareness activities,
- to prepare recommendations for the Government, the Assembly and other competent institutions on the matters related to protection and promotion of human rights, equality and discrimination,
- to recommend amendments on the existing laws and drafting of new laws and by-laws and harmonization of such legal acts with international standards,
- to prepare annual, periodical and other reports on the situation of human rights, equality and discrimination,
- to cooperate with all actors involved in the protection of human rights and freedoms, and other responsibilities as provided for under paragraphs 2-8 of Article 18 of LO.

Submission and reviewing of alleged claims for discrimination by OI is done based on the procedures specified in the LO. Within OI there is the Department for Protection from Discrimination which aims to provide all citizens with equal access in realization and protection of human rights and to undertake the measures in prevention of the various forms of discrimination. The new LPD extended the competencies of OI to protect not only individuals and legal entities but also, for the first time, to deal with discrimination in the

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>32</sup> Law on Ombudsperson, Chapter III, Powers and Responsibilities of the Ombudsperson, Article 6, paras 1-16.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>33</sup> Law on Ombudsperson, Article 17, paras 1-7.

<sup>34</sup> Law on Ombudsperson, Article 18, paras 1-8.

private sector.<sup>35</sup> It remains to be seen how the OI will execute this part of the mandate, considering that the Constitution of Kosovo\* contains a specific provision which provides OI with a mandate to oversee the public authorities, and these additional competences reflects a clear conflict of LPD with Constitutional provisions.

In addition, OI has a particular role in provision of a legal assistance in the context of discrimination, both to the individuals and legal entities who have submitted complaints on the basis of an unequal treatment, to provide them with advice on their rights and duties, and on possible judicial and other protection.

As per the procedure for handling the complaints the main principle that applies is based on the individual cases.

After receiving the complaint, OI decides on its admissibility of the case and informs the person accordingly. If OI considers that the complaint falls under *ex officio* competence and it provides sufficient basis for investigation, it initiates the procedure of investigation. Based on the Constitutional provision<sup>36</sup> and the provisions of LO,<sup>37</sup> all authorities and other physical and legal persons are obliged to respond on the requests of the Ombudsperson for information and documents related to the issue or to allow access to all relevant files and documents. After reviewing of all available evidence (information, testimonies, statements and other evidence) and if concluded that the discriminatory treatment exists, OI publishes a report with recommendations to cease or prevent and eliminate discrimination addressed to relevant authorities responsible for such unequal treatment. OI will follow-up with monitoring of the implementation of its recommendations. Under LPD<sup>38</sup> the monitoring of implementation of OI recommendations is also a core obligation of OGG. A new, very important novelty is introduced in LPD<sup>39</sup> and it provides that any person who hides or obscures evidences, facts or information in a due process of combating the discrimination will be punished by a fine in an offence procedure.

LPD provides that OI may “address directly the investigation and prosecution bodies with a request to initiate an investigation of criminal offenses and requires initiating the applicable disciplinary proceedings”.<sup>40</sup> Comparing to previous competencies of OI, this novelty presents a very important tool which essentially changes the concept of the role and the competencies of OI in Kosovo.\*

### 2.2.2 Intermediaries

As described above under section 2.1, there are few CSOs that deal with the different aspects of the discrimination and which develop certain cooperation and coordination with institutional authorities mandated to combat this phenomenon. They mostly provide free legal assistance and counselling for the victims, while in certain cases they also represent them at courts and other authorities. Also, there are few organizations that provide

<sup>35</sup> Law on Protection from Discrimination, Art. 12.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>36</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with INSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence) Constitution, Article 132, para. 3.

<sup>37</sup> Law on Ombudsperson, Article 18, paras 4&6; Article 25, para. 1.

<sup>38</sup> Law on Protection from Discrimination, Article 10, para 1.2.

<sup>39</sup> Law on Protection from Discrimination, Article. 12, para 4.

<sup>40</sup> Law on Protection from Discrimination, Article 9, para 2.4.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

accommodation (sheltering) for the victims of human rights violations (in particular, victims of domestic violence) including discrimination and they develop close relations with the Centres for Social Work (CSWs), Police and other competent institutions/authorities. However, there is a need for profilization and networking, as well as capacity building of such CSOs and other actors, in order to be able to properly respond the needs for promoting and combating discrimination.

### 2.2.3 Police

For many years, Kosovo\* Police (KP) is considered as one of the most credible and reliable institutions in Kosovo by the general public. KP is a constitutional category and its mandate derives from Kosovo Constitution<sup>41</sup> and Law on Police.<sup>42</sup>

Office for Human Rights within the HQ of KP is tasked to ensure that the executive functions of PK are in line with the applicable domestic legislation and human rights standards. Also this Office works in promotion and advancing of human rights and diversity, taking the effective measures for assessing the compliance of policies, legislation and activities of PK with the applicable legal framework.

In terms of discrimination, and based on the interview performed with KP Office for Human Rights,<sup>43</sup> the role of KP in combating discrimination may be categorized in two main components:

- to prevent and combat discrimination, and
- to promote effective equality through enforcing the principle of equal treatment of citizens before the law.

Within the hierarchy of PK there is the Directorate for Professional Standards, while at the level of the MiA functions Inspectorate of KP, as an independent body, which deals with complains of citizens on the behavior of police officers while performing their official duties. The procedure for investigation of such claims/complaints is regulated with the Standard Operational Procedure (SOP) which applies for each Police Department, Division, Directorate, Station and Unit as well as with respective AIs which administer such complaints.

The role of KP in supporting of the other institutions in the promotion, preventing and treating the discrimination: Through various forms of cooperation with other stakeholders, KP supports these bodies and institutions in execution of their mandates related to the prevention and combating of discrimination and in supporting of the victims of discrimination.

In execution of its mandate, the KP cooperates closely with the Prosecutor's Office, Courts, OGG, AGE, NGOs and other institutions and organizations, while recently it issued the Instruction No. 00/2015 on the obligation of the police units to cooperate and support the Ombudsperson Institution in performing of its duties.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>41</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Constitution, Article 128, para 1. "The Police of the Republic of Kosovo shall be responsible for the preservation of public order and safety throughout the territory of the Republic of Kosovo".

<sup>42</sup> Law No. 03/L-035 on Police.

<sup>43</sup> Interview with the Head of Human Rights Office of KP Mr. Hysni Shala, 10.03.2016.

## 2.3 Mapping the Cooperation among Stakeholders

Preventing and combating discrimination is a complex task that requires a multi-sectoral approach and close cooperation of all actors involved. As regards the cooperation with other institutions and actors treating discrimination, based on the interviews performed with all actors involved, the general impression is that the most frequent cooperation is developed among the stakeholders mandated under the current legal framework to promote, prevent and combat discrimination. This cooperation includes OGG, Ombudsperson Institution, Police, AGE, HRUMs and several NGOs dealing with discrimination at various instances. In line with the efforts to implement non-discrimination policies and to guarantee equal opportunities for all categories of the society, and with a focus on addressing the problems faced by the LGBT community members, Kosovo\* Government, on 18.12.2003, through decision No. 05/161, established Counseling and Coordination Group for the rights of the LGBT with the aim of creating the partnership and regular cooperation between the local institutions, international organizations and NGOs working in promoting of the rights of the LGBT community in Kosovo\* and combating their discrimination. OGG developed a very close cooperation with the Ombudsperson Institution. The Ombudsperson Institution is the observer in all Inter-ministerial working groups, which were created by the OGG. Also, OGG monitors the process of the implementation of the Ombudsperson's recommendations addressed to the central and local level of Government.<sup>44</sup> The OGG also has an institutional cooperation with the Kosovo\* Police (KP) and KP is the part of the most of the mechanisms created by the OGG. AGE has a close cooperation with other institutions and bodies dealing with the human rights issues, gender equality and discrimination, including Ombudsperson Institution, Kosovo\* Police, NGOs, HRUMs and other actors involved. Also, AGE develops and participates in various forms of awareness raising activities aiming to increase the awareness on gender equality and inform the citizens on related issues.

### 2.3.1 Equality Body/Bodies

The Ombudsperson as an equality body has a very developed cooperation with the most institutions and bodies mandated to combat discrimination. As mentioned above, the OGG is legally obliged to monitor the implementation of the Ombudsperson's recommendations therefore there is a close cooperation between these two bodies in accomplishing their legal mandates. Also, the Ombudsperson cooperates with the HRUMs at municipal level concerning various human rights concerns of the citizens addressed to these bodies. The Ombudsperson is in the process of intensification of the coordination in the implementation of his recommendations with all other institutions, including Kosovo\* Police. As the result of these efforts, the level of implementation of the OI recommendations is increased for 50% in the second part of 2015, comparing to the previous period.<sup>45</sup>

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>44</sup> Law on Protection against Discrimination, Article 10, para.1 (1.2).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

<sup>45</sup> OI Media Statement, December 30<sup>th</sup> 2015.



### 3. The Role of Courts in Combating Discrimination

#### 3.1 Capacities of Courts in Combating Discrimination

A new court structure was introduced in Kosovo\* by the Law on Courts, which entered into force on 1 January 2013. There are now seven first instance Basic Courts vested with general jurisdiction, the Court of Appeal in Pristina and the Supreme Court of Kosovo\* being the supreme judicial authority in the country and the final Court of Appeal.

The statistics on the judgments in discrimination cases are not available to the public. They are presumably not available due to lack of proper system/database for gathering data from the courts. In order to find out the number of cases on discrimination in Kosovo,\* a request was sent to the Kosovo\* Judicial Council (KJC) for statistical data. However, the information received was insufficient to find out the number of discrimination cases that were dealt with by the courts. According to the Statistical Department of the KJC, the KJC does not have data on the cases regarding discrimination arguing that discrimination is not a criminal offence according the Kosovo\* Criminal Code. This suggests that the statistics on the discrimination cases need to become available and reliable. The KJC capacities need to be strengthened to enable the collection and processing of data on discrimination cases.

In Kosovo\* there is still not a systematic way of disseminating the judgments on discrimination cases to the relevant institutions. Judgments are not yet published online despite the fact that the KJC and the courts have designed a new website, which contains useful information about the structure of the courts, the profile of judges, annual reports etc; but there are no judgments still available online, let alone judgments on discrimination cases. Only judgments of the Constitutional Court are published in the website of the Court and at the Official Gazette of the Republic of Kosovo,\* which are easily available to the public in three languages - Albanian, Serbian and English.

There is not yet any good practice example of dissemination for the contribution in the raising of the awareness among judges, to harmonize judgments or encourage the victims of discrimination taking their cases to court. As stated above, the judgments in general are not easily accessible. The general public has difficulties in accessing the judgments of the courts on discrimination. The cases on discrimination are also rare in the Kosovo\* case-law, which is another problem that hampers the process of raising the awareness among judges, law students, or victims in assessing the judgments of the courts on discrimination cases. To improve this situation it is important to invite the media when cases on discrimination are treated by the courts, to publish such decisions, to organize seminars that would involve law faculties, institutes, judges, lawyers and NGOs dealing with anti-discrimination in order to assess the case-law, the quality of the judgments on discrimination cases, to address the problems that exist in referring the discrimination cases to the courts through administrative procedures.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

There are no judges that are specialized in the discrimination cases in Kosovo.\* So far the judges are mainly specialized in the following sectors: criminal law, civil law, commercial law, administrative law and family law. There are legal provisions which provide for equality bodies, ombudsperson institutions or intermediaries to partake in the court proceedings regarding discrimination. The Law on Administrative Procedure enables all interested persons to start the administrative proceeding or to participate in it either personally or through representation. In order to protect the public interests, the right to start an administrative proceeding or to participate in it, is also recognized to persons to whom administrative proceeding infringes their common rights such as: public health, education, cultural heritage, environment and quality of life; persons who live within or near a public property, which may be affected by the administrative proceeding and the Ombudsperson.

Moreover, pursuant to the Law on Administrative Conflicts in Kosovo\* (2010/03-L-202) any natural or legal person is entitled to start an administrative conflict before the competent Court (Pristina Basic Court) if it considers that his/her rights or legal interests have been violated by a final administrative act in administrative procedure. The Law enables not only the administrative bodies but also the Ombudsperson, associations and other organizations, which protect public interests, to refer cases to the competent court regarding the judicial review of decisions that are claimed to infringe the constitutional and legal provisions regarding anti-discrimination. Their role is essential in starting the procedures because these bodies have often the required internal legal capacities to refer discrimination cases, and can strongly advocate these cases before the competent court. One such example is the Ombud vs University of Pristina case:

The OI has reported on the discriminatory decision of the University of Pristina Senate on not recruiting professors over age of 50. The Ombudsperson considered the decision of the Senate unlawful and unconstitutional recalling relevant provisions of the Kosovo\* Constitution prohibiting discrimination based on age. Moreover, the OI has initiated the issue on administrative conflict to the competent court to rule out the case. Based on its powers, the OI initiated the case before the Kosovo\* Supreme Court seeking the judicial review of the UP Senate decision. After the reform of the judiciary system in Kosovo,\* the Basic Court of Pristina reviewed the case initiated by the OI and after the court hearing the Court accepted the writ of OI, and declared the decision of Pristina University Senate as unlawful. This constitutes one of rare examples of the role of the equality bodies or Ombudsperson Institution in preventing discrimination.<sup>46</sup>

The use of the statistical data in discrimination cases is not yet regulated by law therefore one cannot speak about the practice of the courts using statistical data in discrimination cases. As mentioned above, the courts and the KJC are still not able to report the number of discrimination cases that have been reviewed by the courts. The exception is the Kosovo\* Constitutional Court, which has built a new system for the management of cases, through which one can track discrimination cases by the Constitutional Court.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

<sup>46</sup> See the 2013/13 OI Annual Report, which is available at [http://www.ombudspersonkosovo.org/repository/docs/Report\\_2013\\_-\\_Eng\\_666390.pdf](http://www.ombudspersonkosovo.org/repository/docs/Report_2013_-_Eng_666390.pdf).

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

With regard to the measures that courts take to prevent further victimization during the court proceedings, one can note in the Kosovo\* context that the Anti-discrimination Law foresees that any court of competent jurisdiction or an administrative body which has determined that a violation of the Anti-discrimination Law has occurred may impose sanctions, which is the most effective instrument to prevent further victimization. The court can also impose temporary measures during the procedures to prevent further victimization of the victims of discrimination. The Kosovo\* Law on Protection from Discrimination foresees compensation for both the pecuniary and non-pecuniary damages suffered by victims of violations as specified in the footnote below.

Unfortunately, there are no good practice examples of preventing the further victimization in the court proceedings. As stated, courts on rare occasions have dealt with anti-discrimination cases despite the fact that in Kosovo\* discrimination is reported to affected several public and private sectors, particularly in the area of employment, education, social-welfare, health, etc. The first factor is that the lack of referrals on part of the victims and those who have been affected by discrimination. The courts do not institute legal proceedings *ex officio*. Referrals on discrimination have to come from the private individuals, citizens or organizations protecting public interests. Only through consistent referral of these matters to judicial procedures the courts in Kosovo\* will be able to further prevent the victimization through the court proceedings. On the question as to what kind of support would be needed in order to improve the situation, there are multiple factors that can contribute to change the situation. For example, through public awareness programs to increase the legal awareness of the citizens, in particular among those sectors of the population that are more vulnerable and who are potentially exposed to various forms of discrimination. Such an increase of legal awareness about the constitutional and legal rights regarding anti-discrimination will also increase the level of cases that penetrate to the court system, which in turn will enable the courts to prevent further victimization through court procedures.

In absence of a number of court judgments in discrimination it is difficult to assess whether the sanctions that are considered effective and proportionate. Clearly under the new Law on Protection from Discrimination, the court acting upon a civil lawsuit can pronounce a sanction by prohibiting the defendant from performing activities which violate the right of the victim, or to compel the defendant to eliminate all discriminatory actions from the plaintiff. The courts can also order the defendant to compensate the plaintiff for material or non-material damage when caused by the infringement of the rights protected by the Law. However, there isn't any court ruling ordering compensation for material or non-material damage for discriminatory activities of the defendant. It is for this reason that the effectiveness of the sanctions in the discrimination cases can be hardly assessed. As noted above, in the case initiated by the Ombudsperson against the discriminatory decision of the University of Pristina Senate on not recruiting professors over age of 50, the Pristina Basic Court annulled the decision of the Senate on grounds of discrimination as it found the act to be in contradiction with the laws prohibiting discrimination.

The following discrimination case is related to the criminal proceedings initiated against defendants who have been held responsible for infringement of the provisions of the Kosovo\* Criminal Code. In the case "Hysen Ademaj and others vs. Pale Bardheci" - "Hidromont"

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

N.SH. [judgment of the Peja Municipal Court of 31 may 2011-], Mr. Ademaj and others in the capacity of the plaintiff claimed they were illegally removed from the list of the works of the socially-owned enterprise (SoE) and were not able to benefit from acquiring 20 % of the value of the sold assets of the SoE without the notification and prior consultation. This led to criminal investigations against the defendant, who was sentenced with a one-year conditional sentence and a 2000 euro fine for having committed the criminal offence against labor relationships pursuant to Articles 182 and Article 183 of the former Kosovo\* Criminal Code.<sup>47</sup> But the criminal offence was related to infringement of the provisions of the Criminal Code on labor relations but not related to infringement of the provisions on anti-discrimination. Therefore, this case is not entirely related to the protection the individuals from discrimination.

Another case worth mentioning is the so-called Headscarf Case.<sup>48</sup> The applicant was a secondary school student who filed a referral with the Constitutional Court seeking enforcement of a Gjilan District Court judgment requiring the Municipal Education and Culture Directorate (MDE) to afford her all rights as a secondary school student despite her use of a headscarf, alleging that non-execution of the judgment violated Article 24 (equality before law) and Article 38 (freedom of religion) of the Constitution. In reply, MDE denied that it had violated the applicant's right to an education, adding that she withdrew from school voluntarily, highlighting that a secondary education was optional under the Law on Primary and Secondary Education. MDE emphasized that its Regulations require identical school uniforms, and by admonishing that policy, deviations would hamper the educational process. Finally, MDE argued that the Constitution mandates that Kosovo\* remain a secular state in relation to religious beliefs. The Court held that the referral's execution claim was inadmissible pursuant to Article 113(7) and Article 47 of the Law on the Constitutional Court because the applicant did not seek execution of the judgment in a lower court, reflecting a failure to exhaust all legal remedies. It also held that the referral was manifestly ill-founded because the Applicant had not been expelled or otherwise prevented from obtaining an education citing *Dogru v. France*.<sup>49</sup>

The assessment of the court decisions in Kosovo\* reveals that the judicial discourse still follows formalist understandings of the law, which illustrate the fact that the judiciary in Kosovo\* still conducts a formalistic reading of the law, even if hints of change are noticeable. This is because the effects of historical past that runs deep into the layers of legal culture. While the Kosovo\* legal order through Article 22 of the Constitution enables judges application of the key international human rights and fundamental freedoms (see page 4 of this report), the direct application of these instruments in the judicial cases in Kosovo\* is still

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>47</sup> See the Report [http://ks.yihr.org/public/fck\\_files/ksfile/Anti-Discrimination%20Law%20in%20Kosovo%20-%20seven%20years%20on.pdf](http://ks.yihr.org/public/fck_files/ksfile/Anti-Discrimination%20Law%20in%20Kosovo%20-%20seven%20years%20on.pdf)

<sup>48</sup> Case KI 36-2011, decision of 30 September 2011. The case is available at <http://www.gjk-ks.org/repository/docs/BULETINI%202011%20ANG.pdf>.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>49</sup> Interview with Mr Anton Nrecaj, Coordinator at CLARD – Center for Legal Aid and Regional Development. 25.03. 2016.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

absent. The only exception in this regard is the Kosovo\* Constitutional Court, which since the beginning has manifested a high degree of reliance on UN Conventions, and the ECHR and its jurisprudence.

Courts take actions to guarantee easy accessibility to court buildings and accommodation of diversity during the court proceedings. Pursuant to Article 16 of the Criminal Procedure Code of Kosovo,\* the languages and scripts which may be used in criminal proceedings shall be in Albanian and Serbian, and any person participating in criminal proceedings who does not speak the language of the proceedings is entitled to speak his or her own language and has the right to be informed through interpretation, free of charge, of the evidence, the facts and the proceedings. Interpretation is provided by an independent interpreter while any arrested person, a defendant who is in detention on remand and a person serving a sentence is entitled to have a translation of the summonses, decisions and submissions in the language which he or she uses in the proceedings.

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

*Number of discrimination cases decide on by courts (2010-2015)*

Year	2010				2011				2012				2013				2014				2015			
Type of court	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM
Constitutional court	0	0	0	0	8	0	1	0	8	0	1	0												
Civil court	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Misdemeanour court	0	0	0	0	0	0	0	0	0	0	0		0	0	0	0	0	0	0	0	0	0	0	0
Criminal court	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Any other types of courts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

In absence of a case-law on discrimination it is difficult to evaluate the quality of the judgments involving discrimination. After having reviewed some of the judgments that have indirectly dealt with discrimination (Peja Case), it can be argued that the reasoning of the

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* ibid.

judgments involving discrimination was weak. This may be linked to judges' lack of knowledge and experience in specialized areas of law, including discrimination.<sup>50</sup> Moreover, the pace of legislative progress has outstripped the institutional capacity of the courts to implement the new laws. Judicial decision-making is further complicated by the multiple sources of law, including the judicial application of international law in the context of Article 22 of the Kosovo\* Constitution. In order to ensure an efficient and well-functioning judiciary, it is essential to strengthen the judicial capacity, which would include judicial training in Discrimination Law areas as well as judicial skills such as legal drafting and reasoning. Judges also need appropriate court support staff, such as court clerks and judicial assistants, to help them manage their day to day work and administration. In addition, all court judgments should be made publicly available within an easily accessible and searchable system that facilitates transparency and oversight of the court system.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

One of the key activities of the Kosovo\* Judicial Institute is the Continuous Training Program (CTP) intended to support the judges and prosecutors in development of professional, personal and interdisciplinary competencies. Generally, the duration of the CTP training is a one (1) year program, and includes topics in the area of Criminal Law, Civil Law, Justice for Children, Commercial and Financial Law, Administrative Law, European and International Law, Human Rights, Gender Equality and Non-Discrimination, procedural and substantive aspects of Minor Offence character and interdisciplinary topics. The KJI has organized five (5) trainings on gender equality and non-discrimination. In this regard a number of issues have been addressed such as higher standards on the prohibition of discrimination, the protection and promotion of diversity, tolerance and equality in the context of the legislation on non-discrimination. The aim of these workshops was to provide a clearer and broader overview on the diversity, tolerance and equality and to explore the relation between international mechanisms, institutions and various local organizations dealing with the equal treatment and combat of discrimination. Judges and prosecutors were introduced to the specifics of the Kosovo\* legislation on the non-discrimination and how key international treaties against discrimination are applied in concrete cases. The purpose of the training was to transfer the knowledge about the international and national legal norms and relevant jurisprudence, about the Equal Treatment Law but also to increase the awareness with regard to the causes, forms and consequences of discrimination and the identification of the indirect and the structural discrimination. The trainings have helped the judges to enhance their ability to judge complex situations and to identify discrimination and to efficiently counteract the discrimination and prejudice.

Courses on anti-discrimination are part of the regular curriculum. There are no major challenges on this point. There are no concerns regarding the development of the anti-discrimination courses. These courses are developed by the KJI, and occasionally with assistance from the donors. With regards to the attracting of educators/lecturers/speakers as well as participants, according to Mr. Valon Jupa (KJI senior official), "participation is usually a problem in attracting participants, who are usually judges or prosecutors. Seminars are organized during working days (Monday-Friday) which sometime prevent judges /

<sup>50</sup> Interview with Teuta Hoxha, Acting Executive Director in YIHR, 26.03.2016.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

prosecutors from participating in these courses. In Kosovo\* training is not mandatory for sitting judges and coordination needs to be made with Presidents of the Courts in terms of participation in the training”.

When it comes to cooperation with equality bodies, the Ombudsperson Institution, the intermediaries or any other relevant stakeholders in the area of combating discrimination / promoting equality, Mr. Jupa stated that “KJI cooperates with equality bodies, Ombudsperson Institution and other relevant stakeholders in the area of combating discrimination when it prepares curriculum. KJI often invites representatives from these institutions in the course of the drafting curriculum, or requests information and data from these institutions regarding the implementation of the law on protection from discrimination”. There are no specific handbooks focusing only on discrimination that are available for judges to legislation, conventions and cases from the court to increase the participant’s awareness about the legislation and the exiting case-law on protection from discrimination identify discrimination. However, KJI through its trainers ensures that the training materials developed by the trainers include relevant.

## 4. Procedural Aspects in Discrimination Cases

### 4.1. Mediation

The Law on Protection from Discrimination provides for the possibility of using the procedure of mediation or reconciliation to address alleged discrimination cases.<sup>51</sup> The wording of this provision is general one and it does specify neither any specific procedure or criteria, nor stakeholders which could practice mediation nor reconciliation procedure. However, in regards to the procedure which could be used in mediation or reconciliation, it merely refers to ‘legislation in force’ what clearly indicates the Law on Mediation,<sup>52</sup> which foresees detailed procedure of mediation, composition of the Mediation Committee, its duties and responsibilities, individual Mediators to exercise mediation and/or reconciliation duties, conditions they should meet to be certified, the procedure for certification and Registry of Mediators.

The Ombudsperson is mandated to exercise his/hers competences through the mediation or conciliation procedure.<sup>53</sup> Based on the information received by interviewed stakeholders, up to date, it is only the Ombudsperson who used mediation in discrimination cases. The case of discrimination on the basis of disability was mediated by the current Ombudsperson and it resulted in a solution which was accepted by both parties.<sup>54</sup> From the point of the procedure of mediation in the discrimination cases, it may be interesting to mention Article 232 of Kosovo\* Criminal Procedure Code (CPC), which under “Mediation Proceedings” provides for the possibility of applying the mediation for certain criminal offences which are to be punishable by fine or imprisonment of up to three (3) years. In such cases, the state prosecutor shall take into account the type and nature of the act, the circumstances under

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>51</sup> Law on Protection from Discrimination, Article 21.

<sup>52</sup> Law on Mediation No. 03/L-057, 2008.

<sup>53</sup> Law on Ombudsperson, Article 16 “Powers”, para. 11.

<sup>54</sup> The first case of mediation based on Anti-discrimination Law – discrimination based on disability, Case of Malisheva Mayor Statement.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

which it was committed, the personality of the perpetrator and his or hers prior convictions for the same criminal offence or for other criminal offences, as well as his or hers degree of criminal liability. The Mediation is to be conducted by an independent mediator who is obliged to accept a case referred by the State Prosecutor and to take measures to ensure the contents of the agreement are proportionate to the seriousness and consequences of the act. An agreement may only be reached through mediation with the consent of the defendant and the injured party. On receiving a notification that an agreement has been reached, the state prosecutor shall dismiss the criminal report. The mediator is obliged to inform the state prosecutor in case of failure to reach an agreement and the reasons for such failure. The length of time for reaching an agreement may not exceed three (3) months. An agreement concluded due to mediation shall be enforceable, *mutatis mutandis*, under the Law on Obligation Relationships and the Law on Mediation, or successor law. This procedure could be used in discrimination cases when such cases are treated under the criminal proceedings.

As seen above, the institute of mediation or conciliation is not common and not sufficiently explored in Kosovo\* in relation with discrimination cases and even for other human rights violations. This is probably as the consequence of the lack of promotion of this very appropriate procedure to solve disputes, including alleged unequal treatments. Considering the fact that the positive outcome of such a procedure may be reached only by the consent of both parties, mediation usually produces sustainable solutions and it should be promoted and practiced every time when possible.

#### 4.2 Evidencing Discrimination

As mentioned throughout the writing, the overall experience in identifying, reporting and handling of discrimination cases in Kosovo\* is very poor. The best indicator of this situation is the very low number of cases treated within our judicial system and the up-to-date tendency to avoid dealing with such cases. Difficulties and challenges in evidencing the discrimination are closely connected with, not only the tradition and culture of human rights, but also with the Kosovo\* legal system which, in past did not allowed for a flexible approach to human rights concerns. The Kosovo\* legal system is a continental system whereby the only legal source that remains is the law, while the best results in combating discrimination are achieved within the systems which apply good developed judicial practice. Although the Kosovo\* Constitution provides that “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”<sup>55</sup> this is not happening, especially at Kosovo\* regular courts.

The situation testing as a possible tool to testify discrimination is not used in Kosovo\* and it is very challenging in terms of the possibility of its application. Kosovo\* Penal Code and Procedural Code treat as illegal unauthorized recording/filming of a certain situation which

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

<sup>55</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Constitution, Article 53.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*



would serve as a test of behavior of public authorities towards citizens.<sup>56</sup> It would be very important to challenge the possibility of situation testing, even if it would require a Supreme Court opinion on the legality of such a test.

### 4.3 Strategic Litigation

As reflected throughout writing and as indicated in the interviews with all stakeholders and other actors involved in the discrimination issues, the awareness and the knowledge of the general public and, even, competent officials dealing with human rights issues on discrimination concepts is very poor and, consequently, the number of discrimination cases initiated at competent bodies is therefore very low. From all interviewed actors only the NGO CLARD has initiated few discrimination cases as strategic litigation which is already mentioned under the section 2. The cases are related to different treatment in the right to education,<sup>57</sup> freedom of thought, conscience and religion and rights to education<sup>58</sup> and segregation amounting in discrimination based on ethnic origin.<sup>59</sup> As concluded by the interview with CLARD, the main criteria for selection of cases for strategic litigation are:

- Beneficiary must be Kosovar citizen;\*
- Beneficiary must belong to the category of VMG (Vulnerable and Marginalize Group);
- There must be strong arguments and proofs of alleged violations;
- Target should be Kosovo\* institutions;
- Issue should raise topics that affect the interests of the specific community/ies;
- Legal issue should raise attention of the public institutions;
- Beneficiary should accept his/her representation in the public (media);
- Certainty that the litigation case will raise public debate.

It is questionable what is achieved so far with only a few strategic cases treating discrimination. As informed by the CLARD, only one of the three described cases reached positive outcome (segregation case). Identification and initiation of discrimination cases are closely linked with the general awareness on this occurrence. The implementation of tailored-made projects which would promote anti-discrimination legislation, raise the awareness on discrimination concepts, promote the ECtHR case-law in Kosovo\* legal system, initiate strategic litigation in the areas which are mostly affected by discrimination, certainly would induce individuals to address their unequal treatment to the competent bodies, including courts, and will increase the number of initiated discrimination cases.

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<sup>56</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Penal Code, Article 205. However, paragraph 4 of this Article may be used as creating ‘space’ for situation testing, if there is good grounded suspicion for unequal treatment of individuals of group of individuals on specific discrimination basis.

<sup>57</sup> Case *Gorani v. Ministry of Education*.

<sup>58</sup> Case *Arjeta Halimi v. Kuvendi i Lezhës*.

<sup>59</sup> Case *Bahadır Troshupa v. Directorate of Education Gjakova/Djakovica Municipality*.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

#### 4.4 Class Action/Actio Popularis

The Kosovo\* legal system framework does not provide for the institution of class action/*actio popularis*. The Kosovo\* Constitution<sup>60</sup> exactly determines the authorized parties which may refer cases to the Constitutional Court, without mentioning any possibility for *actio popularis*. Also the Law on Constitutional Court<sup>61</sup> does not contain any provision which would allow for initiation of a class action on matters related to a group of concerned people.

However, the case KI 11/09, Tome Krasniqi v. RTK and KEK, is a typical case initiated on the basis of the principle of *actio popularis*. The case raised a lot of concerns having that the Court decided on the merit of the case, without treating the issue of the admissibility. The case contained the request for temporary measure related to payment of public TV RTK bills through bills of Energy Company KEK. It is interesting to mention the "Dissenting opinion on interim measures" of international judge Almiro Rodrigues, who considered that the "...interim measure should not be decided without prior admission of the referral and the request for interim measure should be rejected as unfounded in its entirety".<sup>62</sup> While being confident on the honesty, fairness and full accordance with the ethical and professional obligations of the majority of the judges deciding the issue, judge Rodrigues recalls solely *issues of law, and not issues of fact*. In fact, the judge in his opinion considers that the failure of the majority of judges to consider the admissibility of the case in contrary with the requirements contained in Article 113 of Kosovo\* Constitution. While if such a procedure would take place, the case would certainly be rejected as inadmissible due to the lack of provisions allowing for a class action. Furthermore, the Kosovo\* legal framework allows for initiation of proceedings only based on referrals of parties who claim to have their rights violated, which logically leads to a conclusion that there is no possibility for *actio popularis* initiatives.

As prescribed above, the major challenge in initiation of class actions is the lack of legal basis for implementation of such a legal institute. In order to improve the situation, it is necessary to undertake the initiative for legal amendments which would include a legal provision providing for the possibility of using *actio popularis* in combating human rights breaches, including the discrimination.

#### 4.5 Shifting of the Burden of Proof

The LPD Article 20 clearly defines the burden of proof in the discrimination cases. The person who claims to be differently treated should submit proofs supporting his/her claim.<sup>63</sup> The burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment.<sup>64</sup>

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>60</sup> Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Constitution, Article 113.

<sup>61</sup> Law No. 03/L-121.

<sup>62</sup> Dissenting Opinion on Interim Measures of International Judge Almiro Rodrigues in case KI 11/09, *Tome Krasniqi vs RTK and KEK*.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>63</sup> Law on Protection from Discrimination, Article 20, para 1.

<sup>64</sup> Law on Protection from Discrimination, Article 20, para 2.

As the matter of different procedures under which the breach of the principle of equal treatment is considered, the Article 20<sup>65</sup> provides that in the criminal and offense proceedings shall not apply the obligation of the person claiming to be differently treated to submit the proofs of such treatment. This is clearly connected with *ex officio* obligation in such proceedings.

#### 4.6 Remedies

With the adoption of the package of the three very important human rights Laws<sup>66</sup>, the Kosovo\* legal framework covering the discrimination may be considered to be fairly completed and pretty in line with international standards on human rights. This also applies in regards to the remedies at disposal to the persons who claim to be discriminated on any ground and who wish to address such concerns to competent bodies.

Chapter III<sup>67</sup> of the Law on Protection from Discrimination provides for the remedies that are at disposal for persons who claim to be the victims of any kind of discriminatory behavior.

#### **Complaint filled to Ombudsperson**

Article 12 of LPD allows for any person to file a ‘*complaint against discrimination to the Ombudsperson*’ regarding unequal treatment ‘on the grounds prescribed in Article 1 of the Law’. The procedure for filling of a complaint to the Ombudsperson is provided for under the Chapter IV of “Complaints Review Procedures”.<sup>68</sup> Under the same Chapter are foreseen: the procedure after receiving the complaint,<sup>69</sup> cases of rejection of complaint review,<sup>70</sup> cases of prescription and exclusion,<sup>71</sup> procedure after the start of the investigation<sup>72</sup> and other procedural steps aiming to address the complaint. From the point of the obligation of all authorities to cooperate with Ombudsperson during the investigation procedure, Article 25<sup>73</sup> introduces a very important novelty regarding the cases of refusal of any of the officials or authority to respond to a requests of the Ombudsperson related to the matter under consideration. In such cases, the Ombudsperson has the right to require disciplinary measures (for individual officials) and/or to require from competent prosecution office to initiate the legal procedure for refusal or/and obstruction in performance of the official duty. After completion of the investigation, the Ombudsperson shall issue a decision containing his/her findings and recommendations, which is delivered to the complainant and the responsible public authority/ies.<sup>74</sup> Public authority/ies to which the recommendation, request or proposal for concrete actions is addressed must respond within thirty days.

In terms of the use of the different remedies at disposal, the LPD Article 12(3), provides that “Submission of an appeal to Ombudsperson is not a condition to file a lawsuit and does not constitute an obstacle to the injured party to address the court or criminal prosecution bodies”.

<sup>65</sup> Law on Protection from Discrimination, Article 20, para 3.

<sup>66</sup> Law on Protection from Discrimination, Law on Gender Equality and Law on Ombudsperson.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>67</sup> Law on Protection from Discrimination, Chapter III, Articles 12 & 13.

<sup>68</sup> Law on Ombudsperson, Chapter IV, Articles 19 & 20.

<sup>69</sup> Law on Ombudsperson, Article 21.

<sup>70</sup> Law on Ombudsperson, Article 22.

<sup>71</sup> Law on Ombudsperson, Article 23.

<sup>72</sup> Law on Ombudsperson, Article 24.

<sup>73</sup> Law on Ombudsperson, Article 25, paras 2&3.

<sup>74</sup> Law on Ombudsperson, Article 27.

## Lawsuits on discrimination disputes

The LPD Article 13(1), provides for the possibility to address the competent court to consider alleged discrimination filling a lawsuit through the procedure as provided in Article 14. The law clearly allows for initiation of the procedures in criminal, offence, contested (civil) and administrative procedures through a lawsuit. However, the possibility of initiation of discrimination cases seems to be still very challenging due to contradiction of the LPD provisions with basic laws and respective procedural laws. There is no provision in the LPD that excludes the possibility of a parallel initiation of proceedings in civil, administrative, offence and penal procedures. From the legal point of view, it remains unclear how will these judicial sectors act if such a situation occur in practice? Furthermore, such a legal situation would seriously endanger the basic principle of functioning of the judicial system which excludes two litigations for the same matter. Also, the procedural actions in penal and offence proceedings remain undetermined. As provided for by the Law on Minor Offences, the only authorized parties to initiate an offence procedure are the Police and Inspectorates; so how will the court react if an individual submits a lawsuit pretending to be the victim of discrimination? Such a person would be without the legal legitimacy to initiate the procedure. At the same time, in Kosovo\* legal system the only difference between the criminal offences and the minor offence is their level of social threats determined by the legislator and, based on the current legal solutions, so it could happen that a same person initiate both these procedures for the same matter! These dilemmas were raised by Ombudsperson during a workshop dedicated implementation of LPD with judicial institutions. As the main conclusion from this workshop was that the courts have no answers on how to deal with such situations, if they occur.

### 4.7 Follow-Up to Opinions and Recommendations

As indicated above, the Ombudsperson is the only body mandated to issue opinions and recommendations in cases of discrimination.<sup>75</sup> Apart of the opinions and recommendations, the new LPD introduces the possibility of the Ombudsperson to act as *amicus curiae* (friend of the court) in cases related to discrimination.<sup>76</sup> The Ombudsperson started to issue *amicus curiae* opinions and, while one is already accepted, another is under the consideration of the Appeal Court.

There is no expressive legal provision in the LPD or the LO which states that the opinions and recommendations of Ombudsperson are legally binding. However, the provisions in Articles 25 and 28 of new Law on Ombudsperson indicate a clear intention of the legislator to give the additional power to the Ombudsperson work and, consequently, his/her opinions and recommendations.

Article 25 requires all authorities to respond to the Ombudsperson's requests on conducting investigations and provides for the possibility for initiation of disciplinary proceedings for the civil servants and, even, criminal procedure at a competent prosecutor for institution that refuses to cooperate or obstructs the Ombudspersons work.

Also, Article 28 obliges the authorities to respond within 30 days to the Ombudsperson's recommendations, requests or proposals for undertaking concrete actions.

The effects of such legal provisions supportive to the Ombudsperson work are marked with the increase of implementation of recommendations for 50% in the second part of year 2015 comparing to previous period.

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<sup>75</sup> Law on Protection from Discrimination, Article 9, para 2.1.

<sup>76</sup> Law on Protection from Discrimination: Article 9, 2.13. states that "*Ombudsperson may be presented in the quality of a friend of the court (amicus curiae) in proceedings related to issues of equality and protection from Discrimination*".

There are two recent initiatives related to the implementation of the Ombudsperson's recommendations:

The first, is the request that the Ombudsperson addressed to the Parliamentary Commission for Human Rights which requires Kosovo\* Assembly to cease the practice of making Ombudsperson Annual Report as a document to be formally adopted but rather a document which should, after wide discussion, produce conclusions on further steps that should be undertaken by the Assembly in a case of non-implementation of the recommendations by the Government; and the

Second, is related to the initiative for implementation of the Human Rights Indicators<sup>77</sup> which ensures a new approach towards the respect for human rights, on the basis of the measurement indicators for respecting and protecting of the human rights. This would assist not only the Ombudsperson but also other institutions to avoid the discretionary assessments on human rights and to use exact language and measures related to human rights parameters.

## 5. The Role of Universities in Combating Discrimination

The universities and other higher education institutions in Kosovo\* have an important role to play in combating discrimination. This is not only the case with Law Faculties in Kosovo\*, which contain a number of subjects that indirectly deal with anti-discrimination but also with other faculties e.g. Political Science, and other institutes such as the Human Rights Institute at the University of Prishtina, which has provided and continues to provide seminars on matters related to combating discrimination. The following writing provides an analysis of the programs that are offered at the law departments and other departments, including the Institute for Human Rights that is part of the University of Pristina.

### 5.1 Law Departments

The higher education system in Kosovo\* operates through the public universities and private higher education institutions (colleges, institutes, higher professional schools). These various institutions cover a full range of higher education services from professional to purely academic programs. The majority of the higher education institutions have now implemented the Bologna three-cycle structure. Universities offer programs at Bachelor, Master and Doctorate levels. Bachelor programs usually last between 3 and 4 years (180 - 240 ECTS credits), with some exceptions in Medicine, Veterinary Science or in Education. Master program last 2 years (120 ECTS credits) or 1 year (60 credits) if the previous Bachelor program lasted 4 years. The other higher education institutions also offer 2 to 3-years long vocational diplomas.<sup>78</sup>

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>77</sup> UN OHCHR, Human Rights Indicators – A Guide to Measurement and Implementation, HR/PUB/12/5, New York and Geneva, 2012.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

<sup>78</sup> See an overview of the higher education in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) at [http://eacea.ec.europa.eu/tempus/participating\\_countries/overview/kosovo\\_tempus\\_country\\_fiche\\_final.pdf](http://eacea.ec.europa.eu/tempus/participating_countries/overview/kosovo_tempus_country_fiche_final.pdf).

The University of Prishtina houses the largest and best known law school. In compliance with the Bologna Declaration requirements, legal education consists of a three degree cycle. The degree cycles are based on a successful completion of a prescribed number of ECTS credits, with one credit representing 25-30 working hours, or an annual student workload of 1,500-1,800 hours. Consequently, the legal education providers are authorized to award the following types of qualification degrees:

- Bachelor of Law [hereinafter LL.B.], which is an undergraduate degree issued following the completion of 240 ECTS credits over four years after graduating from secondary school.
- Master of Laws [hereinafter LL.M.], which is a postgraduate degree issued to individuals with an LL.B. degree who have successfully completed an additional 60 ECTS credits in the course of one year.
- Doctorate degree, which is a postgraduate research-oriented degree issued to individuals with an LL.M. degree who have successfully completed an additional 180 ECTS credits. At present, the only institution in Kosovo\* offering a Ph.D. program in law is the University of Pristina Faculty of Law.

There are no special courses on anti-discrimination that are offered at the law faculties in Kosovo\*, including both public and private institutions of higher education. Special courses on anti-discrimination are also not provided at the master level studies. However, the curriculum offered at the Faculty of Law of the University of Prishtina (which serves as a model for the other public universities and private higher education institutions (colleges, institutes, higher professional schools) addresses the combat of discrimination in a number of courses such as:

#### Anti-discrimination Integrated into other Courses (2010-1015)

Title of course	Description of content (as regards the issue of discrimination)	Teaching aims (as regards the issue of discrimination)	Level of education <sup>79</sup>	Mandatory (M)/elective (E)	Number of participants	Date of implementation	Faculty/Department	Name of university
Constitutional Law	Right to equality as a constitutional right	to familiarize students with constitutional standards on the protection from discrimination.	BA	M	50		Fac of Law	Uni of Pristina
Public International law	Right to equality/principle of non-discrimination	to familiarize students with international standards on the protection from discrimination	BA	M	50			Uni of Pristina

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\* *ibid.*

<sup>79</sup> Graduate, master, PhD courses.

Administrative Law	Right to equality / principle of non-discrimination	to familiarize students with admin law standards on the protection from discrimination	BA	M	50			Uni of Pristina
EU Law	Right to equality / principle of non-discrimination	to familiarize students with EU law standards on the protection from discrimination	BA	M	50			Uni of Pristina
Labor Law	Right to equality / principle of non-discrimination	to familiarize students with legal standards on the protection from discrimination in the context of the labor law.	BA	M	50			Uni of Pristina
Criminal Law	Right to equality / principle of non-discrimination	to familiarize students with legal standards on the protection from discrimination in the criminal law context.	BA	M	50			Uni of Pristina

In the above mentioned courses the students are introduced with the constitutional and statutory provisions concerning the combat of discrimination, the leading cases in the area of jurisprudence of the Kosovo\* Constitutional Court and courts of ordinary jurisdiction as well as with the international standards combating discrimination.

The combat of discrimination is also addressed at the Master Program in Constitutional and Administrative Law at the Pristina Law Faculty. This program in Constitutional and Administrative Law serves to refine the legal education of the future political and administrative elite of Kosovo.\* The master level courses that address the combat of discrimination within the curricula and programs include:

- Comparative Constitutional Law
- Constitutional Review Procedures
- Legal Clinics in Constitutional and Administrative Law

Although the program does not offer a course on anti-discrimination, the students examine the international human rights treaties, institutions and procedures and cover the major

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\* *ibid.*

elements of Kosovo\* anti-discrimination legislation, including types of discrimination, the protected grounds of discrimination, the areas of public life and activities in which discrimination is prohibited and the exemptions and exceptions which may be relied on under the anti-discrimination laws.

The program also discusses the procedures by which the legislation may be enforced and the remedies which may be available to the successful complainants, noting the functions of the human rights and anti-discrimination bodies such as the courts, Ombudsperson, the Constitutional Court and other agencies empowered to protect citizens against discrimination.

With regards to challenges that Law Faculty/University Department/Police Academy face in terms of developing of anti-discrimination courses, in attracting educators/lecturers/speakers as well as participants or at implementing the courses, one can address a number of issues. One challenge is that the law faculties lack professors that are specialized merely on this type of law. Secondly, law faculties (including the Faculty of Law of the University of Pristina which is the largest law school in Kosovo\*) lack co-operation with other universities, foreign institutes and professors in order to launch anti-discrimination courses as special courses for law students. Law faculties should enter into bilateral arrangements with foreign law faculties and institutes for staff and student exchange, and should receive assistance for launching the anti-discrimination courses at the bachelor or master level. Law Faculties should also arrange projects such as offering internship programs for students on anti-discrimination related admin bodies and institutes, or by hosting seminars and conferences with the respective institutions covering legislative or jurisprudential developments in the area of anti-discrimination.<sup>80</sup>

## 5.2 Legal and Institutional Structures Combating Discrimination

Other departments within the University structures that combat discrimination include the Department for Political Science, which is part of the Faculty of Philosophy. Likewise the Law Departments at public or private universities in Kosovo.\* These Departments do not offer any special course on protection from discrimination. Aspects of discrimination, however, are treated in other subjects but only in passing such as the subject on Gender and Politics, which analyses how gender is reflected in the discourse of political representation.

There are legal documents issued by universities providing for the prohibition of discrimination. The Statute of the Pristina University in its Article 7 states that it is committed to equal opportunities for all without any discrimination on the basis of gender, race, sexual orientation, marital status, language, religion, political or other belief, national, ethnic or social origin, association with a national community, property, birth or other status. Moreover, the University is also obliged pursuant to Article 8 of the Statute to support gender equality, and to give priority to female candidates in cases where the qualifications and professional accomplishments are equal among the candidates.<sup>81</sup> The University does not have a special body or office that takes care of complaints related to discrimination. It has however established the Office for Gender Equality. This office was established in 2012 and

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\* *ibid.*

<sup>80</sup> Interview with Prof. Dr. Iliriana Islami, Lecturer at the Faculty of Law of the University of Pristina, 16.03.2016.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>81</sup> The Statute of the University of Pristina is available at <http://www.uni-pr.edu/Ballina.aspx>.



serves to provide and promote equal rights and opportunities for women and men, into every stage of the process, planning, approval, implementation, monitoring and evaluation of regulations, policies or programs and budgets at the University level.

There are no surveys that have been conducted to map the level of awareness for discrimination among the teaching staff and/or students as well as the occurrences of discrimination at the University of Pristina. It is advisable to conduct such surveys to measure the level of awareness for discrimination.

## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

It is a general conclusion of all respondents who were the subject of the interviews that the level of awareness among the general public, including the competent authorities, on the issues related to discrimination is poor. Almost the entire feedback of interviews performed by OGG, AGE, OI, Kosovo\* Police, NGOs and other respondents points to this conclusion.

The citizens, who are the potential victims of discrimination, are not familiar with the basic concepts of discrimination therefore they hardly are in a position to distinct a situation of different treatment and to initiate procedures aiming to testify such treatment. Also, most of them have no knowledge on the bodies and institutions where they can address their human rights concerns, including discrimination. As indicated through the interview with CLARD,<sup>82</sup> among the citizens claiming human rights violations, over 50% had no due level of legal education, therefore their claims for being differently treated can not be evidenced. The same conclusion can be drawn also from the interviews with OI and other stakeholders who are included in this research. This indicates that the highest number of citizens are not familiar with the discrimination concepts and thus not able to differ different treatment. This is a consequence of the lack of the tailored-made legal education programs within the Kosovo\* educational system as well as due to the lack of sufficient number of various forms of awareness raising and information activities. In order to overcome this situation, it is necessary to launch initiatives to strengthen the human rights education in the Kosovo\* education system and to organize information activities, debates, publication of commentaries and friendly-read forms of laws, broadcasting of TV stories that would illustrate concrete cases of discrimination and other forms of information of the general public.

The authorities, who are mandated to deal with complaints/claims for different treatment potentially constituting discrimination also lack sufficient capacities to deal with discrimination issues. The mere fact that the number of discrimination cases at the Kosovo\* courts and other competent bodies is too low indicates that Kosovo\* judicial and administrative bodies hesitate to precede such cases even if they are initiated and try to shift legal qualification of an alleged act, in order to avoid dealing with the potential

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<sup>82</sup> Interview with CLARD Project Coordinator Anton Nrecaj, 7.03.2016.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

discrimination elements of such a case. This clearly indicates the lack of a sufficient knowledge of the discrimination concepts as provided for by the international standards on human rights and Kosovo\* applicable law. Although Kosovo\* Constitution<sup>83</sup> provides for introduction of the European Court of Human Rights practice in Kosovo\* judiciary, there are not practical tools which would provide ECtHR jurisprudence to be used by the judges while dealing with human rights violations cases.

The need for training and other capacity building activities for judges, prosecutors and advocates are crucial for better understanding of the concepts related to discrimination. This would increase their capacities to identify situations constituting discrimination and to act appropriately in their respective roles.

Also, it would be very helpful for Kosovo\* judiciary and other competent bodies to be more familiar with the ECtHR case-law and to base their actions on the very exuberant jurisprudence of this court. It is of utmost need the preparation of an easy-handled tool, in form of the bulletin or other appropriate form, containing ECtHR rulings in various areas of human rights, which would serve the Kosovo\* authorities (judicial and administrative) as guide for dealing with discrimination cases and support their capacity building in human rights area, in particular, in discrimination.

## 6.2 Achievements in Awareness Raising

Based on the interviews performed with all stakeholders and NGOs involved in discrimination issues, each of these actors declares to implement activities aiming at the awareness raising of the general public on the issues of human rights and unequal treatment situations. The awareness raising activities are organized in the form of campaigns related to a specific issue, through preparation and distribution of brochures, leaflets and other written material, broadcasting of TV and radio programs, organization of various events (conferences, debates, roundtables) marking human rights jubilees and other appropriate forms of information and awareness raising activities. Generally, the target groups are "marked" as marginalized categories of the population, including the minority communities (in particular Roma, Ashkali and Egyptian communities – RAE), the children, persons with disabilities, the LGBT members, the elderly, and other groups which are vulnerable in terms of realization of their basic human rights. From the feedback received by different stakeholders, it appears that the most active actor in the area of the awareness raising is Ombudsperson Institution (OI).

The OI develops intensive promotion and awareness raising activities in the area on anti-discrimination and the role of the OI in its prevention. These activities are performed through various workshops and roundtables, organization of thematic conferences, participation in various professional and promotional events organized by local and international NGOs,

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\* *ibid.*

<sup>83</sup> Kosovo (This designation is without prejudice to positions on status, and it is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence). Constitution, Article 53 [Interpretation of Human Rights Provisions]: "Human Rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

participation in public debates related to the discrimination issues in the national media (radio and TV), providing of opinions in public debates on amendments and supplements of the draft-law on discrimination. It regularly communicates with media. During 2014, over 90 public presentations were realized through the mass and written media, while in 2015 these presentations were even more intensive.

OI awareness raising activities in discrimination area are realized also through ‘face-to-face’ meetings with the citizens in all Kosovo\* municipalities aiming to promote the anti-discrimination through direct discussions and promotional materials which tends to promote the role and competencies of OI, meetings with the Coordinators of Human Rights Units (HRUMs) at municipal and central levels, regular visits to the schools and other educational institutions aiming to inform the pupils on the role and mandate of OI. As a good example that should be mentioned is the organization of a roundtable on the topic of “Stop Discrimination against Children” in which the results of the research in six elementary schools were published. Also, OI participated in the drafting of an online-platform “Know Your Rights”, in cooperation with UNICEF, which enables young people to learn more about their rights and be more informed on legal system in Kosovo\* and in the appropriate mechanisms for protection of human rights. The realization of the workshop “Implementation of the Law on Protection against Discrimination – Procedures and Responsible Authorities – Ombudsperson, Judiciary and other actors – Challenges and Opportunities”, supported by UNDP, aimed to discuss with the main representatives of the judiciary the challenges in the implementation of the Law on Protection against Discrimination and the procedures and sanctions in the course of discrimination litigations.

The awareness raising activities are also performed by the OGG, Police, AGE and HRUMs, each in their own areas of activities, although their activities are mainly limited to written materials and organization of various events related to the topics concerned to their competences.

As for the NGOs included in this writing, it is worth to mention the activities of CLARD and CRP/K in the human rights awareness raising activities. As indicated by CLARD, this organization organizes twice a year awareness raising campaigns which aim to inform the citizens on their rights guaranteed by the laws and the Constitution. It also implements ‘door-to-door’ information activities and is also very active in various TV, radio, and other debates related to human rights.

The Civil Rights Program in Kosovo\* (CRP/K) in each of its project implementation activity has the particular component related to the public information and awareness raising of its persons of concern. Such activities are very intensive especially within its activities in the prevention of the statelessness and the legal support of returnees and IDPs. The activities are performed through variety of written material, ‘face-to-face’ meetings with citizens, information of marginalized communities on their rights through community based activists working with CRP/K, organization of debates, round tables and other appropriate events aiming to raise the awareness on human rights, including discrimination.

### 6.3 Preventing Future Discrimination

As already mentioned, the Ombudsperson holds the statutory right to issue recommendations related to the specific cases of discrimination. As concerning the legal basis for issuance of

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

the recommendations related to the systematic problems and issues in regards to discrimination, the laws mentioned under the section 1 and 2, places the Ombudsperson, the Office of Good Governance and the Agency for Gender Equality as bodies which, among other, are mandated to do so. In addition, the NGOs dealing with human rights issues may also direct their recommendations related to any systematic problem or issue to the competent bodies. The target groups of such recommendations are Kosovo\* Government, Kosovo Assembly, courts and Assembly Committees. As mentioned under the Section 2, OGG has a mandatory role to follow-up and monitor the recommendations issued by the Ombudsperson, whether those on specific discrimination cases or those related to systematic issues. When concerning monitoring of implementation of the NGOs there is no any institutional mechanism and system and they are dealt with on *ad hock* basis. It is important to be mentioned that the EU Progress Reports also serves as an institutional monitoring tool in regards to the implementation of the recommendations of the competent bodies related to discrimination.

One of the biggest challenges in the follow-up work is the very frequent changes of the laws which create an inconsistency in terms of sustainable basis for adequate monitoring processes. For instance, in 2015, from 100 law submitted for approval, 65 are draft-laws with amendments and supplements. In order to improve this situation, it is necessary to consolidate legal framework and to create conditions for a due treatment of all recommendations by the Executive Bodies, regardless of the source of such recommendations. Up to date, there is no such mechanism in place which would treat the general recommendations, and all depends on the good will of institutions.

The institution which has the legal basis to initiate *ex officio* investigations and to issue special/ad hock reports is the Ombudsperson Institution. Between 2010 and 2015, over 10 reports containing recommendations were issued by this institution. However, based on the interview with the Ombudsperson, the implementation of the recommendations contained in those reports is still at low level. There is no any follow-up procedure to monitor the impact of such reports. It remains to be seen if the Kosovo\* Assembly will set up a specific obligation for the Governmental Sectors to report on the implementation of Ombudsperson's recommendations, which is one of the requests of the Ombudsperson Institution recently directed to the Kosovo\* Assembly.

As indicated by the interviews performed with all stakeholders and other actors dealing with non-discrimination, there are only few organized and target-tailored activities aiming to combat stereotypes and prejudices towards specific vulnerable groups. As mentioned above under the Section 2, the OGG is co-implementing partner of a Twining Project against Homophobia and Trans-phobia. This project aims to address the violence, prejudice and discrimination against the LGBT in Kosovo,\* through providing the capacity building, awareness raising and professional approach of the Kosovo\* authorities, in particular, of the police, judiciary, education system and media towards the members of LGBT community. Also, the Ombudsperson's mediation case may well impact stereotypes and prejudices towards persons with disabilities.<sup>84</sup>

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

<sup>84</sup> The case of public statement of Malisheva Mayor related to his Deputy with disabilities is a typical case reflecting stereotypes and prejudices towards persons with disabilities.

There are few good examples of affirmative action undertaken by the authorities in order to address the inequality among vulnerable categories of Kosovo\* population. For example, in the process of prevention of statelessness among the Kosovo\* population, Roma, Ashkali and Egyptian (RAE) communities appeared to be the most vulnerable in terms of the lack of civil status registration.<sup>85</sup> In order to support the process of civil registration facilitated by UNHCR and CRP/K, Kosovo\* Government issued a circular letter<sup>86</sup> through which the members of RAE communities were released from payment of administrative taxes and fines which are provided for by Law for late registration. The selection of the RAE in this case was based on the overall assessment that these communities are the most vulnerable in almost all aspects of their life.

Although every institution in each public sector has the obligation to comply with the principle of non-discrimination, as provided for in the Kosovo\* Constitution and in the Law for Protection from Discrimination, they do not have the established structures for preventing and combating the discrimination.

As mentioned above, at the central level, up to date, the OGG developed several strategies related to human rights. However, such strategies were not followed by the due action plans and by appropriate implementation. This leads to conclusion that there is mentioning on responsible bodies for implementation, indicators for measurement of results, deadlines and allocation of resources neither for potential measures, nor for the monitoring structures and responsibilities for such process.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

<sup>85</sup> Based on an assessment made by UNHCR and CRP/K at the end of 2016, from 20% to 40% of RAE communities' members were not registered in registry books and risked to remain statelessness.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

<sup>86</sup> Ministry of Internal Affairs, Civil Registration Agency, Circular Letter for non-application of fines and tariffs for civil registration services for RAE Communities, Pristina, 14.03.2013. The Circular Letter is still in application, after being extended every year through separate decision of competent authority.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*

\* *ibid.*



## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from the particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviors of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, Labor Inspectorates, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination. Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counselors, etc.)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination



## Annex 2 – Template for Good Practice Examples

<b>Area:</b> <sup>87</sup>	Combating discrimination at universities
<b>Title (original language)</b>	Rasti i Ombudpersonit kundër Universitetit të Prishtinës
<b>Title (EN)</b>	The Ombud vs University of Prishtina case
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Zyra e Avokatit të Popullit
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Ombudsperson in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.)
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	
<b>Internet link</b>	<a href="http://www.ombudspersonkosovo.org/">http://www.ombudspersonkosovo.org/</a>
<b>Type of initiative</b>	Judicial Case
<b>Main target group</b>	University professors
<b>Brief description (max. 1000 chars)</b>	<p><u>The Ombud vs University of Prishtina case.</u></p> <p>One of the success stories is the Ombudsperson vs University of Pristina case. The case was about the discriminatory decision of the University of Pristina on not recruiting professors over age of 50. Regarding this case, the Ombudsperson published a report with recommendations and argued that the decision of the UP Senate was ungrounded and unlawful in contradiction with the Constitution of the Republic of Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.), Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the ECHR, Law on Labor, Anti-Discrimination Law as well as the University Statute, which is the highest act of the University. Based on its competencies and pursuant to the Law on Administrative Conflicts, the Ombudsperson initiated procedures of administrative dispute before the competent court (prior to judicial reforms that took place in 2013 the Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) Supreme Court was responsible to rule on administrative disputes) to rule out the case. After the reform of the judiciary system in Kosovo (This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.) in 2013, the Basic Court of Pristina was the competent one for a judicial review of the administrative cases initiated by the OI. After the court hearing held on November 20, 2013 and the session on the main case held on December 9, 2013, the Court declared the appeal of the OI admissible and grounded and ordered the annulment of the discriminatory decision of Pristina University Senate no. 1/499 on 25 May 2010. This</p>

<sup>87</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

	constitutes one of the rare examples of the role of the equality bodies or ombud institutions in preventing the discrimination by referring matters before the competent court to judge the lawfulness of the decisions that are discriminatory.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes      how? The Ombudsperson has followed whether the Court decision on this matter has been implemented.</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> <u>no</u></li> <li>• <input type="checkbox"/> yes      who? and how?</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input type="checkbox"/> <u>effectiveness and impact</u>      <input type="checkbox"/> transferability</li> <li>• <input type="checkbox"/> innovation</li> </ul>

### Annex 3 – Statistics<sup>88</sup> Equality Bodies/Ombud Institutions

	2010	2011	2012	2013	2014	2015
<i>Budget in €<sup>89</sup></i>	523,735.00	629,319.00	681,310.00	968,039.00	1,095,610.00	979,286.00
<i>Number of staff (full time equivalent)</i>	47	48	48	55	63	63
<i>Number of professional/legal staff (full time equivalent)</i>	27	28	28	32	35	35
<i>Complaints/queries received</i>	30	22	27	46	56	51
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	1	1	1	-	2	-
<i>Total number of cases (please break down according to different grounds)<sup>90</sup></i>	16	15	14	20	24	26
<i>Age</i>						
<i>Belief</i>						
<i>Disability</i>						
<i>Ethnic origin</i>						
<i>Gender</i>						
<i>Gender identity</i>						
<i>Religion</i>						
<i>Sexual orientation</i>						
<i>Other grounds</i>						
<i>Total number of cases (please break down according to different forms)</i>	16	15	14	20	24	26
<i>Direct discrimination</i>						
<i>Indirect discrimination</i>						
<i>Harassment</i>						
<i>Victimization</i>						
<i>Other forms</i>						
<i>Number of surveys</i>						
<i>Number of research projects</i>						
<i>Number of awareness initiatives</i>						
<i>Number of training actions</i>						
<i>Number of promotional initiatives to support good practice</i>						

<sup>88</sup> The table of statistics does not contain a break-down based on age, belief, disability and other grounds as provided by the template. This is due to the fact that OI did not generate such data up to the election of the new Ombudsperson, who already initiated the process of improving the database in order to respond to the needs of OI for diversity of data.

<sup>89</sup> OI Total budgets per different years. The budgets presented per different years are the overall budgets of the OI in the respective year and they have no divisions in specific budgets for specific activities, including discrimination.

<sup>90</sup> OI Database does not provide for more specific classification of the complaints or cases of discrimination.

# **Legal Protection against Discrimination in Macedonia**

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Skopje, March 2016

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# Table of Contents

<b>Executive Summary.....</b>	<b>291</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>293</b>
1.1 Overview of Constitutional and Legal Provisions.....	293
1.2 Assessment of the Legal Framework .....	294
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>296</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	296
2.2 Stakeholders Putting Combating Discrimination into Practice .....	298
2.2.1 <i>Equality Body/Bodies</i> .....	298
2.2.2 <i>Ombud Institution(s)</i> .....	299
2.2.3 <i>Intermediaries</i> .....	301
2.2.4 <i>Police</i> .....	302
2.3 Mapping the Cooperation with Stakeholders .....	302
<b>3. The Role of Courts in Combating Discrimination .....</b>	<b>304</b>
3.1 Capacities of Courts in Combating Discrimination.....	304
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	305
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	307
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>309</b>
4.1 Mediation .....	309
4.2 Evidencing discrimination .....	309
4.3. Strategic litigation .....	310
4.4. Class Action/Actio Popularis .....	311
4.5 Shifting the Burden of Proof .....	311
4.6 Remedies.....	312
4.7 Follow-Up to Opinions and Recommendations .....	312
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>313</b>
5.1. Law Faculties .....	313
5.2 Other Educational Institutions.....	316
5.3 Legal and Institutional Structures Combating Discrimination .....	318
<b>6. Developing a Culture of Rights .....</b>	<b>320</b>
6.1 Assessing the Levels of Awareness .....	320
6.2 Achievements in Awareness Raising .....	321
6.3 Preventing Future Discrimination .....	322
<b>7. References .....</b>	<b>325</b>
<b>Annexes .....</b>	<b>329</b>
Annex 1 – Glossary .....	329
Annex 2 – Template for Good Practice Examples .....	330
Annex 3 – Statistics Equality Bodies/Ombud Institutions.....	340



## Executive Summary

This Report represents a summary of the research carried out within the project “Legal protection against discrimination in South East Europe”, supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, the Open Regional Funds for Southeast Europe – Legal Reform (ORF-LR).

The objective of the Project is to improve the methodological capacities of relevant stakeholders to act against discrimination in SEE. The results expected to be achieved with the Project are to: (a) enable the state authorities dealing with anti-discrimination to improve the enforcement of the protection against discrimination in their institutions; and (b) legal training institutions and law faculties to be able to improve the quality of education on anti-discrimination anchored in the legal training.

For this purpose a comprehensive regional research of anti-discrimination in various fields of legal activity that is supposed to uncover the deficiencies in the procedure of the legal protection and should identify common solutions has been conducted.

This Report was prepared to implement the above activity for the country of Macedonia.

The aim of the research is to identify the good practices as well as e challenges and systemic obstacles for effective legal protection mechanisms. The study looks into the implementation of anti-discrimination provisions by equality bodies, ombud institutions and the judiciary covering the aspects like access to justice, social awareness of legal protection and other practical aspects. Furthermore, the study maps out whether the law departments at universities in Macedonia offer courses on Anti-discrimination Law or integrate anti-discrimination aspects in their educational programs. These approaches are central to strengthen the capacity for both (a) the employees of the judiciary, public bodies and authorities as well as for (b) the judicial and legal training institutions and law faculties.

The Report is complemented by a list of good practice examples that have been developed by the relevant stakeholders and SCOs.

Finally, having in mind the mix of the theoretical and practical experience of the authors, it is their belief that this Report can serve as a good starting point in locating the systemic obstacles in the anti-discrimination area and in building a strategy for overcoming them.





# 1. Legal Framework Prohibiting Discrimination

## 1.1 Overview of Constitutional and Legal Provisions

At a very beginning, in order to elaborate the overview of the constitutional and legal provisions, firstly the importance of the fundamental values of the Constitutional order of the of Macedonia should be emphasized, with special focus to some of them concerning combating discrimination, such as: the basic freedoms and rights of the individual and citizen recognized in the international law and set down in the Constitution; the rule of law; the division of state powers into legislative, executive and judicial; and respect for the generally accepted norms of the international law.<sup>1</sup> Having these fundamental values as a ground, within the Macedonian legal system provisions exist which prohibit discrimination and they are part of the general legal acts as follows: a) Constitution of the Republic of Macedonia<sup>2</sup> (hereinafter: “Constitution”); b) Law on Prevention of, and Protection Against Discrimination;<sup>3</sup> c) European Convention on Human Rights<sup>4</sup> (hereinafter: “ECHR”); and d) another Macedonian laws<sup>5</sup> as well as sub-laws<sup>6</sup> (hereinafter: “Other national legal acts”).

a) According to the Constitution, the citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status.<sup>7</sup> The freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution, as well as during states of war or emergency, in accordance with the provisions of the Constitution, but the restriction of freedoms and rights cannot discriminate on grounds of sex, race, color of skin, language, religion, national or social origin, property or social status, and cannot be applied to the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offenses and sentences, as well as to the freedom of personal conviction, conscience, thought and religious confession.<sup>8</sup> Furthermore, according to Article 110 Constitutional Court of the Republic of Macedonia plays a role in protecting the freedoms and rights of the individual and citizen related to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex,

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<sup>1</sup> Macedonia/The Constitution of the Republic of Macedonia/52/1991 (promulgated 17.11.1991) Article 8 items: 1,3,4 and 10.

<sup>2</sup> Macedonia/The Constitution of the Republic of Macedonia/52/1991 (promulgated 17.11.1991).

<sup>3</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010).

<sup>4</sup> Council of Europe/European Convention for the Protection of Human Rights and Fundamental Freedoms (03.09.1953)/(ratified by the Assembly of the Republic of Macedonia in 1997).

<sup>5</sup> More important Macedonian laws consisting provisions which prohibit discrimination are: Law on the Ombudsman/60/2003...114/2009 (22.09.2003), Law on equal opportunities for women and men/6/2012...150/2015 (13.01.2012), Law on Protection Against Harassment at Work Place/79/2013...147/2015 (31.05.2013), Law on Labour Relations/62/2005...27/2016 (28.07.2005) etc.

<sup>6</sup> Such as: Macedonian/Rules of Procedure of the Constitutional Court/70/1992 (14.11.1992), Rules of Procedure of the Assembly/91/2008 (21.07.2008), Rule of Procedure of the Ombudsman/92/2011 (07.07.2011) etc..

<sup>7</sup> Macedonia/The Constitution of the Republic of Macedonia/52/1991 (promulgated 17.11.1991)/Article 9.

<sup>8</sup> Macedonia/The Constitution of the Republic of Macedonia/52/1991 (promulgated 17.11.1991)/Article 54.

race, religion or national, social or political affiliation.<sup>9</sup> Amendment XI of the Constitution stipulated that the Ombudsman (Public Attorney) protects the constitutional rights and legal rights of the citizens when these are violated by the bodies of state administration and by other bodies and organizations with public mandates. The Ombudsman shall give particular attention to safeguarding the principles of non-discrimination and equitable representation of communities in public bodies at all levels and in other areas of public life.

b) Article 1 of the Law on Prevention of and Protection Against Discrimination regulates that “this Law shall ensure prevention of, and protection against discrimination in the exercise of the rights guaranteed by the Constitution, law and ratified international agreements” and for that purpose a Commission for Protection Against Discrimination, which has capacity of a legal entity is formed. Furthermore, all provisions of this law refer to different aspects in order to prohibit discrimination, but several of them need some improvement in order to justify the purpose of this Law.<sup>10</sup>

c) ECHR in Article 14 prescribes the prohibition of discrimination as following: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” And years later, the Article 1 of the Protocol 12 prescribes: “1. Enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”<sup>11</sup>

d) Other national legal acts contain significant number of provisions which prohibit discrimination, but not uncommonly they make confusion in our legal system since they produce negative conflict of competences among the stakeholders combating discrimination or do not secure effective protection against discrimination on high level into practice.<sup>12</sup>

## 1.2 Assessment of the Legal Framework

According to the Law on Prevention of and Protection Against Discrimination, different types of discrimination are recognized and specified, such as: direct discrimination, indirect discrimination, harassment and humiliating treatment, sexual harassment, victimization, discrimination of persons with mental and physical impediment, call for and incitement to discrimination, discrimination in the provision of goods and services and severe forms of discrimination. The grounds of discrimination are: sex, race, colour, gender, belonging to a vulnerable group, ethnic origin, language, nationality, social background, religion or religious beliefs, other types of beliefs, education, political affiliation, personal or social

<sup>9</sup> Only stipulated human rights in Article 110 item 3 from the Constitution can be protected in front of the Constitutional Court of the Republic of Macedonia, and it is assumed that all the rest rights can be protected in front of regular courts (Basic courts, Appellate courts, Supreme Court, Administrative Court and Senior Administrative Court).

<sup>10</sup> Institute for Human Rights Skopje (IHR) (2013), *Analysis on the implementation of the Law on Prevention of and Protection Against Discrimination* available at: [http://www.ihr.org.mk/images/pub/IHR-brosura\\_web\\_diskriminacija.pdf](http://www.ihr.org.mk/images/pub/IHR-brosura_web_diskriminacija.pdf); and Institute for Human Rights Skopje (IHR) (2014), *Analysis on the Shortcomings of the Law on Prevention of and Protection Against Discrimination*.

<sup>11</sup> Macedonia/ Law on Ratification of the Protocol No. 12 to the ECHR/30/2004 (11.05.2004).

<sup>12</sup> For more details see footnotes below number: 20, 24, 27 and 28.

status, mental and physical impediment, age, family or marital status, property status, health condition or any other basis anticipated by a law or ratified international agreement.<sup>13</sup>

**Direct discrimination** is defined as any unfavorable treatment, differentiation, exclusion or limitation which results or may result in deprivation, violation or limitation of the equal recognition or enjoyment of the human rights and fundamental freedoms, compared to the treatment that another person gets or may get in the same or similar situation. **Indirect discrimination** is defined as a placement of a person or a group in an unfavorable position compared to other persons by adopting apparently neutral provisions, criteria, or by accepting certain practices, unless such provisions, criteria or practices result from a justified aim, while the means for achievement of the referred aim are appropriate and necessary.

**Harassment and humiliating treatment** shall be a violation of the dignity of a person or a group of persons that results from a discriminatory ground and is aimed at or results in violation of the dignity of a particular person or creation of intimidating, hostile, humiliating or offensive environment, approach or practice. Macedonian legal framework recognizes also **sexual harassments** specified form of harassment, which is defined as unwanted behavior of sexual nature, manifested physically, verbally or in any other manner, aimed at or resulting in violation of the dignity of a person, especially when creating hostile, intimidating, degrading or humiliating environment. **Victimization** is defined as unfavorable behavior towards a person, bearing harmful consequences as a result of the activities it undertook in order to protect against discrimination (has reported discrimination, initiated a procedure due to discrimination and testified in the course of the procedure). As specific form of discrimination the **discrimination of persons with mental and physical impediment**, is recognized, which is defined not only as intentional disabling or hindered access to health protection, i.e. restriction of the rights to health protection, regular medical treatment and medicinal products, rehabilitation means and measures in accordance with their needs, restriction of the right to marry and to create a family, and other marriage and family relations rights, restriction of the right to education, work and labor relation rights, but also as failure to undertake measures for removal of the obstacles, i.e. for adjustment of the infrastructure and the space, use of publicly available resources or participation in the public and social life. **The call for and incitement to discrimination** is defined as a segregate form of discrimination, which is defined as any activity on the basis of which a person directly or indirectly calls for, encourages, gives directions or incites another person to discriminate. **Discrimination in the provision of goods and services** is defined as hindering or limiting the use of goods and services by a person or group of persons on any of the grounds referred to in Article 5 item 3 of this Law shall be discrimination. **The severe forms of discrimination**, which shall be considered: the discrimination inflicted on a certain person on multiple discriminatory grounds (multiple discrimination), discrimination inflicted several times (repeated discrimination), discrimination being inflicted for a longer period (extended discrimination) or discrimination the consequences of which severely affect the discriminated person.<sup>14</sup>

According to the definition of discrimination which is prescribed as any unjustified legal or factual, direct or indirect, differentiation or unequal treatment, i.e. omission (exclusion, limitation or giving priority), and, on the other hand, the definition of the discriminatory behavior and treatment, which is defined as any active or passive behavior of any person of the public authorities, as well as of legal entities and natural persons of the private and public

<sup>13</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Article 3.

<sup>14</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Articles 6-12.

sector in the public life, arise that these two definitions categorically include the assumed and associative form of discrimination.<sup>15</sup>

The Law on Prevention of and Protection Against Discrimination is familiar with few exceptions to the prohibition of discrimination whose are specified in three categories as affirmative measures, unequal treatment and protective mechanisms for particular categories of persons.<sup>16</sup>

Generally, the assessment of the some equality bodies and the Ombudsman is that there are not any conflicting legal provisions (collision) which could prevent the effective implementation of the prohibition of discrimination by their own body, but there are some shortcomings in the respective laws<sup>17</sup> and having into consideration our practice, there is a possibility of different interpretation and implementation of the provisions in particular cases (especially by the courts), which can lead to legal uncertainty in affirmation of the human rights.

## 2. Institutional Framework for Combating Discrimination

### 2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination

Autonomous and independent tribunal-type of equality bodies are: the Commission for Protection against Discrimination,<sup>18</sup> the Ombudsman<sup>19</sup> (both of them also have some additional competences that characterized them as promotional-type of equality bodies, too), the courts of all instance, as well as, theoretically, the Constitutional Court.<sup>20</sup> The only

<sup>15</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Article 5.

<sup>16</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Articles 13-15.

<sup>17</sup> This was one of the answers of the interviews with **Mrs. Mirdita Salju** - Head of Department for Equal Opportunities within the Ministry for labour and Social Policy (10.02.2016) and with **Mr. Idzet Memeti** – the Ombudsman (23.02.2016). Unfortunately, beside our efforts to interview the other stakeholders combating discrimination, they did not answer our questions at all. (Beside two attempts, there were no answers from: members of the Commission for Protection Against Discrimination, from President of the Committee for Equal Opportunities for Women and Men within the Assembly, President of the Standing Inquiry Committee for Protection of Civil Freedoms and Rights, as Equality Bodies, as well as from representatives of the Network for Protection from Discrimination, representatives of the Network – Macedonia without Discrimination, representatives of the Union of Trade Unions of Macedonia representatives of the Macedonian Young Lawyers Association and from representatives of the network – National Council for Gender Equality, as intermediaries in combating discrimination).

<sup>18</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Article 1.

<sup>19</sup> Macedonia/Law on the Ombudsman/60/2003...114/2009 (22.09.2003)/Article 13.

<sup>20</sup> Macedonia/Rules of Procedure of the Constitutional Court/70/1992 (14.11.1992)/Articles 51-57, prescribe that every citizen who believes that his/her rights or freedoms guaranteed by the Article 110 item 3 of the Constitution (among them is the right for non-discrimination) have been violated by the single act or action, has a right to protect them in front of the Constitutional Court in the specific procedure. On the other hand, from the annually reports of the Constitutional Court (2010-2014) it can be easily concluded that in practice almost never the citizens succeed in order to protect their rights through this procedure (not only the right of non-discrimination). Namely, in 2010 from 9 submitted requests for protection of human rights and freedoms, the Constitutional Court reached a positive decision just in one case - Constitutional Court, *Annual Report 2010*, pp. 5, 46-47, available at:

established as promotional-type of equality bodies that function within the Assembly of the Republic of Macedonia are: the Standing Inquiry Committee for Protection of Civil Freedoms and Rights<sup>21</sup> and the Committee for Equal Opportunities for Women and Men<sup>22</sup> and the Assembly on its own is also a promotional-type representative body. Besides these, there are promotional-type of equality bodies that has specific executive and/or administrative power as: the Government of the Republic of Macedonia, state administrative bodies, the Ministry for Labor and Social Policy within which a Department for Equal Opportunities is formed and a Coordinator for Equal Opportunities for Women and Men exists, the Local-Self Government units which are obliged to form Commission for Equal Opportunities for Women and Men as a standing body and to designate a Coordinator and Deputy Coordinator for Equal Opportunities for Women and Men, political parties and mass media.<sup>23</sup> Some legal provisions whose infringement is not sanctioned in the concrete law make the access to justice for the victims of discrimination more difficult.<sup>24</sup>

The Law on Free Aid began to be applied from June 2010<sup>25</sup> and it is applicable to all court and administrative procedures. Hence, it is applicable to discrimination cases. Namely, by

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<http://www.ustavensud.mk/domino/WEBSUD.nsf>; (06.03.2016). In 2011 from 23 submitted requests for protection of human rights and freedoms, the Constitutional Court didn't reach a positive decision in any case, just one case was finished through administrative way - Constitutional Court, *Annual Report 2011*, pp. 12, 32-34, available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>; (06.03.2016). In 2012 25 requests for protection of human rights and freedoms were submitted, the Constitutional Court reached decisions in 27 cases (requests for some of them were submitted during previous years) from which 15 refer to right for protection against discrimination and the court didn't reach a positive decision in any case - Constitutional Court, *Annual Report 2012*, pp. 11, 32-35, available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>; (06.03.2016). In 2013 were submitted 22 requests for protection of human rights and freedoms, the Constitutional Court reached decisions in 13 cases from which 10 refer to right for protection against discrimination and the court didn't reach a positive decision in any case - Constitutional Court, *Annual Report 2013*, p. 11, available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>; (06.03.2016). In 2014 were submitted 13 requests for protection of human rights and freedoms, the Constitutional Court reached decisions in 16 cases (requests for some of them were submitted during previous years) from which 7 refer to right for protection against discrimination and the court again didn't reach a positive decision in any case - Constitutional Court, *Annual Report 2014*, pp. 11, 35, available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>. (06.03.2016). Constitutional Court, *Annual Report 2015* is still not published yet (06.03.2016).

<sup>21</sup> Macedonia/The Constitution of the Republic of Macedonia/52/1991 (promulgated 17.11. 1991) /Article 76; and [http://www.sobranie.mk/working-bodies-2014-2018-ns\\_article-standing-inquiry-committee-for-protection-of-civil-freedoms-and-rights-2014-en.nsp](http://www.sobranie.mk/working-bodies-2014-2018-ns_article-standing-inquiry-committee-for-protection-of-civil-freedoms-and-rights-2014-en.nsp) (06.03.2016).

<sup>22</sup> This body is within the Assembly of the Republic of Macedonia composed of the MPs ([http://www.sobranie.mk/working-bodies-2014-2018-ns\\_article-committee-on-equal-opportunities-for-women-and-men-2014-en.nsp](http://www.sobranie.mk/working-bodies-2014-2018-ns_article-committee-on-equal-opportunities-for-women-and-men-2014-en.nsp)) (06.03.2016) and differs from the Department for Equal Opportunities which is within the Ministry of Labor and Social Policy and is composed of two units: Unit for Gender Equality and Unit for Prevention and Protection Against Discrimination.

<sup>23</sup> Macedonia/Law on Equal Opportunities for Women and Men/6/2012...150/2015 (13.01. 2012)/Articles 9-18.

<sup>24</sup> Macedonia/Law on Equal Opportunities for Women and Men/6/2012...150/2015 (13.01. 2012)/Article 15, prescribes that: "*The coordinator for equal opportunities for women and men referred to in Article 14 paragraph (7) of this Law shall be obliged, at least once a year, by 31 March in the current year for the previous year, to submit a report to the Ministry of Labor and Social Policy and to publish it on the web site of the local self-government unit.*" but because no sanction is provided by this law only Municipality of Aerodrom among 84 Local Self-Government Units published their Reports for 2011, 2012, 2013 and 2014, available at: <http://www.aerodrom.gov.mk/dokumenti/mozhnosti> (06.03. 2016).

<sup>25</sup> Macedonia/Law on Free Legal Aid/161/2009...104/2015 (30.12.2009).

the Law on Prevention of and Protection Against Discrimination is provided that the person who seems to have suffered discrimination could initiate the procedure in front of the Commission for Protection Against Discrimination without an obligation to pay a fee or any other compensation.<sup>26</sup> Nevertheless, some of the criteria really make access to free legal aid more difficult for the victims of discrimination.<sup>27</sup> The total number of requests for free legal aid was 332 that were submitted in the period 2010-2012 and concrete cases were formed, out of which, just in 120 cases for free legal aid have been granted.<sup>28</sup>

## 2.2 Stakeholders Putting Combating Discrimination into Practice

### 2.2.1 Equality Body/Bodies

The Commission for Protection against Discrimination as an equality body, formed with the main purpose for protecting against discrimination is composed of seven members appointed by the Assembly with five-year term of office, with the right to one re-appointment. All of the key aspects and characteristics of the Commission that are arising and are visible through its competences. Its competences are as following:

- to act upon complaints, to give opinions and recommendations concerning particular cases of discrimination;<sup>29</sup>
- to give information to the submitter of the complaint regarding the personal rights and opportunities for initiation of a court or other procedure for protection (the case handling procedure);<sup>30</sup>
- to raise an initiative for initiation of a procedure with the competent bodies due to violations of the Law on Prevention of and Protection Against Discrimination;
- to submit an annual report to the Assembly of the Republic of Macedonia;
- to inform the public about discrimination cases and to undertake activities for promotion and education regarding to equality, human rights and non-discrimination;

<sup>26</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Article 25.

<sup>27</sup> For example Macedonia/Law on Free Legal Aid/161/2009...104/2015 (30.12.2009) in Article 14 is defined that “*The free legal aid cannot be approved if the applicant or a member of his/her family living together in the same household has a property that reaches or exceeds five average monthly gross salaries paid in the Republic of Macedonia for the previous month.*” which means that the applicant has to purchase the house where he/she lives for whole life in order to be eligible for using the free legal aid! For more reasons and explanations see also the Macedonian Young Lawyers Association (2010–2012), *Report*, available at: <http://www.myla.org.mk/images/pdf/zbpp.pdf> (06.03.2016).

<sup>28</sup> Macedonian Young Lawyers Association (2010–2012), *Report*, pp. 25-35, available at: <http://www.myla.org.mk/images/pdf/zbpp.pdf>; (06.03.2016). There aren't statistical data on this topic for the period 2013-2015.

<sup>29</sup> In 2011 the Commission for Protection Against Discrimination gave in total 31 opinions, available at: <http://www.kzd.mk/mk/prestavki/2011-mislenja>; (06.03.2016) in 2012 gave in total 45 opinions available at: <http://www.kzd.mk/mk/prestavki/2012-mislenja>; (06.03.2016) in 2013 gave in total 65 opinions available at: <http://www.kzd.mk/mk/prestavki/2013>; (06.03.2016), and in 2014 gave in total 52 opinions available at: <http://www.kzd.mk/mk/prestavki/2014>; (06.03.2016). As it is obvious from these data, most of the opinions were not positive for the citizens who had submitted a complaint. Overall data for 2015 are not published yet. (06.03.2016).

<sup>30</sup> Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Articles 25-29, prescribe the procedure in front of the Commission for Protection Against Discrimination in details.

- to monitor the implementation of this Law, to initiate amendments to the regulations aimed at implementation and promotion of protection against discrimination;
- to establish cooperation with the bodies responsible for attaining equality and protection of human rights in the local self-government;
- to give recommendations to the state bodies for undertaking measures for attainment of equality;
- to give opinions on draft laws of importance for protection against discrimination;
- to collect statistical and other data, to set up databases, to conduct studies, researches and training in the field of discrimination;
- to cooperate with corresponding national bodies of other states, as well as with international organizations in the field of protection against discrimination; and
- to adopt Rules of Procedure for Operation and other acts about the internal work organization.<sup>31</sup>

The Commission, as all equality bodies, needs to strengthen its capacities and skills and also to assure a stronger institutional cooperation and information exchange among the stakeholders,<sup>32</sup> in order to enforce their competences, especially for accommodating to the needs of broad range of vulnerable groups. The effectiveness of this body is not on a satisfactory level still, because it has to increase its professionalism and independence, as well as, its autonomy and impartiality in human resources management and real determination of budget that the Commission needs. These are perceived as common disadvantages of almost all equality bodies which create a systematic problem that refers to all Macedonian citizens.<sup>33</sup>

### 2.2.2 Ombud Institution(s)

**The Ombudsman** is a body of Macedonia that has one of the key roles for protecting constitutional and legal rights of citizens and all other persons that are infringed by acts, actions and omissions by the state administrative bodies and other bodies and organizations vested with public authorizations, and as such it undertakes actions and measures for protection of the principle of non-discrimination and equitable representation of community members in the state administrative bodies, the local self-government units and the public institutions and services.<sup>34</sup> The Assembly of the Republic of Macedonia, on a proposal of the competent commission of the Assembly, shall elect and dismiss the Ombudsman with a majority vote of the total number of representatives in the Assembly, at the same time having a majority of votes of the total number of representatives who belong to the non-majority

<sup>31</sup> All these competences, except the first one and the second one, defined in Macedonia/Law on Prevention of and Protection Against Discrimination/50/2010...31/2016 (13.04.2010)/Article 24, describe theoretically its approach on awareness raising and outreach and public relations work.

<sup>32</sup> From the interview with the Head of the Department for Equal Opportunities within the Ministry for Labour and Social Policy (10.02.2016).

<sup>33</sup> From the Interview with the Ombudsman (23.02.2016) and the Ombudsman (2010), *Annually Report*, available at: <http://ombudsman.mk/upload/documents/Izvestaj%202010-MK.pdf>; (06.03.2016), the Ombudsman (2011), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2011/Izvestaj%202011-MK.pdf>; (06.03.2016), the Ombudsman (2012), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2012/GI-2012.pdf>; (06.03.2016), the Ombudsman (2013), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013.pdf>; (06.03.2016), and the Ombudsman (2014), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014.pdf>. (06.03.2016) the Ombudsman (2015), *Annually Report*, is not published yet. (06.03.2016).

<sup>34</sup> Macedonia/Law on the Ombudsman/60/2003...114/2009 (22.09.2003)/Article 2.



communities in the Republic of Macedonia. The Ombudsman shall be elected for a period of eight years with the right to one re-election.<sup>35</sup> During its everyday work the Ombudsman is led by the international standards and practices which are incorporated in the national legal system and are transposed into the internal obligatory act for all employees in the Ombudsman office. The total number of employees is 74 and almost 80% are with higher education, most of them are lawyers, then social workers etc. Part of them have master degree of studies and part of the employed lawyers had passed the bar exam. Due to the extensive competences more employees are needed, but the consent by the Ministry of Finance is necessary, so the procedure became longer and harder. During this period 2010-2015 all of the employees were trained on different topics in Macedonia as well as in foreign countries. The most of the trainings were supported by OSCE through two twining projects and series of trainings and seminars. Awareness raising of the citizens is always stipulated in the Annual Program of the Ombudsman and is implemented in practice through different forms such as: visibility in media, distribution of leaflets and brochures, presence and organization of public debates and seminars targeting all vulnerable groups within the society, as well as promotion and protection of human rights in all fields which is one of the Ombudsman competences. The Ombudsman, it can be objectively said, has good capacities for accommodating to the needs of a broad range of vulnerable groups because in front of this body a citizens can communicate officially by using their own language, which is one of the prescribed languages by the constitution, and the Ombudsman due to variety of its employees will answer on both, the language of the citizen and Macedonian language. The effectiveness of the Ombudsman is the best assessed by citizens who communicate with its office, by the CSOs and moreover by international bodies which evaluate its work, and of course most importantly, by the number of accepted opinions and recommendations by the targeted institutions. Nevertheless, in this regard must be emphasized the fact whether all stakeholders accept Ombudsman's opinions and recommendations, since their legal effect is not obligatory for other bodies. Precise answer can be gained by the Ombudsman Annual Reports 2010-2014.<sup>36</sup> Furthermore, the Ombudsman itself puts attention on the issue that its

<sup>35</sup> Macedonia/Law on the Ombudsman/60/2003...114/2009 (22.09.2003)/Article 5.

<sup>36</sup> Information gained from the interview with the Ombudsman (23.02.2016). For detailed information take into consideration footnote above number 33 with all data listed and furthermore these data from the Ombudsman Annual Reports 2010-2014 should be emphasized: a) In 2010 the biggest number of not-acceptance of the Ombudsman opinions, suggestions and recommendations came from the second instance commissions of the Government, Ministry for Interior Affairs, Ministry of Finance and the Self-Government Units so from the total number of solved cases in 2010 – 4009 (16 submitted complaints referred to non-discrimination and equitable representation), the Ombudsman found valuation of the rights in 987 cases and from them in 110 cases (11,14%) the state administration bodies and other bodies with public competences did not accept the recommendations given by the Ombudsman; b) In 2011, 4200 cases were finished by the Ombudsman (42 submitted complaints referred to non-discrimination and equitable representation) the Ombudsman found valuation of the rights in 1362 cases and from them in 160 cases (11,75%) the state administration bodies and other bodies with public competences did not accept the recommendations given by the Ombudsman; c) In 2012, 4401 cases were finished by the Ombudsman (32 submitted complaints referred to non-discrimination and equitable representation and in 9 of them was found violation and state administrative bodies in 8 cases accepted the recommendations of the Ombudsman) the Ombudsman found valuation of the rights in 1043 cases and from them in 190 cases (14,01%) the state administration bodies and other bodies with public competences did not accept the recommendations given by the Ombudsman; d) In 2013, 2905 cases were finished by the Ombudsman (51 submitted complaints referred to non-discrimination and equitable representation and in 19 of them was found violation and state administrative bodies accepted the recommendations of the Ombudsman in 15 of them) the Ombudsman found valuation of the rights in 1174 cases and from them in 123 cases (10,48%) the state administration bodies and other bodies with public competences did not accept the recommendations given by the Ombudsman; e) In 2014, 4062 cases were finished by the Ombudsman

individual recommendations are more accepted by all stakeholders in comparison with the Ombudsman general recommendations and suggestions where real obstacles with their enforcement into practice occur.<sup>37</sup>

### 2.2.3 Intermediaries

Some of the **intermediaries** are civil society organizations which have been established with main purpose for prevention of, and protection against discrimination<sup>38</sup> as well as civil society organizations which have as a main aim the protection of human rights, with the right against discrimination included.<sup>39</sup> Furthermore, for enhancing the same purpose, some CSOs' networks have been already established.<sup>40</sup> All of the said intermediaries have a big role in combating discrimination, so the relevant institutions should have bigger will for cooperation with these intermediaries, which the Ombudsman already have.<sup>41</sup> Beside the previously listed, trade unions shall also be recognized as intermediaries. Namely, according to the Law on Labor Relations the employees shall have the right to constitute a trade union and become its members by their own free choice, under the conditions set forth by the statute or by the rules of that trade union. The trade union is an autonomous, democratic and independent organization of employees which they join voluntarily for the purpose of representing, presenting, promoting and protecting their economic, social and other individual and collective interests.<sup>42</sup> In the same line, according to the Law on Mediation, the mediation is applicable amongst others, on disputes regarding discrimination,<sup>43</sup> which means that theoretically, the mediators are also intermediaries for combating discrimination, but practically they still don't function on the satisfactory level and consequently they don't have capacities for accommodating to the needs of broad range of vulnerable groups. Also, their effectiveness up till now is still not visible enough.<sup>44</sup>

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(66 submitted complaints referred to non-discrimination and equitable representation and in 25 of them was found violation and state administrative bodies accepted the recommendations of the Ombudsman in 14 of them) the Ombudsman found valuation of the rights in 114 cases and from them in 72 cases (5.63%) the state administration bodies and other bodies with public competences did not accept the recommendations given by the Ombudsman. The Ombudsman (2015) *Annual Report* is not published yet. (06.03.2016).

<sup>37</sup> From the interview with the Ombudsman (23.02.2016).

<sup>38</sup> For e.g. Civil Society organization "Voice Against Discrimination and Repression" Skopje (available link of its registration at: [http://www.ujp.gov.mk/mk/prebaruvanje\\_pravni\\_lica/prikazi?edb=4030999372652](http://www.ujp.gov.mk/mk/prebaruvanje_pravni_lica/prikazi?edb=4030999372652)) (06.03.2016).

<sup>39</sup> The most visible CSOs from this type in Macedonian society in the period 2010-2015 are Institute for Human Rights (IHR) (<http://ihr.org.mk/en/>) (06.03.2016); Helsinki Committee for Human Rights of the Republic of Macedonia (HCHR): (<http://www.mhc.org.mk/?locale=en#.VtzLQn0rKt8>) (06.03.2016), and Macedonian Young Lawyers Association (MYLA) (<http://www.myla.org.mk/index.php/en/>) (06.03.2016).

<sup>40</sup> Such as: The Network for protection of discrimination (2010-2014, *Report of its work*, available at: [http://www.soros.org.mk/CMS/Files/Documents/izvestaj-mreza\\_za\\_zastita\\_od\\_diskriminacija1.pdf](http://www.soros.org.mk/CMS/Files/Documents/izvestaj-mreza_za_zastita_od_diskriminacija1.pdf)) (06.03.2016), and The Network – Macedonia without discrimination (the aim of its establishment available at: <http://www.mcms.org.mk/en/our-work/programmes/macedonia-without-discrimination.html>) (06.03.2016).

<sup>41</sup> From the interview with the Ombudsman (23.02.2016).

<sup>42</sup> Macedonia/Law on Labour Relations/62/2005...27/2016 (28.07.2005)/Article 184; Everyday work of the Union of Trade Unions available at: <http://www.ssm.org.mk/index.php?lang=en> (06.03.2016).

<sup>43</sup> Macedonia/Law on Mediation/188/2013...192/2015 (31.12.2013), Article 1 paragraph 2.

<sup>44</sup> The assessment that mediation is still not developed in Macedonia on stated aspects comes from the fact that on 02 February 2016 the new Amendments of the Law on Litigation Procedure are applicable and prescribe that the mediation is obligatory only for the disputes between the legal entities, but still it is not applicable obligatory between citizens as natural persons; Macedonia/Law on Amendments of

#### 2.2.4 Police

The role of the **police** in combating discrimination is very limited and, in many cases in practice, the police acts completely opposite<sup>45</sup> due to the fact that only few general provisions in the Law on Police regulate it. These provisions just generally prescribe that one of the many police affairs is to protect the freedoms and rights of the humans and citizens guaranteed by the Constitution of the Republic of Macedonia, by laws and by the ratified international agreements;<sup>46</sup> and also that the police officers during enforcement of their powers have to act humanely and to respect the integrity, the reputation and the honor of the persons and to respect the fundamental rights and freedoms of the humans and citizens.<sup>47</sup> In the same way is the provision from the Law on Interior Affairs which prescribes that under the definition of the interior affairs, among other, is prevention of incitement to national, racial or religious hatred and intolerance.<sup>48</sup> According to the Ombudsman, the police absolutely has no capacities for accommodating to the needs of the broad range of vulnerable groups since the majority of the complaints of the citizens are against the work of the police. The effectiveness of the police in combating discrimination is still negative because the police continues the practice of not accepting and not acting upon the opinions, suggestions, recommendations and special reports of the Ombudsman and in this regard, the citizens also continue submitting complaints against the police treatment. Therefore, the Ombudsman suggests conducting special trainings to all police officers, especially to the part of them that are completely involved in the personal contact with citizens.<sup>49</sup> In relation of the previously mentioned, initial steps are taken by the Ministry for Labor and Social Policy which has started working on strengthening of the capacities of the police in order to recognize discrimination and work on prevention of it.<sup>50</sup> All citizens impatiently expect some positive effects from these undertaken measures.

#### 2.3 Mapping the Cooperation with Stakeholders

As previously mentioned, the Commission for Protection against Discrimination (the Commission) is the central authority and equality body according to the Law on Prevention and Protection against Discrimination. So, in this part of the report we will be focused of the

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the Law on Litigation Procedure/124/2015 (23.07.2015). Macedonian citizens also still don't have both knowledge and habit to initiate a procedure for protection of discrimination in front of the mediators.

<sup>45</sup> From the interview with the Ombudsman (23.02.2016) and for detailed information see data stated in footnotes above number 33 and 36.

<sup>46</sup> Macedonia/Law on Police/114/2006...31/2016 (03.11.2006), Article 5.

<sup>47</sup> Macedonia/Law on Police/114/2006...31/2016 (03.11.2006), Article 32.

<sup>48</sup> Macedonia/Law on Interior Affairs/42/2014...5/2016 (03.03.2014), Article 2.

<sup>49</sup> From the interview with the Ombudsman (23.02.2016) and for detailed information take into consideration footnote above number 33 with all data listed and furthermore these data from the Ombudsman Annual Reports 2010-2014 should be emphasized: a) In 2010 among the total number of submitted complaints, the Ombudsman dealt with 4.828 and 238 of them (5,89%) referred to police treatment, competences and procedure; b) In 2011, among the total number of submitted complaints, the Ombudsman dealt with 5.074 and 179 of them (4,21%) referred to police treatment, competences and procedure; c) In 2012, among the total number of submitted complaints, the Ombudsman dealt with 5.220 and 220 of them (5,06%) referred to police treatment, competences and procedure; d) In 2013, among the total number of submitted complaints, the Ombudsman dealt with 4.599 and 177 of them (4,68%) referred to police treatment, competences and procedure; e) In 2014, among the total number of submitted complaints, the Ombudsman dealt with 4.995 and 173 of them (4,07%) referred to police treatment, competences and procedure. The Ombudsman (2015) *Annual Report* is not published yet. (06.03.2016).

<sup>50</sup> From the interview with the Head of the Department for equal opportunities within the Ministry of Labor and Social Policy (10.02.2016).

cooperation between stakeholders and this authority, but also we will share the information on other forms of cooperation which has contributed towards better implementation of the law and more effective protection against discrimination.

One of the first established cooperation was between the Commission and the Academy for Judges and Public Prosecutors in the field of legal training. The document envisaged that both institutions will share their trainers, participants and knowledge towards preparation of the judges and members of the Commission for proper performance of their duties in the cases according to the new Law. This cooperation was very useful, having in mind that much of the trainings (see 3.3) were conducted with the representatives of the judiciary and commissioners, where the trainers team was also consisted by judges, commissioners and other experts.

When still in the field of training, it is worth to mention another project that was implemented in the period of 2012-2014, with support of British Embassy and British Council in Macedonia. As a part of this project (Strengthening the Capacities of the Ministry for Labor and Social Affairs towards Implementation of the National Strategy for Equality and Non-discrimination)<sup>51</sup> where main partners were the Ministry of Labour and Social Affairs, Commission for Protection Against Discrimination, Academy for Judges and Public Prosecutors and other public institutions, more than 900 hundred state servants were trained on the basic principles of equal treatment and non-discrimination policy. The main objective of the project was to raise the awareness among the employees within the public administration and to prevent the discriminatory behavior, especially for ones that are working directly with the citizens as customers.

Another important Memorandum for Cooperation was signed with the Committee for Equal Opportunities for Women and Men within the National Assembly, on general level, which leads to cooperation with such Committees on local level as part of the local municipality units. This activity has resulted with regular meetings between the commissioners and local representatives in 2014 and 2015, including 16 municipalities in Macedonia, 8 for each year. Targeted municipalities in 2014 were Gostivar, Berovo, Kocani, Kumanovo, Kriva Palanka, Gevgelija, Resen and Shuto Orizari - Skopje, and in 2015, municipalities of Valandovo, Veles, Debar, Kratovo, Makedonska Kamenica, Pehcevo, Radovish and Resen, were focus of the activity.<sup>52</sup>

In the same time, supported by the OSCE Mission in Skopje, the commissioners closely cooperated on local level on the basis on regular meetings, with social partners, workers organizations, chambers of commerce, association of employers etc. The main focus of this activity was to put an elimination of the discrimination forms in the job announcements, but also in the labor relations with special focus on the women rights.

The OSCE Mission in Skopje has offered a great support to the different institutions in fight against discrimination, especially to the Commission and strengthening of its capacity as new authority acting as central equality body. For the support of the training activities, we will refer in 3.3.

But, as a good example, we can also mention their common activity with the Ombudsman and Helsinki Committee in Macedonia, organizing Conference in October 2015, on Discrimination of Roma people on borders in the country.<sup>53</sup>

Although, there was no formal cooperation with the Ombudsman, regular meetings and cooperation was established in order to avoid the overlapping in proceedings, having on

<sup>51</sup> <http://www.britishcouncil.mk/programmes/society/equality>.

<sup>52</sup> Source: Commission for protection against discrimination, March, 2016.

<sup>53</sup> <http://www.osce.org/mk/skopje/192026>.

mind that some applicants are submitting complaints to both institutions.<sup>54</sup> Because of that, the Law is clearly addressing the cooperation between these two institutions according to the Article 33.<sup>55</sup>

The Commission has also established a good and regular cooperation, officially by agreements and memorandums, with several representatives of Civil Society Sector, like HERA organization which is protecting the HIV positive persons and representatives of LGBT Community, “Women Action” which is protecting the women rights, “POLIO PLUS” representing and protecting the rights of the persons with disability, etc.

In the end, we can conclude that the Commission was very open for cooperation and ready to share and implement the experiences and practices that were developed by the Civil Society Sector and other institutions that have previous experience like the Ombudsman, Courts and International Organizations. Of course, there is always possibility to extend and improve the cooperation between different stakeholders, but the challenges for next period are mainly addressed to the new members of the Commission, elected in the beginning of 2016.

### **3. The Role of Courts in Combating Discrimination**

#### **3.1 Capacities of Courts in Combating Discrimination**

Analyzing the capacities of the Courts in combating discrimination is not an easy task, having on mind that the new Law has entered into force in the beginning of 2011, but the first cases accordingly had arrived in 2014. Considering the fact that the amount of the cases in Constitutional, Administrative, Criminal and Misdemeanor Courts is insignificant, this part of the report will overview the capacities of the civil judges, as the Law on Prevention and Protection against Discrimination envisages civil procedure for this kind of cases.<sup>56</sup>

The discrimination cases are randomly allocated to the judges within the civil courts among judges who are dealing with labor disputes or other “classis” civil disputes. They are not allocated only to the judges who are dealing with commercial law cases, family law cases or undisputable cases.

It means that there is no specialized department in the Court that is dealing with discrimination cases. Furthermore, there are no specialized judges who are dealing with this kind of cases. Just as information, two years ago, in 2013 there was a huge reform from a procedural aspect on defamation and insult cases. These kinds of cases were decriminalized and civil jurisdiction was envisaged with completely new Law on Civil Liability for Defamation and Insult. Immediately, after adoption of the Law, specialized judges were appointed in every court, and specialized training program was delivered to these judges. Maybe this can be a successful model for strengthening the capacities of the judges obtaining specialization necessary for this kind of cases. If there is no possibility and/or need for specialized departments (like labor law departments), than we find very useful to have specialized judges like ones that are dealing with cases related to defamation and insult. Nevertheless, the Academy for Judges and Prosecutors has done an impressive number of training activities, which contributes towards preparation of the judges in obtaining the necessary skills and knowledge for the upcoming cases based on the relatively new Law on

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<sup>54</sup> Source: Interview with the President of the Commission in the period 2011-2015, Mr. DuskoMinovski, 12.3.2016.

<sup>55</sup> Law on Prevention and Protection against Discrimination, Official Gazette 50/2010, Articles 33.

<sup>56</sup> Law on Prevention and Protection against Discrimination, Official Gazette 50/2010, Articles 34-41.

Prevention and Protection against Discrimination. Starting from 2011, every year on, the Academy was implementing specialized training program on the concept of equality and anti-discrimination, but more information on this are available in part 3.3 of this document. As practitioners, we can notice that judges who are working on labor law cases are more aware and ready to adopt the concept of antidiscrimination, as a consequence of promoting the anti-discrimination policy in the Law on Labor Relations from 2005.<sup>57</sup>

Beside this, there are some procedural aspects that need attention, especially related to the shifting the burden of proof. It is a common opinion that this procedural mechanism, although is regulated by the Law on Prevention and Protection against Discrimination,<sup>58</sup> is not adequately applied in the court procedures. One of the main reasons for this problem is that the Law on Civil Procedure strictly shifts the burden of proof to the plaintiff, saying that he/she must submit all the evidences latest by preparatory trial. In opposite, the judge has right to dismiss the claim as incomplete. The other problem is that the Law on Prevention and Protection against Discrimination should be treated as *lex specialis* in discrimination cases, but most of the judges will say that there is a collision between these two laws. More observation on this issue will follow in part 4.5 of this document.

The use of statistical data is not formally regulated by the law, but it can be used especially when we are talking about indirect discrimination, strategic litigation or class action/*actio popularis*. In the end of 2015 the first class action was prepared by several non-governmental organization, mainly based on statistical data, but we will elaborate this case further in this document in part 4.4. Please note that this case has entered the Basic (Civil) Court in Skopje in January 2016, and the procedure is at a very early stage.

In this light, it's important to notice that according to the Law, CSOs can take part in the court proceedings when they have reasonable interest to protect the collective rights of a particular group or within the scope of their activities. They can be also co-parties (co-plaintiffs) against the person or institution who has violated the right of equal treatment.<sup>59</sup>

On the other hand, the Commission can take a role as intervener to one of the parties if there is a legal interest, according to the Law on Civil Procedure.<sup>60</sup> Also, a member of the Commission (commissioner) can take a part in the court procedure as a witness if he worked on particular case as commissioner and can testify on the facts or information that he/she gained working on that particular discrimination case.<sup>61</sup>

However, the judges cannot ask equality bodies, ombudsman institution or CSOs to prepare expert opinion, because the issue of discrimination is a legal question, and judges cannot ask for an expert's opinion on legal matters. But, they can use the opinions and recommendations issued by equality bodies or ombudsman institution as evidence or supportive argument when explaining the legal reasoning and argumentation of their decisions.

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

In the period of 2010 – 2015 the case law on discrimination has not been developed on adequate level, but the positive trend can be noticed in increasing the number of cases, starting from 2014. As the report is focused on all kinds of jurisdictions, we should

<sup>57</sup> Law on Labor Relations, Official Gazette 62/2005.

<sup>58</sup> Law on Prevention and Protection Against Discrimination, Official Gazette 50/2010, Article 38.

<sup>59</sup> Law on Prevention and Protection Against Discrimination, Official Gazette 50/2010, Article 41 p. 1.

<sup>60</sup> Law on Civil Procedure, Official Gazette 79/2005, 110/2008, 83/2009 and 116/2010, Article 197 p. 1.

<sup>61</sup> Guidelines on the shifting the burden of proof and role of the Commission for Protection Against Discrimination, OSCE Mission to Skopje, 2013, Authors: Poposka, Mihajloski, Georgievski.

emphasize the following situation: the Constitutional Court from 2012 to 2014 received total of 32 requests for protection against discrimination (2012 – 15, 2013 – 10, 2014 – 7), but unfortunately the Court didn't reach a positive decision in any case.<sup>62</sup> The Administrative Court does not receive any claims based on the Law on Prevention and Protection Against Discrimination, but has received two claims upon the Law on Administrative Disputes, out of which one reached the negative decision and the other one is still in the procedure in front of Higher Administrative Court.<sup>63</sup>

When talking about the number of cases in front of the civil and criminal courts, the number was obtained by an official request sent by the Academy for Judges and Public Prosecutors to every basic court in the country, leading to the following result: no cases in Misdemeanor Courts, only one case in Criminal Court in Skopje, and 47<sup>64</sup> cases in the Civil Courts. The information on which protected ground these cases are submitted is not available from the courts. Furthermore, some courts have mentioned the possibility that there might be more cases, but when, beside the main request for protection against discrimination, in the claim a request for compensation of damage is also made, this case might be registered as a case for compensation of damage. As a result of this, we can propose the establishment of new sub-tick box in the ACMIS (Automatic Court Management Information System) system in the courts where within the discrimination field, also the protected grounds can be easily registered in a proper way.

According to the legislation, only victims and CSOs have a legal standing to initiate a case in front of the courts. The equality bodies such as the Commission and the Ombudsman do not have this privilege,<sup>65</sup> so maybe this is another reason for such a small amount of cases submitted in the last five years.

When talking about the quality of judgments in cases of discrimination, it's hard to obtain and analyze all of them, but in this occasion, we will share some common and general remarks and opinions which are very obvious from substantive and procedural aspects of quality.

- 1) As previously mentioned, shifting of the burden of proof is not adequately applied in the court procedures. It's still likely that the burden of proof is mainly put on the plaintiff, although the other party should also give statements and evidence in opposite way proving that in the particular case there was no violation of the right of equal treatment. Furthermore, the Law on Prevention and Protection against Discrimination is not totally in line with international standards and EU directives, because besides the facts, submitting evidence is also required for creating a *prima facie* case.<sup>66</sup>
- 2) Another negative "mark" related to the quality of the court decisions refers to the lack of differentiation between the constitutive elements of discrimination: unequal treatment, comparator, protected ground, legitimate aim, victim and consequences of the unequal treatment. The judgments are not sufficiently explained in a proper way, with analysis of the facts and evidence related to above mentioned elements or some of them, bringing together to the conclusion whether in particular case there was discrimination, or not.

<sup>62</sup> Constitutional Court, Annual reports for 2010, 2011, 2012 and 2014, more details in footnote 19 of the Report.

<sup>63</sup> Macedonian Young Lawyers association, Report 2010-2012.

<sup>64</sup> Source: Academy for Judges and Public Prosecutors "Pavel Shatev", March, 2016: Basic Court Skopje 2 (Civil Court) has reported 39 cases, Basic Court Skopje 1 (Criminal Court) – 1 case, Basic Court Delchevo – 4 cases, Basic Court Gostivar – 1 case and Basic Court Shtip – 2 cases.

<sup>65</sup> Guidelines on the shifting the burden of proof and role of the Commission for Protection Against Discrimination, OSCE Mission to Skopje, 2013, Authors: Poposka, Mihajloski, Georgievski.

<sup>66</sup> Law on Prevention and Protection Against Discrimination, Article 38.

- 3) Finally, there is a lack of implementation and referring of international standards and case law, especially when we are talking about the European Convention on Human Rights and Strasbourg Case Law, which are directly applicable in our legal system. But, also other international instruments and conventions like CEDAW, CERD etc. are not applied at all, or are not used as supportive argument in the explanations of the judgments. This is maybe because of the lack of knowledge, lack of awareness or lack of willingness, or it's simple way to follow the formal legalistic approach, implementing strictly the content of the Law. However, it's something that must be improved in the future, and that all legal professionals should work on together.

Positive opinion goes for the situation when the court found discrimination in a particular case, then they use in a proper way the legal provisions that allow assessing of immaterial damage, and there are cases when this is a part of the sanctions or of the enforcement part of the judgment in civil cases. Finally, the judgments are not very well disseminated and I cannot share some particular example for good practices. However, they are disseminated between the judges in the courts as part of the regular meetings in the departments, and if they reach the second instance court, they can be also disseminated through publishing of the relevant case law on quarterly basis, of course, if the higher court finds that the judgment was specific, interesting or because of the public interest should be a part of the case law review.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

The Academy for Judges and Public Prosecutors offers antidiscrimination cases from the very beginning of the adoption of the Law on Prevention and Protection Against Discrimination (April, 2010) and its application from the beginning of 2011. Since then, every year the Academy, supported by OSCE Mission to Skopje, was a developing annual training program on antidiscrimination for judges and public prosecutors. First three years the program was dedicated only for judges, prosecutors and commissioners as guest trainees. Every year one Training of Trainers (ToT) event and four two-day events were organized for representatives of all four appellate districts in the country. The situation is such that since, after more than 16 trainings in three years resulted with no court case filed, the activities were extended to the lawyers, so the Memorandum for Cooperation was conducted between the Academy, OSCE Mission and the BAR Association. In 2014 the ToT training has included the lawyers as well, but also other four events per year in 2014 and 2015 were envisaged for 10 representatives of the judiciary, 10 representatives of the BAR Association and 2-3 representatives of the Commission or Ombudsman institution. Furthermore, the training team was consisted of one judge and one lawyer, mentored by one national expert – lawyer and one expert – representative of the OSCE Mission to Skopje. Until 2013, the program on antidiscrimination was not mandatory, but from 2014 the program is a part of the regular curriculum, so beside this activity with OSCE Mission and other donors, the Academy is implementing individual trainings with their own trainers, both as a part of the initial training program (for candidate judges and prosecutors) and as a part of the continuous training program. The courses basically were mixture of lectures, presentations, case studies, group work and testing, firstly on basic principles, but during the years they developed into more specific topics related to the forms of discrimination, protected grounds, procedural aspects and shifting the burden of proof, introduction of the international standards, documents and EU regulations, as well as presentation of the latest developments of the relevant case law of the European Court of Human Rights and Court of Justice of the European Union.



As a good practice, it's worth mentioning the one day legal seminars, organized in the Academy, (four in 2014 and four in 2015) on particular and very specific topics related to discrimination issues, like direct discrimination, indirect discrimination, burden of proof, sexual orientation as protected ground, Case Law of European Court of Human Rights and Court of Justice of the European Union, National case law etc. This good practice will continue in 2016, as well.

The multidisciplinary approach of the Academy leads to a very positive experience, also related to the structure of the pool of trainers, so in the trainers list on antidiscrimination you can find judges, prosecutors, lawyers, commissioners, representatives of the CSOs, university professors etc., which is quite wide range of trainers for Judicial Training Academy.

The total number of the participants is more than 600, mainly judges, prosecutors, lawyers, commissioners and other representatives.

Beside this, in the frame of the Project managed by British Council and other activities of the Academy, during these years, total of 159 representatives of court administrative staff were trained on the basic principles on the concept of equality and antidiscrimination, which leads to overall number of more than 850 participants. Detail figures and statistics can be found in the following table:<sup>67</sup>

Year/target group	Judges	Prosecutors	Court staff	Lawyers/BAR Members	Others	Total
2010	52	25	23	/	2	102
2011	32	32		/	14	78
2012	48	9	2	/	3	62
2013	117	10	54	18	27	226
2014	108	4	44	23	6	185
2015	77	15	36	62	21	211
<b>Total:</b>	<b>434</b>	<b>95</b>	<b>159</b>	<b>103</b>	<b>73</b>	<b>864</b>

As supportive training tools, specific handbooks were developed, as well as compilation of relevant European Case Law was published and translated into Macedonian, providing basic and advance guidance to the judges on identifying and processing discrimination towards rendering quality judgments. These are the most relevant handbooks that were developed in last five years: Handbook for Training of Judges on Antidiscrimination Legislation – 2012, Manual Guidelines for Role of the State Commission on Antidiscrimination in Court Proceedings and Shifting the Burden of Proof – 2013, First Compilation of Relevant Case Law – European Court on Human Rights and Court of Justice of EU – 2013 (13 Judgments – integral version, including the descending opinions of the judges (if any) related to ethnicity, gender, religion, age, sexual orientation and disability), Guideline on Protected Grounds – 2014, Guideline on Reasonable Accommodation, Practical Tool Book on National Law on Protection and Fight Against Discrimination – 2015 (Initial acts, Commission Acts, First Instance Court Judgments, Legal Remedies and Second Instance Court Decisions) and second compilation of relevant case law – European Court on Human Rights and Court of Justice of EU – 2015, all of them developed in cooperation and support by OSCE Mission to Skopje,<sup>68</sup> and two publications supported by British Council<sup>69</sup> in Skopje – Court Manual

<sup>67</sup> Source: Academy for Judges and Public Prosecutors “Pavel Shatev”, March, 2016.

<sup>68</sup> <http://osce.org/resources/publications>.

<sup>69</sup> <http://www.britishcouncil.mk/programmes/society/equality>.

Handbook on preventing and protection against discrimination – 2013, and Guidelines on Implementation of the National Strategy for Equality and Nondiscrimination based on Ethnicity, Age, Disability and Gender Ground – 2013.

This wide range of publications and helpful tools are available free of charge for judges, prosecutors and other legal professionals, online and as a part of Academy's library.

## 4. Procedural Aspects in Discrimination Cases

### 4.1 Mediation

According to the Law on Prevention and Protection against Discrimination, mediation is not estimated in any type or phase of the procedure, so there is no legal basis for mediation in discrimination cases. It means that the Commission does not have mandate to conduct the mediation procedure, and neither has the ombudsman institution. But, if we can share some positive examples, the Commission in the period – subject to this report, has solved five<sup>70</sup> cases with mediation, as an informal part after receiving the application. These are cases when usually the person or the institution that violated the right of equal treatment was not fully aware, or has no intention to undertake such an action, so after the reaction of the Commission, they have removed the irregularities. This was very obvious especially in the private sector. In this occasion, we can also quote the former President of the Commission, who during the interview says: “Although there was no possibility for mediation, in several cases, the Commission has succeeded to solve the problem with mediation. After the positive response of the violator, we also look for approval of the victim whether he/she is satisfied with the decision”.<sup>71</sup>

Also, according to the Law on Civil Procedure, when we are talking about the court files, the Court is obliged to emphasize in the very beginning that the case can be solved by mediators and through the mediation. If the parties agreed, the court will give reasonable time to solve the case through mediation. As practitioners, we can say that there is no such case in all of the above mentioned 46 cases, but also this opportunity is not used at all in other type of cases, as well.

In the end of this part, as information we can also share that nowadays there are thoughts and debate towards the possibility of amendment of the Law on Prevention and Protection Against Discrimination, which will introduce possibility formally to conduct the mediation in discrimination cases.

### 4.2 Evidencing discrimination

The major challenges in evidencing the discrimination are related to the awareness raising, competences of the CSOs, and lack of national case law on indirect discrimination. Usually, for proving indirect and direct institutional discrimination, statistical data is used. That was also a case in a very new court file, which is as based on situation testing as a main evidence.

In order to successfully conduct situation testing, prior analysis of the capacity of the CSOS is needed, i.e. to find out whether it has the necessary resources and knowledge of all the aspects of this method. Thus, it is necessary to conduct this analysis before the beginning of

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<sup>70</sup> Source: Commission for Protection Against Discrimination, March 2016.

<sup>71</sup> Source: Interview with the President of the Commission in the period 2011-2015, Mr. Dusko Minovski, 12.3.2016.

the testing, and it should elaborate on the following aspects: human resources, finances, contact with the community being discriminated, trained persons which would be coordinators and testers of the testing, and attorney(s) with certain experience in court cases of discrimination, who would represent the victims/testers or experts in lobbying and advocacy.

To improve the situation, the support for the CSOs is needed, as well as public campaigns for raising of the general awareness. Also, improvement and enrichment of the cooperation between the relevant stakeholders can contribute to more optimistic results in the field of evidencing discrimination.

#### 4.3. Strategic litigation

When deciding that a certain test is to be performed and that the results of it, if “successful”, shall be the basis for initiating proceedings, this case becomes a strategic litigation case for the organization, which should be further developed and monitored very carefully. So far, in the period 2010-2015, two cases on discrimination were submitted to the courts based on situation testing, considered as strategic litigation, supported by the CSOs community, and mainly done by Helsinki Committee and Foundation Open Society Institute in Macedonia. The first case refers to “Discrimination of the Roma at the Border Crossing Points in the Country”, having on mind that throughout the entire 2013, complaints were sent to various organizations (including the Helsinki Committee) in regard to unjustified limitation of the freedom of movement of Roma people on the border crossing points, with the excuse that they are potential asylum seekers, and their passports were either stamped or marked with two lines.<sup>72</sup> The Basic Court Skopje 2 Skopje established discrimination on the basis of ethnicity in an individual case where one family of the Roma community were not allowed to cross the Macedonian border and participate to a wedding of close relatives in Germany. This decision is not yet final, but this case became a strategic case and a scenario was created for conducting situation testing, in order to initiate a strategic litigation process, protocol and instructions.

The second case refers to “Discrimination against Children with Intellectual Disabilities by the Kindergartens in the Country”, inspired by a case of discrimination against a child with physical disability by a kindergarten in Skopje, considering the historical discrimination against people with intellectual disabilities and their marginalization in society. In this case the general objective is to raise the awareness about this discriminatory practice and increase education of the employees in kindergartens in regards to the children with intellectual disabilities, especially for children with light intellectual disabilities, because it is recommended that they go to regular kindergartens and regular schools.<sup>73</sup> This case was submitted in 2015 and has not been decided yet by the First Instance Court.

The experiences from the situation testing are still very modest, so it’s hard to detect what are the major challenges for using strategic litigation as mechanism for combating discrimination. As practicing lawyer, for me is very encouraging that in the first case, the Basic Court established discrimination, so maybe more work should be done with the Commission as central authority and Ombudsman institution.

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<sup>72</sup> “Situation Testing – Method for Proving Discrimination”, Chalovska, Skopje, 2015.

<sup>73</sup> “Situation Testing – Method for Proving Discrimination”, Chalovska, Skopje, 2015.

#### 4.4. Class Action/Actio Popularis

Law on Prevention and Protection Against Discrimination contains relevant provision enabling the submission of a joint action for protection against discrimination by associations and foundations, institutions or other organizations of the civil society which have a justified interest to protect the collective interests of a certain group or deal with protection of the rights of equal treatment within the scope of their activities. They may file a lawsuit and act as co-litigants in the proceedings before the court against the person who violated the right to equal treatment, if they presume that the actions of the defendant have violated the right to equal treatment of a larger number of people. This provision makes it possible for the civil society to act proactively and institute court proceedings in order to protect a certain group – a larger number of people, against discrimination.

So far, there is only one case as example of class action, which was prepared in last months of 2015 and submitted to the Basic Court in Skopje in January, 2016. Because of that, maybe it's not relevant for this report, but we'll give just a short overview: the lawsuit is submitted by five civil society organizations against the Government of the Republic of Macedonia; the legal base is establishing of the violation of the right of equal treatment – discrimination during the process and use of the right of education of the Roma children Macedonia. The file is very interesting as an example for a good practice, having in mind that it contains a lot of statistical data used as evidences, and it also refers to very similar and leading cases of the European Courts on Human Rights like D.H and others vs. Czech Republic, Orshush and others vs. Croatia, and Horvat and Kish vs. Hungary. I hope that the overall result of this class action will be very positive, and that can be shared in near future as example for best practices.

Similar like when we analyze the situation testing, the lack of a practical experience is something that limits our observation on the major challenges and the kind of support that might be needed, but as we have a very optimistic start of this year, we hope that the only way to spread the use of the class action/*actio popularis* is to strengthen the capacities of all relevant stakeholders, primarily of CSOS, but also of the Commission, Judiciary and Ombudsman Institution.

#### 4.5 Shifting the Burden of Proof

As previously mentioned in this document, its common opinion that the shifting the burden of proof as procedural mechanism, although is regulated by the Law on Prevention and Protection against Discrimination is not adequately applied in the court procedures. One of the main reasons for this problem is that the Law on Civil Procedure strictly shifts the burden of proof to the plaintiff, saying that he/she must submit all the evidences latest by preparatory trial. In opposite, the judge has a right to dismiss the claim as incomplete. The other problem is that the Law on Prevention and Protection Against Discrimination should be treated as *lex specialis* in discrimination cases, but most of the judges will say that here is a collision between these two laws.

Furthermore, the Law on Prevention and Protection Against Discrimination is not totally in line with the international standards and EU directives, because beside the facts, submitting of the evidence is also required for creating a *prima facie* case. This is not creating only problems to judges, but also to might be problem for the Commissioners and Ombudsman institution.

As the main focus of this part is placed on whether the equality bodies adequately apply the shift of the burden of proof, luckily we can give a positive answer, as they are not looking or

waiting for “strong evidence” from the victim to shift the burden of proof to the opposite party.

But, so far, this is not enough, having on mind that their opinions or decisions are not obligatory and legally binding. So, as the main challenge the focus to the law and creation of the *prima facie* case in front of the court remains. In that light, we are on the opinion that the law on prevention and protection against discrimination must be harmonized with the international standards and relevant EU Directives, putting the facts as sufficient indicator that in particular case might be establish discrimination, and accordingly, to shift the burden of proof in that moment to the opposite party.

#### 4.6 Remedies

Considering the positive legislation on antidiscrimination, there are several remedies that can be used by potential victims of discrimination: a) submit a complaint to the Commission; b) submit a complain to the Ombudsman Institution; c) submit application for protection of human rights to the Constitutional Court, and d) submit lawsuit to the civil courts.

As previously described, the applications in front of Constitutional Court as one of the remedies, has been detected as totally ineffective. The legal obstacle of the remedies in front of the Commission and Ombudsman is the fact that they are not mandatory or binding. However, they have achieved some improved influence and efficiency, especially the Commission. The practice shows that the Ombudsman is effective when there is individual application and protection of individual right. But, when the public interest or some wider interest should be protected, or some general behavior or practice should be changed, than the situation is completely different in negative way.

Having in mind the above mentioned, the most effective remedies are the complaints to the Commission and the lawsuits to the civil courts. Also, these two remedies to certain extent contribute to the prevention of discrimination. Firstly, because the court decisions and judgments are legally binding, they are public and have obligation for compensation of damage as result of discrimination, which is discouraging for further discriminatory activities. Secondly, the Commission is performing its role in the prevention of discrimination very well. Using the “soft” methods as mediation, it has 90% successful rate of solved cases.<sup>74</sup> Furthermore, the Law on Prevention and Protection Against Discrimination, gives them the opportunity to react in both, private and public sector, no matter whether the victim or perpetrator of the discrimination is person or legal entity, institution, company, CSOs or similar. In opposite, the Ombudsman Institution has a jurisdiction only when the violation is done by the public sector – state institutions, governmental agencies etc.

To improve the situation and make it better, we suggest that the CSOs should work more on the promotion and publicity of established discrimination, no matter whether it was done by courts, commission or ombudsman institution.

#### 4.7 Follow-Up to Opinions and Recommendations

Only the Commission and the Ombudsman Institution have legal basis for issuing opinions and recommendations, but according to the positive legislation, they are not legally binding. Beside this, the recommendations are easily tangible, they can be operationalised and therefore they can be easily implemented in practice. Accordingly, the effect and progress of the implementation can be monitored. So far, the formal or external procedures for

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<sup>74</sup> Source: Commission for protection against discrimination, March, 2016.

monitoring the compliance with recommendations are not developed, and this is something that can be done in the future in order to improve the situation.

In this occasion, we can share only the experience of the Commission, which can be also presented as an example for good practices. Namely, in the reporting period (2010 – 2015), the Commission has received and processed total of **294 complaints** of potential discrimination, out of which in **29 cases it established discrimination** (10%). In 26 out of 29 cases, their recommendations were fully followed and implemented which lead to the elimination of the discrimination in these 26 particular cases (90%). Five cases were solved through mediation and only three cases were not successfully accomplished, and the victims continued their legal battle in front of the civil courts. More details can be found in the table that follows:<sup>75</sup>

Year	Number of received complaints	Discrimination established	Solved by mediation
2011	56	8	4
2012	61	3	0
2013	72	6	1
2014	72	9	0
2015	33	3	0
TOTAL:	294	29	5

## 5. The Role of Universities in Combating Discrimination

### 5.1. Law Faculties

**Faculty of Law "Iustinianus Primus" - Skopje, University "Ss Cyril and Methodius" in Skopje** (hereinafter: "Faculty of Law")

-Law Studies-

A special course on anti-discrimination law has been introduced at the Faculty of Law in 2013. The Course called "Anti-discrimination Law" was established by the Institute of Business Law and Economic Sciences - as a part of the joint list of optional master courses for law students - and is mainly focused on discrimination in the area of labour relations.<sup>76</sup>

<sup>75</sup> Source: Commission for Protection Against Discrimination, March, 2016.

<sup>76</sup> "Anti-discrimination Law" is a master level course. The Course is described as: "multidimensional law discipline integrating the measures and politics oriented towards establishing equality and prohibition of discrimination of people on various grounds.... The discrimination in the field of labor and labor relations represents the most exploited study area of the Anti-discrimination Law." The main teaching aims are: introducing the students with the "Anti-discrimination Law" as a notion and scientific discipline; assessment of the grounds of discrimination; international dimension of the anti-discrimination regulations and regional organizations; presentation of national dimension of the anti-discrimination regulations and the role of social partners (unions and employer associations) in combating discrimination as well as the role of the institutions in promoting of equal opportunities and prohibiting discrimination; assessment of the concepts of direct and indirect discrimination, positive discrimination, harassment and sexual harassment, and mobbing, as well as introducing the students with the court action for protection against discrimination and mobbing. The Course is elective. It has been attended by approximately 20-30 students in total (from 2013, when established). <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=463> (10.03.2016).

However, the pivotal courses covering anti-discrimination are the following: International Human Rights Law<sup>77</sup> - dealing in details with the international and European legal provisions prohibiting discrimination and Constitutionalism and Human rights<sup>78</sup> - dealing in details with the national legal provisions prohibiting discrimination. Additionally, anti-discrimination has been integrated on a more fundamental basis in the following courses: International Human Rights Law - applied programme;<sup>79</sup> Minority and Other Collective Rights;<sup>80</sup> Human Rights - applied programme<sup>81</sup> and Minority Rights.<sup>82</sup> Finally, the issue of discrimination is integrated in

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<sup>77</sup> "International Human Rights Law" is a master level course (master studies in International Law and Relations and EU Law). The Course covers in details the international standards and mechanism for combating discrimination (with special focus on the European standards), as well as their application in RM (with special focus on vulnerable groups). It aims to bring awareness to the issue of discrimination, to enable students to recognize and fight discrimination and to identify the groups particularly subjected to discrimination (vulnerable groups like Roma, LGBT, people with mental and physical disabilities). *The Course is mandatory. It has been attended by approximately 250 students in total (for the period 2010-2015).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=466> (10.03.2016).

<sup>78</sup> "Constitutionalism and Human rights" is a master level course (master studies in Constitutional Law). The Course covers in details the national standards of non-discrimination, their relation with the international standards (with special focus on the European standards) and the various national human rights protection *mechanisms* for the elimination of *discrimination*. It aims at enabling the students to recognize the role of the instruments for combating discrimination and to stimulate critical analyses of the human rights situation in Republic of Macedonia. *The Course is mandatory. It has been attended by approximately 80 students in total (for the period 2010-2015)* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=1037> (10.03.2016).

<sup>79</sup> "International Human Rights Law - applied programme" is a master level course (master studies in International law and relations and EU law). The course is focused on case-studies of discrimination of vulnerable groups in RM- Roma, LGBT, people with mental and physical disabilities. Additional focus is put on the issue of police treatment ("stop and check", racial profiling and excessive use of force). It aims at preparing the students to effectively combat discrimination - especially in producing the legal complaints. *The Course is elective. It has been attended by approximately 10 students in total (from 2015, when established). From the Interview with Prof. d-r Ljubomir D. Frckoski - Head of the Cathedra of International Public Law (09.03.2016).*

<sup>80</sup> "Minority and Other Collective Rights" is a master lever course (master studies in International Law and Relations and EU Law). The course covers international (and particularly European) regime of minority protection and its application in Macedonia. It aims at bringing awareness to the issue of minority discrimination and effective use of international standards and mechanism. *It has been attended by approximately 10 students in total (from 2015, when established). From the Interview with Prof. d-r Ljubomir D. Frckoski - Head of the Cathedra of International Public Law (09.03.2016).*

<sup>81</sup> "Human Rights - applied programme" is a master lever course (master studies in Constitutional Law). The course focuses on national legal norms and instruments for combating discrimination and enables students to put them to practice. The students are also able to follow the work of the Constitutional court of RM and analyze its judgments, as well as the judgments of the European Court of Human Rights. *The Course is mandatory. It has been attended by approximately 50 students in total (for the period 2010-2015)* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=1037> (10.03.2016).

<sup>82</sup> "Minority Rights" is a master lever course (master studies in Constitutional Law). The course focuses on national and international norms and instruments for combating discrimination of minorities and the situation of minorities in RM. *The Course is elective. It has been attended by approximately 30-40 students in total (for the period 2010-2015)* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=1037> (10.03.2016).

a considerable manner within the following courses: Police and Human Rights<sup>83</sup> and Hate Speech and Hate Crimes in international Law.<sup>84</sup>

#### -Political Science Studies-

Political Science studies include anti-discrimination as a part of the following courses: International Human Rights Law<sup>85</sup> and Human Rights in RM.<sup>86</sup>

#### -Studies of Journalism-

Studies of Journalism include anti-discrimination as a part of the following courses: Human Rights and Freedoms in RM<sup>87</sup> and Freedom of Expression.<sup>88</sup>

The Faculty of Law students are also engaged in putting the Anti-discrimination Law into practice. Each year a group of students attend the Regional Human Rights Moot Court.<sup>89</sup>

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<sup>83</sup> "Police and Human Rights" is a master level course (optional course available to master students in all disciplines of law). The course aims at raising awareness of the overall role and the control of the police in democracy. The issue of discrimination plays an important part of the question of overstepping and misuse of the authorizations and human rights violations by police authorities/officers. *The Course is elective. It has been introduced in 2015/16 (the first lectures expected in the spring/summer semester 2016)*<http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=463> (10.03.2016).

<sup>84</sup> "Hate speech and Hate Crimes in international Law" is a master level course (optional course available to master students in all disciplines of law). The Course covers the issue of discrimination with regard to the phenomena of hate speech and hate crimes. It aims at enabling the students to recognize these phenomena in the Macedonian society, to effectively use international mechanisms to combat it and to raise sensibility towards the concept of harm and discrimination hate speech and hate crimes cause to the individual, the groups in the society and the society as a whole. The course is elective. *It been attended by approximately 30 students in total (from 2015, when established).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=463> (10.03.2016).

<sup>85</sup> "International Human Rights Law" is an undergraduate course. The Course covers in details the international standards and mechanism for combating discrimination (with special focus on the European standards), as well as their application in RM (with special focus on vulnerable groups). It aims to bring awareness to the issue of discrimination, to enable students to recognize and fight discrimination and to identify the groups particularly subjected to discrimination (vulnerable groups like Roma, LGBT, people with mental and physical disabilities). *The Course is elective. It has been attended by approximately 20 students in total (from 2014, when established).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=1084> (10.03.2016).

<sup>86</sup> "Human Rights in RM" is an undergraduate course. The Course covers national legal documents and mechanisms for non-discrimination and aims at enabling the students to recognize the role of the instruments for combating discrimination and to stimulate critical analyses of the human rights situation in Republic of Macedonia. *The Course is elective. It has been attended by approximately 20 students in total (from 2014, when established).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=1084> (10.03.2016).

<sup>87</sup> "Human Rights and Freedoms in RM" is an undergraduate course. The course focuses on national mechanisms for combating discrimination and enables students to understand them and put them into practice. *The Course is mandatory. It has been attended by approximately 250 students in total (for the period 2010-2015).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=257> (10.03.-2016).

<sup>88</sup> Freedom of Expression is an undergraduate course. The course focuses on the role of media in combating discrimination and the media and hate speech. *The Course is mandatory. It has been attended by approximately 250 students in total (for the period 2010-2015).* <http://www.pf.ukim.edu.mk/DesktopDefault.aspx?tabindex=0&tabid=580> (10.03.2016).

<sup>89</sup> For the purpose of preparing the students for the Regional Moot Court, ELSA MK established ELSA MOOT COURT club "Iustiniana Prima". See Annex 2.



The Faculty of Law has not established cooperation with the Academy for Judges and Public Prosecutors, and there exists only a random invitation of individual professors for participation in trainings, workshops and similar activities of the Academy.<sup>90</sup> In this regard a space exists for developing collaboration in order to harmonize the education on anti-discrimination for different legal professions.

Research activities in the area of anti-discrimination are conducted by the Faculty of Law as a part of its MEGA-PROJECT: Euro Integration of Social, Legal and Political System of Republic of Macedonia.<sup>91</sup> Apart from this project, research in the area of non-discrimination is conducted mainly on an individual basis, as individual or joint papers or within the project activities of the SCOs and IOs.<sup>92</sup>

## 5.2 Other Educational Institutions

### **Institute of Sociology, Institute of Social Work and Social Policy, Institute of Gender Studies - Faculty of Philosophy, University "Ss Cyril and Methodius" in Skopje**

- Institute of Sociology covers aspects of anti-discrimination within several courses like: Sociology of Relations Between Sexes,<sup>93</sup> Sociology of European Society,<sup>94</sup> Employment, Public Health, Social Policy and Protection in EU,<sup>95</sup> Employment, Work Relations and Equal Opportunities,<sup>96</sup> etc. The Institute conducts research in the area of non-discrimination mainly on an individual basis (individual or joint papers). The Institute has a practice of collaboration with some of the stakeholders, mainly the Ombudsman.

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<sup>90</sup> For example, participation of Ass. Prof. Elena Mihajlova at the OSCE and Academy for Judges and Public Prosecutors Workshop on "Legal and Civil Society Mechanisms for Tackling Hate Speech", for Macedonian public prosecutors and judges, Skopje, 12.12.2014.

<sup>91</sup> *Forum Europaeum*, no 11, Draft-Law on Prevention and Protection against Discrimination, Faculty of Law "Iustinianus Primus" - Skopje, June, 2010.

<sup>92</sup> Helsinki Committee for Human Rights of the Republic of Macedonia (2013), *Strategic litigation of cases of discrimination on the ground of sexual orientation*, available at: <http://www.mhc.org.mk/publications/174#.VuP5g3rXxf0> (02.03.2016); Helsinki Committee for Human Rights of the Republic of Macedonia (2012), *Improvement of the participation in democratic processes of communities under 20% - Research, Analysis and Recommendations*, available at: <http://www.mhc.org.mk/publications/96#.VuP6cXrXxf0> (02.03.2016); OSCE (2013) *Handbook Freedom of Expression and Hate Speech*, available at <http://www.osce.org/skopje/116608?download=true> (26.03.2016).

<sup>93</sup> Elective undergraduate course. The Course covers sex and gender based discrimination and analyzes the gender inequalities in the area of labour. From the interview with Prof. d-r Mileva Gjurovska (08.03.2016).

<sup>94</sup> Elective undergraduate course. The course focuses on EU policy for gender integration (Gender mainstreaming) From the interview with Prof. d-r Mileva Gjurovska -Institute of Sociology (08.03.2016).

<sup>95</sup> Elective course on master studies. The course covers the EU concept of equal opportunities and gender mainstreaming; From the interview with Prof. d-r Mileva Gjurovska-Institute of Sociology (08.03.2016).

<sup>96</sup> Elective course on master studies. The course covers the concept and practice of equal opportunities. From the interview with Prof. d-r Mileva Gjurovska -Institute of Sociology (08.03.2016).

- Institute of Social Work and Social Policy covers aspects of anti-discrimination within most of its courses, like: Social Law,<sup>97</sup> Social Protection,<sup>98</sup> Child Protection,<sup>99</sup> etc. - focusing mainly on national norms regarding non-discrimination in the area of social protection, with special focus on vulnerable groups. The Institute conducts research in the non-discrimination area mainly on an individual basis and the results are being published as a part of the individual or joint papers. It also follows closely the work of the Ombudsman, and participates in the preparation of national strategies in the social protection area.<sup>100</sup>

#### -Institute of Gender Studies-

Gender studies were introduced at the Faculty of Philosophy, starting from 2008/09, but 5 years later, in 2013, they were put on hold. The decision of the Ministry of Education and Science was strongly disputed by the academic community and the general public, and was followed by some controversy.<sup>101</sup>

While all of the above is witnessing a positive trend of integrating the anti-discrimination into number of University courses, there are still some serious challenges existing in this area. The need to revise a discriminatory text books material is evident in several instances, mainly regarding the topic of sexual orientation. Recent analyses of the university text books point to a number of implicitly and explicitly present heterosexist and homophobic attitudes opposed to the scientifically supported and internationally accepted standards - contents in which the homosexuality is being pathologised, LGBT persons stigmatized or LGBT topics overlooked.<sup>102</sup>

**Faculty of Security - Skopje, University "St. Kliment Ohridski" – Bitola** (hereinafter: "Faculty of Security")<sup>103</sup>

A special course on anti-discrimination, called "Non-discrimination and Vulnerable Groups" is being offered at the Faculty of Security. It is an elective undergraduate level course that systematize the international, European and national norms and standards in the area of

<sup>97</sup> Mandatory undergraduate course. *It has been attended by approximately 500 students in total (for the period 2010-2015).* From the interview with Ass. Prof. Natasa Bogoevska- Institute of Social Work and Social Policy (14.03.2016).

<sup>98</sup> Mandatory undergraduate course. *It has been attended by approximately 500 students in total (for the period 2010-2015).* From the interview with Ass. Prof. Natasa Bogoevska- Institute of Social Work and Social Policy (14.03.2016).

<sup>99</sup> Mandatory undergraduate course. *It has been attended by approximately 500 students in total (for the period 2010-2015).* From the interview with Ass. Prof. Natasa Bogoevska- Institute of Social Work and Social Policy (14.03.2016).

<sup>100</sup> Ass Prof. Natasa Bogoevska is the author of the National Program for Development of Social Protection 2011- 2021, and a member of the Coordinative body that monitors the implementation of the Program. From the Interview with Ass. Prof. Natasha Bogoevska- Institute of Social Work and Social Policy (14.03.2015).

<sup>101</sup> The official explanation of the Ministry was based on the argument that the teaching staff outnumbers the working places for this profile of graduates (approximately 20 graduates?!). However, the same time gender studies were put on hold, the Ministry opened new Institute for family studies at the same Faculty. The Network for protection of discrimination interpreted this decision as an indicator of the University support for the Government conservative politics and not fulfilling its role in developing an autonomous, contemporary scientific and critical thought. <http://www.mhc.org.mk/announcements/217#.VvVvQXrXxf0>.

<sup>102</sup> Coalition 'Sexual and Health Rights of Marginalized Communities' (2011) *Homosexuality in the Education in Republic of Macedonia*, available at: <http://coalition.org.mk/wp-content/uploads/2015/10/Homoseksualnosta-vo-obrazovaniето.pdf> (06.03.2016).

<sup>103</sup> The Faculty of Security continued its work as a legal successor of the Police Academy. <http://www.fb.uklo.edu.mk/faces/EN/history.xhtml>.

discrimination, and analyze the specific role the police has in combating discrimination and stigmatization of the marginalized groups (with special focus on: women, children, elderly, handicapped, and people with HIV/AIDS) as well as the treatment of victims, witness and offenders belonging to a vulnerable group.<sup>104</sup>

Apart from this special course, the principle of anti-discrimination has been integrated into the following courses: Police and Human Rights<sup>105</sup> - dealing with the international and national standards for combating discrimination from the perspective of the specific role of the police in a democratic society with regards to the respect of human rights and their protection; International Human Rights Law<sup>106</sup> - dealing in details with the international and European legal provisions prohibiting discrimination; Human Rights and Freedoms and Gender Perspectives of Criminality.

The Faculty of Security is involved in research activities as a part of its ongoing Project: "Implementation of the Case-law of the European Court of Human Rights in the Republic of Macedonia: Strasbourg at home or Macedonia in front of Strasbourg (2013 - ongoing) and FP7 SECURITY COMPOSITE PROJECT: Comparative Police Studies in the EU."<sup>107</sup> Apart from these Projects, the research in the area of discrimination is conducted mainly on an individual basis and the results are being published as a part of the individual or joint papers, or as a part of publications within IOs supported Projects.

The Faculty of Security has cooperated with the Academy for Judges and Public Prosecutors and other stakeholders only on ad-hoc basis, by including individual professors into training programmes and activities.<sup>108</sup>

### 5.3 Legal and Institutional Structures Combating Discrimination

The Statute of University "Ss Cyril and Methodius" in Skopje provides for prohibition of discrimination. It stipulates that the autonomy of the University cannot be violated by conducting an educational or other activity - that threatens the rights of the members of the academic community - oriented towards discrimination of man and citizen that is based on sex, race, colour, nationality, ethnic origin, social background, political or religious belief, age, property status and social status.<sup>109</sup> However, the list of grounds on which students and other members of the academic community are protected against discrimination is limited and provides protection only for the grounds thus enumerated in the Statute.

The Ethical Code of University "Ss Cyril and Methodius" in Skopje stands for nurturing of equality off all - within the University structures and beyond, without discrimination in

<sup>104</sup> From the interview with Prof. d-r Stojanka Mirceva, Faculty of Security - Skopje, University "St. Kliment Ohridski" - Bitola (11.03.2016).

<sup>105</sup> The Course aims at enabling the students to recognize the human rights as a basis for functioning of a democratic society, to understand the role of the legal instruments for combating discrimination and to stimulate critical analyses of the human rights implementation processes. *The Course is mandatory.*

<sup>106</sup> The Course aims at enabling the students to recognize the role of the international instruments for combating discrimination. *The Course is elective. It has been attended by approximately 50 students in total (for the period 2010-2015). From the Interview with Associate Prof. Marija Milenkovska (11.03.2016).*

<sup>107</sup> <http://www.fb.uklo.edu.mk/faces/EN/projects.xhtml;jsessionid=79c11f540a7b4049d46c4f160eea> (11.03.2016).

<sup>108</sup> For example, Prof PhD Stojanka Mirceva - Training educator: 2 trainings delivered for judges and prosecutors on Victim-offender Mediation in Juvenile Justice System at the Academy for training of Judges and Prosecutors in 2010 and 2011. *From the interview with Prof. d-r Stojanka Mirceva (11.03.2016).*

<sup>109</sup> Statute of the University "Ss Cyril and Methodius" - Skopje, Article 8, available at: [http://www.ukim.edu.mk/dokumenti\\_m/264\\_STATUT%20na%20UKiM.pdf](http://www.ukim.edu.mk/dokumenti_m/264_STATUT%20na%20UKiM.pdf) (12.03.2016).

regards to the sex, race, religion, ethnic origin, mother tongue and the social status of the person. It underlines the University's strong rejection of the attitudes by which people are denied according to some natural characteristics, social status or belief.<sup>110</sup> Although the principle of equality and non-discrimination is included in the Ethical Code of the University, yet again, the list of discrimination grounds should be expanded, and moreover, be kept open so other grounds can be included in accordance with the development of international standards for protection against discrimination.<sup>111</sup>

The Students' Ombudsman is responsible for the protection of the students' legal rights in case these are violated by the University bodies and its units' bodies, as well as by all persons included in the teaching and educational process.<sup>112</sup> The individual student complaints are mainly of administrative nature (right to take exam, completing the students file, etc.) or are reporting corruption or unethical conduct of the university staff. Till now, the Students' Ombudsman has not received students' complaints regarding discrimination.<sup>113</sup> The reasons for not reporting the cases should be subject to additional and more extensive analysis, since the absence of reported case of any kind of discrimination (from university stuff, students or student ombudsman) contradicts the perception of students for discrimination frequency reported by the results obtained through surveys.<sup>114</sup> This points out the need of strengthening the authorizations of the Students' Ombudsman in regard to discrimination complaints, by means of supplementing the responsibilities (enumerated in the Statue of the University) and by clearly laying down the procedure for reporting and for acting cases of discrimination.<sup>115</sup>

In addition, there is a need for appropriate measures to ensure to all persons with disabilities the access, on an equal basis with others, to the physical environment and services of the University. For example, facilitating access to all lecture rooms, staff offices and cabinets and other parts of the physical environment of the University; facilitating access to courses literature like alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring.

<sup>110</sup> Ethical Code of the University "Ss Cyril and Methodius" - Skopje, Section 4, available at: [http://www.ukim.edu.mk/mk\\_content.php?meni=134&glavno=32](http://www.ukim.edu.mk/mk_content.php?meni=134&glavno=32) (12.03.2016).

<sup>111</sup> Coalition 'Sexual and Health Rights of Marginalized Communities' (2013) *Analysis of documents and policies of the University "Ss Cyril and Methodius" in Skopje on the level of inclusion of the principle of equal opportunities and non-discrimination*, p. 40, available at: <http://coalition.org.mk/wp-content/uploads/2015/10/Analiza-na-dokumenti-i-politiki-UKIM.pdf> (12.03.2016).

<sup>112</sup> The Students' Ombudsman is authorized to mediate in disputes between students and professors, students and the University units, students and the University administration; give recommendations in specific cases with the purpose of settlement of disputes; organize public discussion on matters related to the students' rights protection system; promoting support and cooperation among universities in the state and abroad etc. <http://www.pravobranitel.ukim.edu.mk/> (13.03.2016).

<sup>113</sup> From the Interview with the Students' Ombudsman Vaska Bojadzi (10.03.2015).

<sup>114</sup> For example, at the top level appear discrimination based on political affiliation and political background, ethnicity and language. There is also lack of knowledge of student population of the legal norms, regulations and mechanisms for protection against discrimination. Coalition 'Sexual and Health Rights of Marginalized Communities' (2013) *Analysis of Documents and Policies of the University "Ss Cyril and Methodius" in Skopje on the Level of Inclusion of the Principle of Equal Opportunities and Non-discrimination*, available at: <http://coalition.org.mk/wp-content/uploads/2015/10/Analiza-na-dokumenti-i-politiki-UKIM.pdf> (12.03.2016).

<sup>115</sup> Coalition 'Sexual and Health Rights of Marginalized Communities' (2013) *Analysis of Documents and Policies of the University "Ss Cyril and Methodius" in Skopje on the Level of Inclusion of the Principle of Equal Opportunities and Non-discrimination*, p. 67, available at: <http://coalition.org.mk/wp-content/uploads/2015/10/Analiza-na-dokumenti-i-politiki-UKIM.pdf> (12.03.2016).

## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

We can start with the general observation that the awareness of citizens regarding issues of discrimination has been raised in the period of last five years (since the Law on Prevention of and Protection against Discrimination was adopted in 2010). In this manner, the role of the SCOs as some sort of instigators can be noted as significant. However, the recent research on the citizens' understanding of human rights indicates the still significantly low or incomplete knowledge and lack of awareness when it comes to forms of discrimination, hate speech, the competences of the police and social rights. This data serves to underscore the necessity of additional education, information and raising of the citizens' awareness when it comes to the various aspects of practicing human rights in the social processes and state institutions. When it comes to the awareness about the institutions that citizens can turn to in case of violation of rights, there is also a lack of information and existing mistrust. This data serves to prove that it is necessary to inform the public about the existing institutions and mechanisms for protection of human rights. Furthermore, a lot needs to be done to develop institutional policies which would increase the efficiency of the institutions in the process of implementing laws and exercising rights, and consequently increase the citizens' confidence in their work.<sup>116</sup> Consistent and prompt cooperation and coordination of all institutions /establishments that act directly at the state and local level in the realization of citizens' rights is also required.<sup>117</sup>

Some practical tools guiding the successful implementation of relevant legal provisions have been developed, like for example *specific handbooks* providing for basic and advance guidance to judges on identifying and processing discrimination towards rendering quality judgments and *compilations of relevant European case law* translated into Macedonian (as described in section 3.3.).

Regarding the issue of awareness level for legal provisions prohibiting discrimination, it can be said that some progress in the area of *judiciary* is evident, but it is certainly not nearly the required level which will encourage all those subjected to discrimination on any grounds to seek its protection.<sup>118</sup> Sensitization of attitudes towards the victims and the vulnerability of specific groups is also needed, and establishing a linkage with the SCOs as part of the educational and training programmes of judges and prosecutors can be seen as beneficial in this regard.<sup>119</sup>

The level of awareness for legal provisions prohibiting discrimination among the policies being assessed as problematic, having in mind that the citizens continue submitting complaints against police treatment. According to the Ombudsman and Helsinki Committee for Human Rights of the Republic of Macedonia, the police absolutely do not have capacities for accommodating to the needs of broad range of vulnerable groups (Roma population, the

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<sup>116</sup> Helsinki Committee for Human Rights of the Republic of Macedonia (2015) *Research of the Citizens' Understanding and Knowledge of Human Rights and Their Protection Mechanisms*, available at: [http://www.mhc.org.mk/system/uploads/redactor\\_assets/documents/903/Istrazuvanje\\_Razbiranje\\_na\\_covekovi\\_prava\\_MK\\_EN\\_AL.pdf](http://www.mhc.org.mk/system/uploads/redactor_assets/documents/903/Istrazuvanje_Razbiranje_na_covekovi_prava_MK_EN_AL.pdf) (21.03.2016).

<sup>117</sup> This was one of the answers of the Ombudsman to the official questionnaire sent to the Office (24.03.2016).

<sup>118</sup> This was one of the answers of the Ombudsman to the official questionnaire sent to the Office (24.03.2016).

<sup>119</sup> This was one of the answers of the interview with Ms. Neda Chalovska - Legal Advisor, Executive Office of the Helsinki Committee for Human Rights of the Republic of Macedonia (08.03.2016).

sexual workers, drug users, LGBT, asylum seekers) and therefore, conducting special trainings to all police officers, especially to part of them that are completely involved in a personal contact with the citizens is strongly suggested.<sup>120</sup>

The intermediaries, especially SCOs have shown high sensitization regarding discrimination issues and the practice confirms their work as extremely effective in this regard in various areas - analysis of laws and specific provisions, evidencing discrimination, strategic litigation (and free legal aid in strategic cases of discrimination), as well as informing the public about the situation with discriminatory practices in form of opinions, suggestions and special reports. Additionally some SCOs' anti-discrimination networks have been established (as described in section 2.2.). However their work in large if not at all depends on foreign projects and donations.<sup>121</sup>

On the other hand, the practice shows lower awareness levels among administrative authorities. For example, the social work centers (SWCs) have not been sensitized for providing the adequate protection of the vulnerable groups like LGBT and Roma population, drug users, persons with HIV/AIDS<sup>122</sup> and members of marginalized groups such as drug users, people living with HIV, LGBT people, sex workers suffer various violations of their rights as patients.<sup>123</sup>

Finally, as described above, the general public needs to be much more sensitized regarding human rights and non-discrimination issues. The role of the media can be seen as crucial in this regard, having in mind several negative examples of media contribution in strengthening the existing stereotypes, fueling the passions or the interethnic hatred, or even incitement to discrimination (towards LGBT and Roma population).<sup>124</sup>

## 6.2 Achievements in Awareness Raising

We can clearly state that all of the stakeholders have so far been involved in doing awareness raising.

The Commission for Protection against Discrimination has been engaged in organising public debates, round table meetings, conferences, workshops, press releases and campaigns targeting

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<sup>120</sup> From the interview with the Ombudsman (23.02.2016) and interview with Ms. Neda Chalovska - Legal Advisor, Executive Office of the Helsinki Committee for Human Rights of the Republic of Macedonia (08.03.2016). For example, the "Situation Testing - Method for Proving Discrimination" was used by the Helsinki Committee to prove a discriminatory practice of the state towards the Roma community in regard to unjustified limitation of the freedom of movement of Roma people on the border crossing points [http://www.mhc.org.mk/system/uploads/redactor\\_assets/documents/899-/Discrimination\\_Method\\_ENG.pdf](http://www.mhc.org.mk/system/uploads/redactor_assets/documents/899-/Discrimination_Method_ENG.pdf). Another very recent research identified the main types of human rights' violations done to drug users when in contact with police, and again, pointed to the need of conducting special trainings for the police. Coalition 'Sexual and Health Rights of Marginalized Communities' (2016) *Human Rights Violations of Drug Users in Contact with Police*, available at: [http://coalition.org.mk/wp-content/uploads/2016/02/kszpmz\\_prekrshuvanje-na-chovekovi-prava-policija\\_a5\\_3mm-obrez\\_print.pdf](http://coalition.org.mk/wp-content/uploads/2016/02/kszpmz_prekrshuvanje-na-chovekovi-prava-policija_a5_3mm-obrez_print.pdf) (21.03.2016), see annex 2.

<sup>121</sup> This was one of the answers of the Ombudsman to the official questionnaire sent to the Office (24.03.2016).

<sup>122</sup> This was one of the answers of the interview with Ms. Neda Chalovska - Legal Advisor, Executive Office of the Helsinki Committee for Human Rights of the Republic of Macedonia (08.03.2016).

<sup>123</sup> Coalition 'Sexual and Health Rights of Marginalized Communities' (2013) *Protection of Patients' Rights and Observance of Quality Standards In Health Care Of Drug Users, People Living With HIV, and LGBT People*, available at: <http://coalition.org.mk/wp-content/uploads/2015/11/Analiza-Zashtitana-prava-na-patsienti.pdf> (21.03.2016).

<sup>124</sup> This was one of the answers of the interview with Ms. Neda Chalovska - Legal Advisor, Executive Office of the Helsinki Committee for Human Rights of the Republic of Macedonia (08.03.2016).

wide range of groups and sectors like the police, judiciary, local government units, unions, SCOs, students, Roma population, persons with autism, ADHD and Asperger's Syndrome, etc.<sup>125</sup>

Awareness raising of the citizens is always stipulated in the Annual Program of the Ombudsman and is implemented in practice through different forms such as: visibility in the media, distribution of leaflets and brochures, presence and organization of public debates and seminars targeting all vulnerable groups within the society, as well as promotion and protection of human rights in all fields which is one of the Ombudsman competences.<sup>126</sup>

And finally, the SCOs are very actively engaged in doing a wide range of awareness raising activities such as: positive campaigns, protests and other events, visibility on media through press releases, public reactions, initiatives and appeals, presence and organization of public debates and conferences, conducting surveys, researches and analysis, etc. These activities helped many of the disadvantaged groups within the society to gain visibility (LGBT community, Roma population, drug users, persons with HIV/AIDS).<sup>127</sup>

However, more needs to be done in the awareness raising regarding the persons with physical and mental disabilities.<sup>128</sup> The police and the local government employees are the two additional target groups that should be worked with to raise the awareness in this field. Roma citizens should be continuously educated on their rights and obligations, as well as opportunities and mechanisms for protection against discrimination.<sup>129</sup> It has to be stated that the state institutions have a significant responsibility in implementing the awareness raising measures, as well as incorporating the promotion of rights of members of marginalized groups in the national strategies and programs.

### 6.3 Preventing Future Discrimination

In terms of preventing future discrimination there are several mechanisms that should be taken into account.

First, once the Commission for Protection against Discrimination has established a case of discrimination, it recommends a way/ways for its elimination. The recipient of the recommendation is obligated, within 30 days after its receipt, to act upon the same and remove the violation of right. Moreover, he/she is obligated to notify the Commission on the removal of the violation. If, however, the person-discriminator fails to act upon the recommendation within the given deadline, i.e. fails to remove the violation of right, the Commission is entitled to seek initiation of a procedure before the competent authority in order to determine his/her liability.<sup>130</sup> It

<sup>125</sup> For good practice example see annex 2.

<sup>126</sup> For good practice example see annex 2.

<sup>127</sup> For good practice examples see annex 2.

<sup>128</sup> From the interview with Ms. Neda Chalovska - Legal Advisor, Executive Office of the Helsinki Committee for Human Rights of the Republic of Macedonia (08.03.2016).

<sup>129</sup> This was one of the answers of the Ombudsman to the official questionnaire sent to the Office (24.03.2016).

<sup>130</sup> Macedonia/Law on Prevention of and Protection against Discrimination/50/2010...31/2016 (13.04.2010)/Article 28 and Article 29. As regards the opinions and recommendations given by the Commission in 2011, 80% have been acted upon and the violations of rights have been removed by the discriminators. During the 2012 and 2013 operation the Commission noted that the majority of complaints were filed concerning discrimination made by state agencies, local governments and other public institutions. This finding is worrisome because it is about authorities from whom it is expected to ensure and promote equal treatment and non-discrimination as part of their work, as well as to demonstrate understanding of the principles of equality. It is positive that the majority of potential perpetrators of discrimination - state authorities - on the recommendation of the Commission have shown willingness to remove the violation, while some of them in the process of taking action about

can be noted that apart from the recommendations on individual cases there is an evident lack of general recommendations of the Commission aimed at combating patterns of discrimination or discrimination occurring on a more structural level.

In case of violations of the constitutional and legal rights of citizens are found, the *Ombudsman* can make recommendations, remarks, suggestions and opinions on how the violations to be removed. These recommendations, suggestions, proposals and opinions usually contain the findings of the violation made and state the constitutional, law and sub law provisions that have been violated, for which in a clear and legible way their removal is being recommended. A deadline for acceptance of the recommendations, remarks, suggestions and opinions is also envisaged.<sup>131</sup> There exists no specific procedure for monitoring the implementation. In this setting it is left to the complainant to inform about possible non-implementation or violation of the given recommendation. Nevertheless, performing direct revisits of the facilities, preparation of official notes to be submitted to the competent ministry, etc. can be seen as a way of monitoring the implemented recommendations on a specific report.<sup>132</sup> Further on, the Ombudsman has well established practice of issuing general recommendations, as well as opinions in respect to law proposals, initiatives for amending law, ex-officio investigations and special reports on Non-discrimination and Adequate and Equitable Representation in addition to the recommendations on individual cases. However, the Ombudsman itself put attention on the issue that its individual recommendations are more accepted by all stakeholders in comparison with the Ombudsman general recommendations and suggestions where real obstacles with their enforcement into practice occurs.<sup>133</sup>

All of these measures, including the awareness raising activities of the above mentioned stakeholders, as well as those of the *SCOs* can be seen as an important contribution in combating stereotypes and prejudices, and therefore, in preventing future discrimination. In this manner the cooperation with media becomes crucial, especially in regard to the various ad-hoc activities of the *SCOs* and the "storytelling" as an important tool in combating existing stereotypes and prejudices.<sup>134</sup>

Another important mechanism for achieving the full realization of the principle of equality and non-discrimination are the affirmative action measures that exist in the areas like education and employment (for achieving the adequate and equitable representation of the citizens belonging to all communities in the government bodies and other public institutions at all levels), targeting several groups like the ethnic minorities or people with disabilities. However, the mechanisms for control and monitoring need to be developed further on, having in mind the challenges regarding representation of the smaller ethnic communities<sup>135</sup>

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the complaint have withdrew the act of discrimination, so some of the complaints were resolved successfully and become redundant. Unfortunately, there are also those who ignore the recommendations of the Commission. Commission (2011), *Annually Report*, available at: <http://www.kzd.mk/mk/dokumenti/2011> (22.03.2016); Commission (2012), *Annually Report*, available at: <http://www.kzd.mk/mk/dokumenti/2012>; (22.03.2016); Commission (2013), *Annually Report*, available at: <http://www.kzd.mk/mk/dokumenti/2013>; (22.03.2016).

<sup>131</sup> Macedonia/Law on the Ombudsman/60/2003...114/2009 (22.09.2003)/Article 32 and Article 34.

<sup>132</sup> This was one of the answers of the Ombudsman to the official questionnaire sent to the Office (24.03.2016).

<sup>133</sup> See section 2.2., footnote 36.

<sup>134</sup> [http://fokus.mk/kon-pravdata-storija-za-politichka-diskriminatsija/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=kon-pravdata-storija-za-politichka-diskriminatsija](http://fokus.mk/kon-pravdata-storija-za-politichka-diskriminatsija/?utm_source=rss&utm_medium=rss&utm_campaign=kon-pravdata-storija-za-politichka-diskriminatsija) (25.03.2016).

<sup>135</sup> The Ombudsman (2010), *Annually Report*, available at: <http://ombudsman.mk/upload/documents/Izvestaj%202010-MK.pdf> (21.03.2016); The Ombudsman (2011), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2011/Izvestaj%202011-MK.pdf> (21.03.2016); The Ombudsman (2012), *Annually Report*, available at: <http://ombudsman.mk/upload/>



and possible misuses of the simulative measures by employers regarding the employment of persons with disabilities.<sup>136</sup>

And finally, the Government adopted a National Strategy for Equality and Non-Discrimination on the grounds of ethnicity, age, disability and gender. It was adopted in 2012, for the period 2012-2015. The National Strategy was developed by the Ministry of Labour and Social Policy (as a project leader) with participation of the Ombudsman, Commission for Protection against Discrimination, Ministry of Interior, Ministry of Education and Science and other relevant bodies. An Operation Plan - providing for responsibilities, deadlines, allocation of resources and monitoring of the implementation - was also developed in 2013. The New National Strategy is currently being prepared, including the participation of SCOs in the making of its draft version. It is expected to cover an extended list of discriminatory grounds (not just the previous 4) and to establish a Coordinating Body responsible for its implementation.

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Godisni%20izvestai/GI-2012/GI-2012.pdf (21.03.2016); The Ombudsman (2013), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013.pdf> (21.03.2016); The Ombudsman (2014), *Annually Report*, available at: <http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014.pdf> (21.03.2016).

<sup>136</sup> Polio Plus - movement against disability, Ministry of Labour and Social Policy, Commission for Protection against Discrimination, Macedonian Centre for International Cooperation (2013), *Analyses of discriminatory practices in the area of employment and labour relations*.

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## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from the particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviors of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, Labor Inspectorates, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination. Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counselors, etc.)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination

## Annex 2 – Template for Good Practice Examples

### Example 1

<b>Area:</b> <sup>137</sup>	Combating discrimination at universities
<b>Title (original language)</b>	ELSA MOOT COURT клуб "Јустинијана Прима"
<b>Title (EN)</b>	ELSA MOOT COURT club "Iustiniana Prima"
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Здружение на граѓани Европско Здружение на Студентите по Право во Република Македонија
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Citizens' Association The European Law Students' Association (ELSA)
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Non-profit organization (partners: Faculty of Law and USAID)
<b>Internet link</b>	<a href="https://www.elsa.mk/index.php">https://www.elsa.mk/index.php</a>
<b>Type of initiative</b>	Training
<b>Main target group</b>	Students of law
<b>Brief description (max. 1000 chars)</b>	Preparing the students for the Regional Moot Court - competition in the area of human rights, organized for the region of ex-Yugoslavia, following the example of the Nordic Moot Court.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes how?</li> </ul>
<b>Involvement of stakeholders</b>	<input checked="" type="checkbox"/> no
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>137</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 2**

<b>Area:</b> <sup>138</sup>	Combating discrimination at universities
<b>Title (original language)</b>	Хомосексуалноста во образованието во Република Македонија
<b>Title (EN)</b>	Homosexuality in the education of Republic of Macedonia
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Коалиција „Сексуални и здравствени права на маргинализираните заедници“
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Coalition " Sexual and Health Rights of Marginalized Communities"
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://coalition.org.mk/">http://coalition.org.mk/</a>
<b>Type of initiative</b>	Expert analyzes and recommendations for modification of teaching contents/curricula
<b>Main target group</b>	relevant institutions, student population, as well as the general public
<b>Brief description (max. 1000 chars)</b>	To raise public awareness of the need for urgent changes to the teaching materials treat topics related to sexual orientation, gender and gender identity/gender expression
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> </ul> <div style="float: right;"> <input type="checkbox"/> transferability  <input type="checkbox"/> sustainability </div>

<sup>138</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.



### Example 3

<b>Area:</b> <sup>139</sup>	Combating discrimination at universities
<b>Title (original language)</b>	Анализа на документи и политики на универзитетот „Св.Кирил и Методиј“ во Скопје за степенот на вклученост на принципот на еднакви можности и недискриминација
<b>Title (EN)</b>	Analysis of the University "Ss. Cyril and Methodius" documents and policies regarding the level of inclusion of the principle of equal opportunities and non-discrimination
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Коалиција „Сексуални и здравствени права на маргинализираните заедници“
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Coalition " Sexual and Health Rights of Marginalized Communities"
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://coalition.org.mk/publikacii/analiza-na-dokumenti-i-politiki-na-univerzitetot-sv-kiril-i-metodij-vo-skopje-za-stepenot-na-vkluchenost-na-printsipot-na-ednakvi-mozhnosti-i-nediskriminatsija/?lang=en">http://coalition.org.mk/publikacii/analiza-na-dokumenti-i-politiki-na-univerzitetot-sv-kiril-i-metodij-vo-skopje-za-stepenot-na-vkluchenost-na-printsipot-na-ednakvi-mozhnosti-i-nediskriminatsija/?lang=en</a>
<b>Type of initiative</b>	Analysis
<b>Main target group</b>	relevant institutions - University, student population, as well as the general public
<b>Brief description (max. 1000 chars)</b>	The focus of this analysis are the policies being pursued at the University "Ss. Cyril and Methodius " and it is a starting point for further analysis of the degree of involvement of equal opportunities and non-discrimination policies at other higher education institutions in the Republic of Macedonia. This analysis also aims to determine whether discrimination is a problem in higher education institutions in Macedonia, to determine the perception of the extent and frequency of emergent forms of discrimination and locate the subjects who most often initiate discrimination
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>√ no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>√ no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li>√ effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>139</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 4**

<b>Area:</b> <sup>140</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	„За нација без дискриминација“
<b>Title (EN)</b>	"For a Nation Without Discrimination"
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Комисија за заштита од дискриминација – во соработка со Х.Е.Р.А. – Асоцијација за здравствена едукација и истражување и Коалицијата „Сексуални и здравствени права на маргинализираните заедници“, поддржана од Холандска Амбасада.
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Commission for Protection against Discrimination in cooperation with H.E.R.A. - Association for health education and research and the Coalition 'Sexual and Health Rights of Marginalized Communities' and supported by Dutch Embassy
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Government Dutch Embassy
<b>Internet link</b>	<a href="http://www.kzd.mk/mk/novosti/128-komisijatazapocnasopromocijanakampanjatanacijabezdiskriminacija">http://www.kzd.mk/mk/novosti/128-komisijatazapocnasopromocijanakampanjatanacijabezdiskriminacija</a>
<b>Type of initiative</b>	Campaign
<b>Main target group</b>	The whole population
<b>Brief description (max. 1000 chars)</b>	Campaign aiming to raise awareness among citizens and to reduce discrimination on various grounds, especially focused on changing the image that has been constructed for years for people with a different sexual orientation. The campaign also included a <i>video</i> "For a Nation Without Discrimination" and promotion of a <i>Protocol</i> for laying down the procedure for handling cases for protection from discrimination based on sexual orientation and gender identity
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>✓ no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li>✓yes                      Commission for Protection against Discrimination</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li>✓ effectiveness and impact</li> <li>✓ innovation</li> </ul> <div style="float: right;"> <input type="checkbox"/> transferability  <input type="checkbox"/> sustainability </div>

<sup>140</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Example 5

<b>Area:</b> <sup>141</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Тркалезни маси за НПМ и дискриминација
<b>Title (EN)</b>	Public debates - The Ombudsman and Discrimination
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Народен правобранител на Република Македонија
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Ombudsman
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	
<b>Internet link</b>	<a href="http://ombudsman.mk/EN/default.aspx">http://ombudsman.mk/EN/default.aspx</a>
<b>Type of initiative</b>	Campaign
<b>Main target group</b>	The whole population
<b>Brief description (max. 1000 chars)</b>	The campaign that consisted of several public debates organized in Skopje and other cities (Stip, Tetovo, Kumanovo, Veles and Struga) for the promotion of the Ombudsman's Department for Protection from Discrimination and Equitable Representation established in 2011. These debates were attended by representatives from local government, SCOs, local media and others.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• <input checked="" type="checkbox"/> yes      The Ombudsman</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input checked="" type="checkbox"/> innovation</li> </ul> <div style="float: right;"> <input type="checkbox"/> transferability  <input type="checkbox"/> sustainability         </div>

<sup>141</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 6**

<b>Area:</b> <sup>142</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Марш на толеранцијата „Македонија има љубов за сите – Насилството не почнало и нема да заврши со мене!“
<b>Title (EN)</b>	March of Tolerance “Macedonia has Love for All – Violence didn’t start and won’t end with me!”
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Хелсиншки комитет за човекови права на Република Македонија и ЛГБТИ центар за поддршка
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Helsinki Committee for Human Rights of the Republic of Macedonia and the LGBTI Support Centre
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://www.lgbti.mk/Home/Post/4bcea7c4-d53d-4a66-bc6d-3217107f6970#.VvEceXrXxf0">http://www.lgbti.mk/Home/Post/4bcea7c4-d53d-4a66-bc6d-3217107f6970#.VvEceXrXxf0</a>
<b>Type of initiative</b>	March of Tolerance - awareness raising activity
<b>Main target group</b>	The whole population
<b>Brief description (max. 1000 chars)</b>	The fifth March of Tolerance (16.11.2013) with the slogan “Macedonia has Love for All – Violence didn’t start and won’t end with me!”, is an event organized annually on the occasion of the International Day of Tolerance, and this one was dedicated to the right to life free from violence. The aim was to raise awareness to the fact that violence has become an everyday occurrence in our society, and in these current conditions, it becomes a habit. On the frontline, the victims are always marginalized groups who are directly and personally affected by the pressure of the structural non-functionality, which produces even more anger toward diversity. The institutions become even more passive in regard to finding the perpetrators, providing access to justice for victims and implementing concrete procedures equally for all citizens of the Republic of Macedonia. For this purpose, the March of Tolerance, means: saying NO TO VIOLENCE! Macedonia has love for all, and the institutions have an obligation to provide protection for all citizens of the Republic of Macedonia.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input checked="" type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>142</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Example 7

<b>Area:</b> <sup>143</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Заштита на правата на пациентите и почитување на стандардите за квалитет на здравствена заштита на корисниците на дроги, лицата што живеат со ХИВ и ЛГБТ
<b>Title (EN)</b>	Protection of Patients' Rights and Observance of Quality Standards In Health Care Of Drug Users, People Living With HIV, and LGBT People
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Коалиција 'Сексуални и здравствени права на маргинализирани заедници'
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Coalition 'Sexual and Health Rights of Marginalized Communities'
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil Society
<b>Internet link</b>	<a href="http://coalition.org.mk/wp-content/uploads/2015/11/Analiza-Zashtita-na-prava-na-patsienti.pdf">http://coalition.org.mk/wp-content/uploads/2015/11/Analiza-Zashtita-na-prava-na-patsienti.pdf</a>
<b>Type of initiative</b>	Analysis
<b>Main target group</b>	members of marginalized groups, in particular people with HIV and those vulnerable to HIV and the competent state institutions, relevant institutions and the whole public
<b>Brief description (max. 1000 chars)</b>	To promote the patients' rights of members of the marginalized groups, in particular people with HIV and those vulnerable to HIV. Proper information for members of marginalized groups regarding patients' rights is a necessary step for their encouragement in the direction of undertaking specific activities for protection of the rights.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>143</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 8**

<b>Area:</b> <sup>144</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Прекршувања на човековите права на луѓето кои употребуваат дрога при контакт со полиција во Република Македонија – Истражување спроведено помеѓу корисниците на дроги
<b>Title (EN)</b>	Human rights violations of drug users in contact with police
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Коалиција ‘Сексуални и здравствени права на маргинализирани заедници’
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Coalition 'Sexual and Health Rights of Marginalized Communities'
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil Society
<b>Internet link</b>	<a href="http://coalition.org.mk/wp-content/uploads/2015/11/Analiza-Zashtita-na-prava-na-patsienti.pdf">http://coalition.org.mk/wp-content/uploads/2015/11/Analiza-Zashtita-na-prava-na-patsienti.pdf</a>
<b>Type of initiative</b>	Analysis
<b>Main target group</b>	Drug users, police and other relevant institutions, the general public
<b>Brief description (max. 1000 chars)</b>	This Analysis aims at raising awareness regarding various violations of the drug users' human rights among the general public, among the police and among the very people who use drugs (the need to take concrete measures to protect their human rights in the event of violation during application of police powers)
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> <li>• <input type="checkbox"/> yes how?</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards</li> <li>• <input checked="" type="checkbox"/> effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>144</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Example 9

<b>Area:</b> <sup>145</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Дискриминација на Ромите во образовниот процес - кршење на ѕидот на одбивање и сегрегација
<b>Title (EN)</b>	Discrimination against Roma in the Education Process - Breaking the Wall of Rejection and Segregation
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Институт за човекови права
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Institute for Human Rights (IHR) Supported by Roma education fund in Budapest
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://www.ihr.org.mk/images/pub/covekovi-prava-web.pdf">http://www.ihr.org.mk/images/pub/covekovi-prava-web.pdf</a>
<b>Type of initiative</b>	Analitical Report
<b>Main target group</b>	Roma population and relevant institutions (central and local level)
<b>Brief description (max. 1000 chars)</b>	This Report analyzes the general situation in the primary and secondary education which concerns the Roma children in the Republic of Macedonia. It aims at the raising of the awareness among local stakeholders about anti-discriminatory principles and the need for effective policies of desegregation in regard to education of Roma students. It also aims at raising awareness among the Roma parents and students about their right to desegregated education without discrimination and the need to ensure full participation of their children in mandatory education process in primary education.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>√ no</li> </ul>
<b>Involvement of stakeholders</b>	yes - municipalities /municipal authorities in the area of education
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li>√ effectiveness and impact</li> <li><input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>145</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 10**

<b>Area:</b> <sup>146</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Правото на образование на децата Роми со посебен фокус на Девојчињата Ромки
<b>Title (EN)</b>	The Right to Education of Roma Children with Special Focus on Roma Girls
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Институт за човекови права
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Institute for Human Rights (IHR) This publication has been produced within the Project “Improving the Right to Education on Roma Children with a Special Focus on Roma Girls through Establishing a Long-term Mentorship” implemented by the Institute for Human Rights with the assistance of the Embassy of Canada to Serbia, Macedonia and Montenegro.
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	Civil society
<b>Internet link</b>	<a href="http://www.ihr.org.mk/images/pub/broshuraweb.pdf">http://www.ihr.org.mk/images/pub/broshuraweb.pdf</a>
<b>Type of initiative</b>	Publication
<b>Main target group</b>	Civil sector, the relevant institutions in the area of education, municipalities and schools
<b>Brief description (max. 1000 chars)</b>	This publication aims to identify the major shortcomings that Roma children face in the primary education and by providing mentoring and promoting quality education tries to contribute to overcoming the problem of interest of Roma in education and reducing early school leaving, especially of Roma girls
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li>• <input checked="" type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> no</li> <li>• yes - municipalities /municipal authorities in the area of education</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li>• <input type="checkbox"/> above international/EU standards √ effectiveness and impact</li> <li>• <input type="checkbox"/> innovation</li> <li><input type="checkbox"/> transferability</li> <li><input type="checkbox"/> sustainability</li> </ul>

<sup>146</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.



## Annex 3 – Statistics Equality Bodies/Ombud Institutions

### Statistics Equality Bodies - Commission for Protection against Discrimination

	2011	2012	2013	2014	2015
<i>Budget in €</i>				4.557.000	4.557.000
<i>Number of staff (full time equivalent)<sup>147</sup></i>	/	/	/	/	/
<i>Number of professional/legal staff (full time equivalent)<sup>148</sup></i>	/	/	/	/	/
<i>Complaints/queries received</i>	61	79	85	107	70
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	0	0	0	0	0
<i>Total number of cases (please break down according to different grounds)</i>					
<i>Age</i>	4	3	4	8	8
<i>Belief</i>	1	2	1	3	2
<i>Disability</i>	6	9	6	13	8
<i>Ethnic origin</i>	14	16	21	27	9
<i>Gender</i>	3	2	0	4	1
<i>Gender identity</i>					
<i>Religion</i>	0	3	5	7	2
<i>Sexual orientation</i>	5	3	5	4	0
<i>Other grounds</i>	3	3	7	10	14
<i>Number of surveys<sup>149</sup></i>	/	/	1	1	1
<i>Number of research projects</i>	/	/	/	/	/
<i>Number of awareness initiatives</i>	/	8	11	8	12
<i>Number of training actions<sup>150</sup></i>	/	/	/	2	5
<i>Number of promotional initiatives to support good practice</i>					

<sup>147</sup> Number of staff (full time equivalent)-We don't have staff that are engaged full time. Our Commission has 7 commissioners who work on honorary bases.

<sup>148</sup> Number of professional/legal staff (full time equivalent) - Our commission has 7 commissioners who work on honorary bases.

<sup>149</sup> Number of surveys -Commission has made these researches with the support of OSCE Mission to Skopje.

<sup>150</sup> Number of training actions- Our Commission has participated in many trainings from 2011, but in these particular 7 trainings the commissioners were acting as trainers in the trainings.

# **Legal Protection against Discrimination in Montenegro**

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Podgorica, March 2016

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# Table of Contents

<b>Executive Summary.....</b>	<b>345</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>347</b>
1.1 Overview of Constitutional and Legal Provisions.....	347
1.2 Assessment of the Legal Framework .....	348
1.2.1. <i>The Article 2 of the Law on Prohibition of Discrimination prohibits any form of discrimination, on any ground.</i> .....	348
1.2.2. <i>Multiple discrimination is recognized under the Article 20 § 1 (1) as a grave form of discrimination*</i> .....	349
1.2.3. <i>The sole definition of discrimination neither recognizes nor defines the assumed and associative discrimination *</i> .....	349
1.2.4. <i>Law on Prohibition of Discrimination does not provide in a separate article exception to the prohibition of discrimination, the so-called "positive discrimination"</i> .....	349
1.2.5. <i>There are no conflicting legal provisions preventing the effective implementation of the prohibition of discrimination. *</i> .....	349
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>349</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination .....	349
2.2 Stakeholders Putting Combating Discrimination into Practice .....	351
2.2.1 <i>Equality Body/Bodies</i> .....	351
2.2.2 <i>Ombud Institution</i> .....	351
2.2.3 <i>Intermediaries</i> .....	353
2.2.4 <i>Police</i> .....	353
2.2.5 <i>Other Relevant Stakeholders</i> .....	354
2.3 Mapping the Cooperation among Stakeholders .....	354
2.3.1 <i>Equality Body/Bodies</i> .....	354
2.3.2 <i>Ombud Institution</i> .....	354
2.3.3 <i>Intermediaries</i> .....	354
2.3.4 <i>Police</i> .....	355
2.3.5 <i>Other Relevant Stakeholders</i> .....	355
<b>3. The Role of Courts in Combating Discrimination.....</b>	<b>355</b>
3.1 Capacities of Courts in Combating Discrimination.....	355
3.2 Quantity and Quality of Judgments in Cases of Discrimination* .....	359
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	362
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>363</b>
4.1 Mediation .....	363
4.2 Evidencing Discrimination.....	364
4.3 Strategic Litigation.....	364
4.4 Class Action/ <i>Actio Popularis</i> .....	365
4.5 Shifting of the Burden of Proof.....	365
4.6 Remedies.....	365
4.7 Follow-Up to Opinions and Recommendations .....	366
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>366</b>
5.1 Law Departments .....	366

5.2 Other Departments .....	368
5.3 Legal and Institutional Structures Combating Discrimination .....	370
<b>6. Developing a Culture of Rights .....</b>	<b>371</b>
6.1 Assessing the Levels of Awareness .....	372
6.2 Achievements in Awareness Raising .....	373
6.3 Preventing Future Discrimination .....	374
<b>7. References .....</b>	<b>377</b>
<b>Annexes .....</b>	<b>379</b>
Annex 1 – Glossary .....	379
Annex 2 – Template for Good Practice Examples .....	380
Annex 3 – Statistics Ombud Institution .....	381
Annex 4 – Anti-Discrimination Courses (2010-2015) .....	382
Annex 5 – Relevant Legal Provisions .....	392

## Executive Summary

The report gives a comprehensive overview of the legislative and the institutional framework for combating the discrimination in Montenegro, identifying good practices, through promoting values of equality and non-discrimination and providing protection against the discrimination, as well as identifying the obstacles, challenges and needs in regard to the improvement concerned.

Consequently, the report contains analysis of the relevant legal provisions and assessment on the stakeholders putting combating discrimination into practice, followed by description of the cooperation realized among them, as well as analysis of the role of the Montenegrin Courts in combating discrimination and procedural aspects in discrimination cases.

Having in mind that the education is crucial for self-awareness and assertiveness, the university has special role in combating of the discrimination. Hereinafter is the overview on the present situation in regard to the presence of anti-discriminatory contents in the educational curricula, as well as the analysis of the positive and negative facts in regard to the integration of the anti-discriminatory values and principles. In addition, the report gives an overview assessment regarding the mechanisms for combating discrimination at the university.

Finally, this report assesses the elements for developing a culture of (human) rights, with emphasis on the present level of awareness, achievements in the awareness raising and the discrimination prevention measures.

After the research has been done, and after the interviews with the relevant stakeholders and numerous relevant individuals have been conducted, invoking on very low level of awareness and having in mind the undeveloped culture of rights, as well as the low rate on reported cases on discrimination, referring to the non-transparent work of judicial bodies, lack of specialized courses on international, European and national antidiscrimination norms and standards, the conclusion is that lot has to be done in near future to improve the situation on combating discrimination in Montenegro.



# 1. Legal Framework Prohibiting Discrimination

Montenegro has a comprehensive legislative framework prohibiting discrimination and protecting from discrimination. Prohibition of discrimination is a constitutional category, which is further concretized in the systemic Law on Prohibition of Discrimination and the relevant provisions of other laws that have been harmonized with it. Hereafter is the overview of the relevant anti-discriminatory legislation.

## 1.1 Overview of Constitutional and Legal Provisions

- Constitution of Montenegro<sup>1</sup> (Article 6(3), Article 7 and Article 8)<sup>2\*</sup>
- Law on Prohibition of Discrimination<sup>3</sup> (Article 2(1)) \*
- Article 1 of this Law provides complementary application of other laws
- Law on Prohibition of Discrimination against Persons with Disabilities<sup>4</sup> (Article 2(1))\*
- Law on Prohibition of Harassment at Work (mobbing)<sup>5</sup> (Article 4)\*
- Law on the Protector of Human Rights and Freedoms of Montenegro<sup>6</sup> (Article 1 and Article 2)\*
- Law on Gender Equality<sup>7</sup> (Article 1)\*
- Law on the Movement of Persons with Disabilities with the Help of a Dog Helper<sup>8\*</sup>
- Law on Professional Rehabilitation and Employment of Persons with Disabilities<sup>9</sup> (Article 5)\*
- The Law on the Protection and Exercise of the Rights of the Mentally Ill Persons<sup>10</sup> (Article 3(1))\*
- Rules on the Conduct of Employer and Employee on Prevention and Protection from Abuse at Work<sup>11</sup>
- The Law on Health Care<sup>12</sup> (Article 4)\*
- The Health Insurance Law<sup>13\*</sup>
- Law on Social and Child Protection<sup>14</sup> (Article 7(1) item 1)\*
- Law on Pension and Disability Insurance<sup>15\*</sup>

<sup>1</sup> Official Gazette of Montenegro no. 1/07.

<sup>2</sup> Terms marked with \* are quoted in the Annex no. 5 to the main text.

<sup>3</sup> Official Gazette of Montenegro no. 46/10. and 18/14.

<sup>4</sup> Official Gazette of Montenegro no. 35/15" and 44/15.

<sup>5</sup> Official Gazette of Montenegro no. 30/12.

<sup>6</sup> Official Gazette of Montenegro no. 42/11 and 32/14.

<sup>7</sup> Official Gazette of Montenegro no. 46/07 and 35/15.

<sup>8</sup> Official Gazette of Montenegro no. 76/09.

<sup>9</sup> Official Gazette of Montenegro no. 49/08, 73/10. and 39/11.

<sup>10</sup> Official Gazette of the Republic of Montenegro no. 32/05 and Official Gazette of Montenegro no. 27/13.

<sup>11</sup> No. 1090, Ministry of Labour and Social Care no. 11-484/2012 dd. 05.11.2012.

<sup>12</sup> Official Gazette of the Republic of Montenegro no. 39/04, Official Gazette of Montenegro" no. 14/10 and 47/15.

<sup>13</sup> Official Gazette of the Republic of Montenegro no. 39/04 and Official Gazette of Montenegro" no. 14/12.

<sup>14</sup> Official Gazette of Montenegro no. 27/13.

<sup>15</sup> Official Gazette of the Republic of Montenegro no. 54/03, 39/04, 79/04, 81/04, and Official Gazette of Montenegro no. 47/07, 79/08, 14/10, 78/10, 34/11, 66/12, 38/13, 61/13, 6/14, 60/14-I, 60/14-II I 10/15.



- Labour Law<sup>16</sup> (Article 5, Article 6, Article 7, Article 8 and Article 9)\*
- Law on Civil Servants and State Employees<sup>17</sup> (Article 7)\*
- Law on Employment and Exercising Rights with Respect to Unemployment Insurance<sup>18</sup> (Article 5)\*
- General Law on Education<sup>19</sup> (Article 9 and Article 9a)\*
- Media Law<sup>20</sup> (Article 2 and Article 3(1))\*
- Electronic Media Law<sup>21</sup> (Article 3)\*
- Criminal Code<sup>22</sup> (Article 158 until Article 183)\*
- Law on Protection against Domestic Violence<sup>23</sup>
- Law on Free Legal Aid<sup>24</sup> (Article 8)\*
- European Convention on Human Rights and Fundamental Freedoms (Article 14 and Article 1 of the Protocol 12 to the Convention).

## 1.2 Assessment of the Legal Framework

### *1.2.1. The Article 2 of the Law on Prohibition of Discrimination prohibits any form of discrimination, on any ground.*

Despite this general prohibition of discrimination some of its forms have been identified and defined, as follows:

“direct, indirect, harassment and sexual harassment, victimization, segregation and hate speech.”

The grounds, upon which the discrimination is prohibited by this law, can be read as follows:

“race, colour of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organization as well as other personal characteristics.”

The areas in which the discrimination is prohibited can be read as follows:

“Discrimination in use of facilities/buildings and areas in public use, discrimination in goods and service delivery, discrimination in field of labour and employment, safety at work, pension and disability insurance, health and social protection, gender equality, education, media, family relations, etc.”

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<sup>16</sup> Official Gazette of Montenegro no. 49/08, 26/09, 59/11, 66/12, 31/14.

<sup>17</sup> Official Gazette of Montenegro no. 39/11, 50/11, 66/12, 34/14.

<sup>18</sup> Official Gazette of Montenegro no. 14/10, 45/12, 61/13, 20/15.

<sup>19</sup> Official Gazette of the Republic of Montenegro no. 64/02, 31/05, and Official Gazette of Montenegro no. 49/07, 45/10, 45/11, 39/13, 44/13.

<sup>20</sup> Official Gazette of the Republic of Montenegro no. 51/02, 62/02.

<sup>21</sup> Official Gazette of Montenegro no. 46/10, 53/11, 6/13.

<sup>22</sup> Official Gazette of the Republic of Montenegro no. 70/03, 13/04, 47/06, and Official Gazette of Montenegro no. 40/08, 25/10, 32/11, 40/13, 56/13, 14/15 and 42/15.

<sup>23</sup> Official Gazette of Montenegro no. 46/10.

<sup>24</sup> Official Gazette of Montenegro no. 20/11 and 20/15.

*1.2.2. Multiple discrimination is recognized under the Article 20 § 1 (1) as a grave form of discrimination\**

*1.2.3. The sole definition of discrimination neither recognizes nor defines the assumed and associative discrimination\**

*1.2.4. Law on Prohibition of Discrimination does not provide in a separate article exception to the prohibition of discrimination, the so-called "positive discrimination"*

However, the provisions of the Article 10 § 2 and the Article 16 § 3 of the Law on Prohibition of Discrimination stipulates what is not considered as discrimination in certain areas and in accordance with a special law which regulate this area.\*

*1.2.5. There are no conflicting legal provisions preventing the effective implementation of the prohibition of discrimination.\**

## **2. Institutional Framework for Combating Discrimination**

### **2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination**

In Montenegro, Protector of Human Rights and Freedoms of Montenegro, i.e. the Institution of the Human Rights and Freedoms of Montenegro or well known as the Ombudsman Institution (hereinafter referred as the OI)<sup>25</sup> is in charge of the implementation of Montenegrin anti-discriminatory legislation, as national institutional anti-discriminatory mechanism. Its competence and mandate in regard to combating discrimination, through promoting equality and non-discrimination, supporting the victims of discrimination and preventing future discrimination, through dissemination of anti-discriminatory values and international standards, is explicitly stipulated in the Article 21 of the Law on Prohibition of Discrimination.

Also, according to the Article 6a of the Law on Gender Equality, protection of persons discriminated against on grounds of sex shall be exercised in accordance with the Law on Prohibition of Discrimination and the Law of the Protector of Human Rights and Freedoms. Article 6 of the Law on Prohibition of Discrimination of the Persons with Disability stipulates the competence of the Ministry of Human and Minority Rights, as explained below.

Generally speaking, there are two main responsibilities in regard to the prohibition of discrimination: to prevent discrimination and to protect from discrimination. Both are connected with the promotion of equality, but especially the first one.

Competent bodies for promotion equality and non-discrimination in Montenegro are: the OI, Ministry for Human and Minority Rights, other ministries in respect of their mandate (e. Ministry of Labour and Social Care is competent to promote equality in the context of work and social care, Ministry of Education in the educational sector at all levels, etc.). In addition, non-governmental organizations, civil society organizations, academic institutions and training bodies are important stakeholders in respect of promotion of the above-

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<sup>25</sup> Available at: <http://www.ombudsman.co.me> (27.03.2016.).

mentioned values, as well as dissemination of knowledge and best practices concerning prohibition of discrimination.

During the period from November 2011 to February 2016, the Council for the Protection against Discrimination<sup>26</sup> was functioning, with a competence to follow and coordinate the activities of the state organs and public bodies concerning the implementation on anti-discriminatory legislation, as well as to analyse the existent laws and administrative measures and propose new legal solutions and measures, to adopt measures on promotion on equality and prohibition of discrimination. Its disestablishment was justified by the constitution that the Council has fulfilled its mandate, having in mind that the anti-discriminatory legislation is completed and harmonized with the European standards.<sup>27</sup>

Supporting the victim of discrimination falls under the mandate of the OI, which will be described below. Also, the police has a significant role concerning combating discrimination, as they are in a direct contact with the victims reporting the cases of violence of their right to equality, sometimes in a very severe manner. Also, some NGOs, like “Civic Alliance” support the victims of discrimination in terms of giving free legal advices as well as directing them to a competent body and connecting them with the latter.

Preventing the future discrimination is a part of a broad mandate of all the above mentioned. The OI, Ministry for Human and Minority Rights and the Centre for Training in the Judiciary and Public Prosecution Office (hereafter referred as JTC) have the most prominent role in disseminating the relevant knowledge and practices, as well as the case-law of the ECHR and international human rights standards, as preventive activities in regard to combating discrimination, stereotypes and prejudices. Out of those stakeholders, only the OI has both aspects of a promotional-type and tribunal-type body. The rest are promotional-type bodies.

From the interviews conducted with the stakeholders in Montenegro, it is visible that some provisions, that were difficult to be realized in practice as being un-harmonized with the systemic Law on Prohibition of Discrimination, in the mean time were harmonized (ex. Law on Amendments of the Law on Gender Equality<sup>28</sup> now is harmonized with the systemic law as it established competence of the OI for the cases of discrimination on the grounds of gender identity and violation of gender equality, which was not the case previously and which caused difficult implementation and made access to justice for victims of discrimination more difficult).

Also, as reported by some NGOs and the Ministry for Human and Minority Rights there is a problem concerning the difficult following of the data that the courts are in charge with, especially in respect of the prosecuted cases on discrimination? There is a certain lack of transparency of the court decisions concerned.

Finally, it was reported by several stakeholders that the provision on shifting the burden of proof is not fully implemented in practice. Namely, although the Article 29 of the Law on Prohibition of Discrimination recognizes the importance of the standard to transfer the burden of proof to the defendant/alleged discriminator, which essence is to strengthen the procedural position of the applicant, because he/she is a victim of discrimination, this legal

<sup>26</sup> The Council was established by the *Decision on Establishing the Council for the Protection against Discrimination* by Government of Montenegro from 28 July 2011, which entered into force in November 2011 (Official Gazette of Montenegro no. 50/11 from 21.10.2011. and no. 53/11 from 11.11.2011). The Council was disestablished on 25<sup>th</sup> February 2016, by Decision of the Government, which is supposed to be published in Official Gazette of Montenegro soon.

<sup>27</sup> <http://www.cdm.me/politika/vlada-odlucila-savjet-za-zastitu-od-diskriminacije-prestaje-sa-radom> (29.03.2016.).

<sup>28</sup> “Official Gazette of Montenegro” no. 35/15.

standard still does not have proper application in practice. It seems that the courts, ruling in civil proceedings for protection from discrimination, have interpreted the mentioned standard in such a way that the applicant is still obliged to carry out all the evidence available to it, which is a wrong and ultimately unfair attitude. Having in mind the factual small number of judgments which established discrimination, it is to be concluded that there is the lack of knowledge or readiness of judges to follow the jurisprudence of the ECtHR, which firmly established the principle of shifting the burden of proof on the defendant, provided that the applicant indicate discrimination probable.

The Law on Free Legal Aid, which is in force as of 01.01.2012., stipulates that free legal aid is within jurisdiction of basic courts. The implementation is very restrictive in practice and the free legal aid can be granted only to poor persons without any property. Civil society requested that victims of torture and victims of discrimination are recognized by the Law as the potential beneficiaries of the free legal aid. However, for the time being there are no results concerned. Also, the OI has repeatedly noted the restrictive nature of this institute, calling upon necessity to harmonize its implementation with the European Convention on Human Rights standards and the case-law of the European Court of Human Rights, particularly with regard to the type of procedure that can be granted free legal aid for and the amount of financial means testing as the conditioned factors for implementation of the Law. What is particularly unjustified is the fact that the Law does not recognize notions of victims of torture, victims of ill-treatment, as well as victims of discrimination. In that regard, the Law should be amended, hopefully in near future. There are no available data on the number of discrimination cases where the free legal aid was granted.

## 2.2 Stakeholders Putting Combating Discrimination into Practice

### 2.2.1 *Equality Body/Bodies*

There is no special or specialized equality body in Montenegro.

### 2.2.2 *Ombud Institution*

The competence regarding combating discrimination was entrusted to the OI, which has a leading role in this issue. In addition, there are additional stakeholders that are involved in promoting equality and non-discrimination, as well as preventing discrimination through trainings and dissemination of non-discrimination, as follows below.

The OI is an independent, autonomous state body elected by the Parliament, which has a wide mandate in the area of the promotion of equality and anti-discrimination in all areas of social life. The Institution is entrusted with protecting and promoting human rights and freedoms when these have been violated by means of an enactment, act or failure to act on the part of the state authorities, local self-government authorities, public services and other holders of public powers. In addition to this function, the mission of the OI also includes awareness raising regarding the importance of the rule of law and consistent protection of human rights and freedoms and in general terms, bringing about legal certainty, lawful and impartial work of the state authorities before which citizens exercise their rights, freedoms, duties and legal interests.

The OI has a range of measures, out of which the most relevant is to receive and consider claims regarding discrimination, to provide an opinion and recommendations in concrete cases as a sort of pre-trial arrangement / solution, to provide information to the complainant on his/her rights and possibilities of initiating a court procedure or other type of protection

measures, and to file complaints for protection from discrimination on behalf of (but with the approval of) the discriminated person.

The above-mentioned Law on Prohibition of Discrimination is the principle legal source of anti-discriminatory legislation in Montenegro. According to its provision in the Article 21, the OI's competences are the following:

- 1) to act upon complaints on discriminatory treatment authority, the company, other legal entity, an entrepreneur and physical persons, and take measures and actions to eliminate discrimination and protect the rights of the discriminated person, if not initiated proceedings before the court;
- 2) to provide the necessary information about applicant's rights and obligations, as well as about to possibilities of judicial and other protection of the applicant who considers himself/herself discriminated against by the authority, the company, other legal person, entrepreneur or natural person;
- 3) to conduct the conciliation proceedings between the person who considers to be discriminated against, with his consent, and the concerned authority, the company, other legal entity, entrepreneur and natural person referred to in the complaint for discrimination;
- 4) to initiate proceedings before the court for protection from discrimination or to appear as an intervener in this process, if Ombudsperson determines that the conduct of the respondent was discriminatory on the same ground to a group of persons with the same personal characteristics;
- 5) to warn the public on the occurrence of severe forms of discrimination;
- 6) to keep separate records of submitted complaints related to discrimination;
- 7) to collect and analyse data on discrimination cases;
- 8) to undertake activities to promote equality;
- 9) to submit to the Parliament of Montenegro, in the context of the annual report, a special part of the report on activities implemented to protect against discrimination and to promote equality;
- 10) to perform other duties in connection to protection against discrimination, laid down in special law.

It is to be emphasized that OI, according to aforementioned article, may initiate proceedings for protection from discrimination before the court, with the consent of the applicant, or may appear in this process as an intervener, if the applicant makes discrimination probable, and OI finds that the conduct of the respondent was discriminatory on the same basis as to a group of persons with the same personal characteristics. OI has repeatedly appeared as intervener, having learned that the civil proceedings for protection from discrimination are in process, and according to the claims of persons with disabilities. In all cases discrimination was established.

The aforementioned legal solution offers the possibility to participate as an intervener Protector of the so-called "strategic litigation" for protection against discrimination. It is the litigation in the public interest, with the aim of the OI to contribute to improving the access to justice, the proper application of anti-discrimination legislation and improvement of judicial practice, as well as to further encourage the vulnerable social groups, educate and sensitize the public to the problem of discrimination.

The OI has a competence to deal with all grounds of discrimination enshrined in the Law on Prohibition of Discrimination, as well as Law on Gender Equality and the Law on Prohibition of Discrimination against Persons with Disabilities. Also, after amendments of the Law on Ombudsperson, the institutional capacity was strengthened. Namely, one of the

four Deputy Ombudspersons is in charge for discrimination cases, having in mind that OI became the institutional mechanism against discrimination.

Law on Protector of Human Rights and Freedoms<sup>29</sup> establishes competences, working methods and activities of the OI. In addition, the Rules on the work of Protector of Human Rights and Freedoms are relevant legal source.<sup>30</sup>

Strategic documents of the OI are the following: Action Plan for Chapter no. 23 of Accession Process to the EU, Strategy for the Integration of Persons with Disabilities, Strategy for Permanently Resolving the issue of Refugees and Internally Displaced Persons in Montenegro with special emphasis on the Konik area, Strategy for Improving the Situation of LGBT People.

Organisational structure of the OI consists of several organizational units. These are: the National Preventive Mechanism, protection from torture and the right to trial within a reasonable time (NPM), an Institutional Mechanism for Protection Against Discrimination, the Unit of Children's Rights and Social Protection, as well as the Unit of General Affairs. Within each of these units, there are separate departments dealing with the respective issue of its jurisdiction. Each department separately handles the complaints, and take measures and actions to protect the rights and freedoms of persons whose rights were reported as violated or who reported being discriminated against.

Main activities of OI are connected with acting on complaints about possible discrimination, initiating legal proceedings and stirred in to start court proceedings in a civil dispute, taking measures and actions to eliminate discrimination and protect the rights of the discriminated person, keeping separate records of submitted complaints related to discrimination, collecting and analysing data on discrimination cases, undertaking activities to promote equality and awareness raising, as well as the outreach work concerned.

### *2.2.3 Intermediaries*

The role of the intermediaries as social partners in combating discrimination is significant. They play an important role in ensuring compliance with and enforcement of equality law. There are several institutions that are very active in regard to promoting of the anti-discriminatory contents and best practices. Primarily, those are NGOs, such as “Civic Alliance” which also gives free legal aid to the victims of discrimination, CEDEM, “Mladi Romi”, as well as Centre for Training of Judges and Prosecutors, Ministry for Human and Minority Rights which all are mainly focused on organizing trainings and seminars, round tables, publishing brochures, and cooperating with domestic and international organizations on different matters.

### *2.2.4 Police*

The role of the police is important, but not always at the level it should be in terms of recognizing discrimination. Most of interviewed intermediaries expressed a need for more training of the police officers concerning discrimination. Having in mind that individuals or groups report the cases on discrimination that were mainly connected to domestic violence, police was involved and its activities were focused on the criminal offences. According to the CSOs reports there is police's lack of understanding of discrimination of Roma, LGBT and marginalized groups, as well as a slow administration of reported cases by the Roma in respect of their personal documents issuing.

<sup>29</sup> Official Gazette of Montenegro, no. 42/11 and 32/14.

<sup>30</sup> Official Gazette of Montenegro, no. 53/14-71.

The Police Directorate, in the opinion of the OI, has been recognized as an institution where the victim can speak on the occasion of the consequences resulting from discriminatory act. Further, the OI notes that the police officers acted professionally in ensuring the Pride Parade in Podgorica, executing the positive obligation of the state to protect peaceful assembly and to combat any possible counter-demonstrations aimed at obstructing the assembly and peaceful expression of the commitment of the participants of the parade.

### *2.2.5 Other Relevant Stakeholders*

There are two bodies of the parliament of Montenegro – the Committee for Human Rights and Freedoms and the Committee for Gender Equality which are competent to deal with antidiscrimination legislation and policies, as well as concerned issues within the Parliaments' competence. Also, the universities are relevant stakeholders especially in anti-discriminatory education.

## *2.3 Mapping the Cooperation among Stakeholders*

### *2.3.1 Equality Body/Bodies*

N/A

### *2.3.2 Ombud Institution*

The OI reported effective cooperation primarily with the Ministry of Human and Minority Rights, the Committee for Human Rights and Freedoms and the Committee for Gender Equality of the Parliament of Montenegro, Council for Civil Control of Police. The OI reported good cooperation with the police officers, as well. It also commends the cooperation with the CSOs established for the protection of persons and groups particularly susceptible to marginalization and exclusion such as LGBT, persons with disabilities, members of ethnic minorities, victims of violence, displaced and internally displaced persons, etc.

The OI emphasized good cooperation with the civil sector, especially those organizations whose focus of interest are the vulnerable groups that are usual subject to discriminatory treatment (women, persons with disabilities, members of the LGBT population, victims of domestic violence, etc.). Thus, as a reflection of fruitful cooperation, the CSOs (LGBT Forum “Progres”, the Civic Alliance, “Juventas”, Center for Women's Rights, CEDEM, etc.) address the OI whenever they have allegation on discrimination, and they forward the case to the OI for further processing.

### *2.3.3 Intermediaries*

It seems also that the Ministry and CSOs have good cooperation. They work together on promoting antidiscrimination and equality, organizing joint events and engaging experts from NGOs and academia to train different target groups, mainly public officers.

On the other side, the cooperation among different CSOs is not at sufficient level, except for “Mladi Romi” which reported cooperation with all CSOs. Also, most of NGOs that were contacted to reply to the questionnaire for this research did not show interest in it, although they showed interest in donations concerning the topic of our research. Those ones that accepted participation in this project stressed that better inter-civil society sector would be desired.

### 2.3.4 Police

Cooperation between police and OI is very good, as it was mentioned before. The cooperation between the police and the Ministry for Human and Minority Rights is realized through the exchange of information on discrimination cases, through joint work on strategic documents, as well as through educational and training activities of the Ministry which are designed for police officers in cooperation with the OSCE Mission in Montenegro.

The interviewed NGOs expressed a satisfactory level of cooperation with the police, and some of them have joint projects with the police (Project “Personal Documents – First Step towards Equality” of NGO “Mladi Romi”) or agreement of cooperation (such as the agreement on cooperation with regards to conditions in prisons and treatment of prisoners).

### 2.3.5 Other Relevant Stakeholders

The cooperation between the Parliaments’ afore mentioned Councils and OI, as well as the Ministry in charge is reported as constructive. Also, according to the working rules of the Councils, there is possibility that they invite representatives of CSOs and academics to take part in working sessions with specific topic.

## 3. The Role of Courts in Combating Discrimination

### 3.1 Capacities of Courts in Combating Discrimination

In accordance with Article 62 of the Rules of Court,<sup>31</sup> all received cases are allocated to the judges by applying the method of random allocation of cases, after entering the basic data in the Judicial Information System (hereinafter referred as PRIS), using special algorithm. There are no judges specialized exclusively for work on discrimination cases.

On the question how are the capacities of judges assessed by relevant stakeholders such as equality bodies, ombud institutions and intermediaries to identify discrimination and apply the relevant legal framework, the OI stated that further training of the judges on standards on ruling on the protection from discrimination is necessary, particularly in relation to the European standards contained in the anti-discrimination directives and the jurisprudence of the European courts. In this respect, the absence of a uniform court practice in the same or a similar legal and factual basis has been noted, as well as the insufficient number of final procedures in which the act of discrimination has been determined.

The Intermediaries stated that the certain judges do not have the capacity in that respect or that it is not in their competence to assess the capacity of judges in identification of discrimination and application of the relevant legal provisions, or that the work of judges is not sufficiently transparent, so it is difficult to give an assessment of the capacity of the judges in connection with the cases of discrimination. However, their research indicates a low level of public confidence in the work of the courts and prosecutors' offices, as well as the perception that there are illegal political interference in the work of the same, which greatly hamper their impartial performance. Some of the intermediaries did not have a comment. For given comments the intermediaries did not explain the way in which they came to such an assessment.

<sup>31</sup> Official Gazette of Montenegro no. 26/11, 44/12 and 2/14.



The burden of proof is regulated by Article 29 of the Law on Prohibition of Discrimination.

In the opinion of the OI, this legal standard still does not have a proper application in practice because while ruling in discrimination cases the courts interpret the mentioned rule in a way that the prosecutor is still obliged to carry out all the evidence, what the OI see as a wrong and unjust attitude. Attached to this view is the fact that there is a small number of judgments where the act of discrimination has been found, which indicates not just to the lack of knowledge but also the commitment of judges to follow the jurisprudence of the ECtHR.

The intermediaries stated either that the court practice in this respect should be improved, especially taking into account the protection of privacy and identity of the person whose rights have been violated, or if they do not have an access to the work of the courts or that they have no comment.

On the question, if not, why not, the answer has not been given.

On the question, what kind of support would be needed to improve situation, the answer was that the presence of the NGOs or other organizations dealing with the protection of human rights in the proceedings when ruling in discrimination cases should be ensured, as well as the provision on the burden of proof should be introduced in the misdemeanour and criminal proceedings.

The answer to this question is asked by the judges who stated that the intensive education and seminars are needed in that respect, while a number of judges stated that not only in cases of discrimination, but otherwise, they adequately implement this principle. Some said that they don't have practice in this respect, or did not have cases of discrimination, and that in practice this rule is still not fully implemented because the courts still independently acquire or initiate collection of evidence in proceedings for the proper resolution of the dispute. On the other hand, the criminal judges as well as the judges of misdemeanour courts stated that in criminal and misdemeanour proceedings shifting the burden of proof is not provided, and everyone is innocent until proven otherwise.

The Law on Prohibition of Discrimination does not provide for a specific provision which refers to the use of the statistics in discrimination cases, but it does not prohibit it either. Also, it is not prescribed what kind of statistics can be used. Article 33 of the same law prescribes an obligation on keeping separate records on the filed complaints, initiated proceedings and decisions taken within their own jurisdiction in relation to discrimination to the courts, the state prosecutor's offices, misdemeanour authorities, the authority responsible for police affairs and inspection authorities.\*

The OI stated that he is not sure how competent courts deal with this type of gathering and presenting of evidence, while the Intermediaries stated, either that they do not have access to the work of the courts, or that although the law stipulates that an electronic database should exist in that respect, it still does not work in practise, and that the use of statistical data in Montenegro in order to establish a discrimination, is not used enough in the practice of Montenegrin courts, because, in accordance to the information they have, the statistical evidence is still not in evidencing discrimination in court proceedings.

On the other hand, the OI stated that, acting on the initiatives of the complainant on several occasions they used the statistical data as evidence in cases where it can provide possibility to identify discrimination. (e.g. if in the complaint is alleged that the employer allocated the complainant and other women after they return from maternity leave, to the lower and lower-paid jobs, namely, that it is a discriminatory pattern in the treatment of women, then the statistics from official records on the number (percentage) of women and men employed,

then women who used maternity leave, about the activities in which they worked and how much they received earnings before and after maternity leave, etc, should be requested and obtained).

The Intermediaries did not declare regarding the adequate use of statistical data by the judge during the proceedings, but they find that in the direction of improving the current situation, the establishment of an electronic database which will enable the development of new policies, strategies and plans for improvements and eliminating flaws in the work of the institution is needed.

The judges stated either that this type of evidence is not used, or that they don't have experience in that respect because they had no cases of discrimination in the practice, and that the practice of the courts in this respect should be improved, with the support of relevant institutions. Some of the judges noted that this institute is of a later date and statistics are not delivered to the courts, or they consider that it is not necessary to use it bearing in mind the free judicial conviction.

Judges of misdemeanour courts responded that they are not sufficiently aware in this regard and that they need education in this respect.

As mentioned, the Law on Prohibition of Discrimination in its Article 4 provides for the prohibition of victimization, but does not provide a clear provision which prescribes measures to prevent further victimization. However, the provision of this article can be interpreted in conjunction with Article 28 of the same Law, which allows the possibility of issuing interim measures in the course of the proceedings for protection from discrimination.

The OI, as well as other intermediaries, either did not give a concrete answer concerning the proper application of these measures, or have indicated that they do not have access to the work of the courts, while one of the answers was that sometimes the proceedings in the lower level, i.e. inspections before the misdemeanour courts last for a long time, which further undermines the dignity and integrity of the victims.

The judges in their responses stated either that they are taking measures to prevent further victimization by applying the clear provisions of the procedural laws, but did not specify what kind of measures, or that they use interim measures, protective measures and such, while some did not have an answer to this question because they had no cases of discrimination. A number of judges did not answer this question because they did not understand the meaning of wording "victimization" - question to them was incomprehensible.

On the other hand criminal judges stated that prevention of further victimization during the proceedings is provided by law, especially in relation to minors as victims.

Misdemeanour judges stated either that they are not familiar with this term, or they take protective measures before and during the proceedings in the field of domestic violence, as well as interim measures, while the majority of respondents did not state how they apply them.

When asked -do lawyers ask for such measures, the answer was not given either by the OI or Intermediaries, judges and misdemeanour judges.

The question on what kind of support would be needed in order to improve the situation is not answered by any of the respondents.

In the opinion of OI, although most of the courts are adapted to disabled persons and persons with reduced mobility, at least at the level of removing architectural barriers

which prevents, restricts or hinders access, movement and stay in the court premises, elimination of such barriers is *a priori* obligation for each court. As far as interpreters for minority languages and sign interpreters are concerned, the OI stated that they have no knowledge that the courts violated the principle of using the language of the party in the proceedings.

The intermediaries largely responded that the implementation of the measures envisaged by the Strategy for the Integration of Disabled Persons is very slow, that some courts provided ramps for access to the building for people with disabilities, while most public buildings and areas in public use did not provide adequate access for persons with disabilities yet. Also, they stated that it is not known whether the measures are taken during the proceedings to ensure that persons with impaired vision or hearing could equally participate, unless they are the party in the dispute.

To this question the judges mostly replied that, if necessary, they engage adequate persons in which case the proceedings are conducted only with their obligatory presence, while if one of the parties in dispute is disabled person or a person with reduced mobility, then, the trials are taking place in the ground floor of the court building, and the parking for persons with disabilities is provided, as well as a customized access through the courts. Some of the judges replied that in some courts, because of the difficult accessibility to the building due to its numerous stairs, is not possible to provide adequate access for persons with disabilities, some stated that they have no knowledge in that respect.

Misdemeanour judges replied either that they are not familiar, or that the question of access to the building of persons with disabilities has not been resolved yet, while others responded that such measures have been undertaken.

On the question if not, why not and what kind of support would be needed to improve the situation, a concrete answer by any of the respondents was not given.

Article 21 of the Law on Prohibition of Discrimination stipulates that the OI may file a claim before the court for the protection against discrimination or to appear in such proceedings as an intervener under conditions closer described in mentioned article.

The OI noted that in most cases, judges upheld the opinion of the Protector (in cases where the OI appeared in the role of intervener) and they adequately applied anti-discriminatory provisions and case law of European courts to which they are commanded by an authorized representative (intervener) of the Institution. Protector noted that in current practice, the judges resorted cooperation and consultation with employees of the Institution of the OI, especially in cases where the OI was directly involved in the court proceedings (strategic litigation) for protection against discrimination.

The intermediaries have not given an answer to the question of participation of the OI in the process.

To this question, the judges responded in different ways, either that the OI direct involvement in proceedings is not necessary, but he can give examples from his practice to further educate the judges, or that they have not had such cases in their practice. Some of them replied that in discrimination cases in which they ruled, the OI did not participate, but they consider that his inclusion would be desirable. They further stated that the judges, while preparing for trial consult with the widest variety of jurisprudence, or that they did not have discrimination cases, or cases where the OI issued a recommendation for a specific case, but they would certainly take into account the recommendation of the OI if it existed. A number of judges answered that they do not have information in this respect, or that the recommendations and opinions are binding to the courts in all the cases in which they are

given, and that the courts are obliged to comply with the time limits and measures contained in these recommendations, while some stated that they believe that such recommendations and opinions are not effective or too interested. Judges further stated that the availability of this body and its opinion, gives the court the possibility to take them into consideration so they find it that it is not necessary to address him directly. Some of judges answered that they did not ask for such opinions or recommendations in their practice, or that they have no knowledge in that respect. Certain judges stated that the judges rule pursuant to free judge belief, so the interpretation of the question whether a particular case is a case of discrimination, can only deal the judge without seeking the expert opinion of anyone, while some of the judges said they did not have enough experience in this respect.

On the other hand the criminal judges stated that there is no possibility of such participation of the OI in the proceedings.

Misdemeanour judges mostly replied that they are not familiar enough in this respect, especially since they had no discrimination cases in work and did not ask for the OI's opinions and recommendations in their practice so far, but they believe that his participation in the proceedings and opinions may influence the efficiency of the proceedings.

Some of misdemeanour judges answered that when deciding and imposing protective measures, they take into account the OI's recommendations and opinions.

When asked whether the judges are satisfied with such expert opinions, no specific answer was given either by the OI, or judges, while Intermediaries stated that they do not have information in this respect.

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination\*

#### I Statistical data of the Judicial Council of Montenegro

*Number of discrimination cases decide on by courts (2010-2015)<sup>32</sup>*

Year	2010				2011				2012				2013				2014				2015			
Type of court	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM
Civil court	1				2				0	0	0	0	2			1	3				8			

<sup>32</sup> The Judicial Council gave information in respect of civil proceedings, which were held in that year and the number of cases in which the first instance decision was made in that year:

2010 - 1 case in which decision was rendered;

2011 - 2 decisions, the ground of a claim was a violation of the right to work, health and gender;

2012 - 0 cases

2013 - 3 decisions, the grounds of claims were violation of personal rights, discrimination on sexual orientation

2014 - 2 decisions and 1 case in work - ground of claim was a violation of the right to work

2015 - 1 decision, 7 cases in work - ground of claims was a violation of the right to work  
The Judicial Council noted that the data referred to are from PRIS. Data relating to the year 2015 were up to date, while for previous years there is a possibility of differences in the data of manual reports and those which are in PRIS.

## II Statistical Data of the Ombudsperson Institution

*Number of discrimination cases decide on by courts (2010-2015)*<sup>33</sup>

Year	2010				2011				2012				2013				2014				2015			
Type of court	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM	V	EB	OI	IM
Civil court	1				6				12				14				19				8			
Misdemeanour court					17			1	6				45				7				21			

On the question are there any references to the relevant UN conventions (CEDAW, CERD, etc), the ECHR and/or other relevant EU legal frame work made in these judgments, or to relevant case law of the ECtHR and/or the CJEU, the OI stated that in the reasoning of their judgments, judges refer to the decisions of the European Court of Human Rights and the European Court of Justice, as well as the standards created in jurisprudence of same courts.

Intermediaries in their replies indicated that practice of the courts in Montenegro regarding to references to international conventions and other relevant EU legal frameworks, as well as regarding the application of the case law of the ECtHR, is still not harmonized, with the exception of the Constitutional Court of Montenegro. Some of the intermediaries stated that they are not sure if they refer at all, while the Judicial Council stated that it has no information in this respect.

Judges and misdemeanour judges on this issue, either did not give an answer or answered that they are not familiar, or that so far they did not have cases of discrimination. A number of judges stated that in their decisions they referred to the Article 14 of the ECHR, Article 158 of ILO Conventions, but not on decisions of the ECtHR and ECJ.

On the question - do judgments contain sanctions that relevant stakeholders assess as effective, proportionate and dissuasive, and whether the immaterial damages are taken into account, the OI noted that although Article 26 of the Law on Prohibition of Discrimination clearly stipulates what can be requested with such claims, the largest number of claims is limited to determining whether there has been discrimination and on claim damages for mental suffering due to violation of honour, reputation and personal rights. In cases where discrimination is found, the courts usually partially adopt the claim concerning the non-pecuniary damage, the amount which is usually twice smaller than the one that is challenging the claim.

<sup>33</sup> The OI noted that the data on the number of discrimination cases in which courts decided are not such ones on which can be relied because they aren't based on well-established state of facts, keeping in mind that the OI has no control over the same, but only limited access, through referral requirements for submission data, which in some cases ends on not submitting or submitting only sporadic parts without substantial display of data on the number of claims and declarations, the applicants, grounds of discrimination, number of final decisions etc.

Following the OI's opinion, all this indicates a defect in terms of restrictive measures imposed in cases where discriminatory treatment of the defendant was found and the question which should be asked is whether and to what extent the effects of discriminatory treatment are eliminated, which is the essence of the protection of victims.

The intermediaries generally answered that a number of proceedings that have appropriate sanctions is really law and always tends to give lower sanction - usually it is a conditional sentence, which does not act preventive (applicable to criminal proceedings), or that they do not have information in this respect in that direction.

Certain judges either did not reply to this question, or replied that as civil judges they do not impose sanctions, but certainly rule on non-pecuniary damages in cases where its award justified. Some replied that in their practice they did not have any discrimination cases and don't have experience in that respect, but they certainly need education in this area, while some of the respondents answered with yes, but without giving examples and reasons.

On the other hand, the criminal judges stated that the verdicts include sanctions that are proportionate and dissuasive, what they take into account through general prevention, which is defined by law. Are such sanctions efficient is the domain of a broader consideration and should involve all relevant institutions, especially the institution in which the convicted person is serving his sentence.

Misdemeanour judges mostly responded that they impose penalties - prison, a fine and protective measures in order to prevent re-committing discrimination, but when imposing such sentence they do not take into account the immaterial damage.

When asked what measures can be taken to ensure implementation of the sanctions and what kind of support would be needed in order to improve the situation, none of the respondents answered.

Final judgments are published on the website of the court that rendered the decision, after anonymisation, which are categorized by the courts and departments within the courts, in accordance with the Rules of the Court. In accordance with the Law on Civil Procedure, the decision is rendered to the parties involved in dispute. Harmonization of the court practice is done through the forensic practices that are formed before the courts.

The respondents did not provide a good practise example of dissemination of the court decisions on discrimination, while the OI in this respect noted that under the current Regulations on the content and manner of keeping separate records, has a limited access to information related to reported cases of discrimination which are to be resolved before the competent courts. In his opinion this creates a barrier in the direct and effective communication and exchange of information which courts have, and over which this Institution should have a complete control, which finally leads to a sporadic and superficial examination of the judgment rendered in the proceedings for protection from discrimination. Data on the number of claims, grounds of discrimination, the manner of termination, etc. are obtained on written request of the OI, which is certainly not enough for a complete review and analysis of the situation that would result in a detailed and comprehensive knowledge of the courts in protecting the right to non-discrimination. This is only not so in a case where the OI appears as intervener in civil proceedings.

Also, the OI is not familiar with the practice of dissemination of court decisions, which would certainly be of a great importance, especially in terms of raising the awareness, the empowerment of the potential victims, and could act as a preventive and at the same time promote ways and mechanisms for protection from discrimination.

The intermediaries stated that the search of the cases on the website of the court that rendered the decision is difficult because in order to reach a concrete decisions, it is necessary to know its number and/or the name of the party, so the courts have not established a practice of adequate dissemination of their decisions in the discrimination cases. This does not refer to the Supreme Court which established the practice of distribution of the bulletins of the court decisions to the NGOs. They also said that the insight into the judgment is only possible in accordance with the Law on Free Access to Information if requested by the type of offenses for example, so it is considered that the practice in this respect endangers the work on prevention and protection of human rights, as many judgments are unavailable to the public. Some believe that it is necessary to change the practice and make it available to the NGOs dealing with human rights all the information relevant for the evaluation and analysis of non-discrimination.

To this question the judges mostly answered that all courts are obliged to publish anonymised final judgments on the portal [www.sudovi.me](http://www.sudovi.me). One of the systems for research of judgments has a specific concept for research and if one types in the concept of discrimination, the "search" option will find and list all judgments containing the specified word. The disadvantage is that according to the above criteria the search will find the judgments in which the judge, when writing, used that word unrelated to the subject of the dispute.

A number of judges in this respect proposed that the solution would be to make a special "window" for the recording of these types of cases when registering a decision into the electronic data base, in which way a centralized database would be created.

A number of judges stated that the bulletins which contain both domestic and international practice are regularly submitted to all courts, while one number answered that there is no good practice examples in this respect or that they are not familiar with it.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

Centre for training in the Judiciary and Public Prosecution Office (JTC) in its response stated that they organize trainings on anti-discrimination in average three to four activities/training modules annually. During 2015, in the area of anti-discrimination they conducted three activities that were related to: anti-discrimination legislation in Montenegro with special emphasis on the obligations of Montenegro upon CEDAW Convention and the Convention on the Protection of Domestic Violence and Against Women; the elimination of hate crimes and violence; the fight against discrimination based on sex/gender, sexual orientation and disability. In the above-mentioned activities participated 59 representatives of the judiciary in total (out of which 15 state prosecutors, 2 advisors in the state prosecutor's offices, 19 judges, 9 advisors in courts, 4 judges of the Misdemeanour Council – Misdemeanour Court of Second Instance and 10 judges of Misdemeanour Courts).

In previous years, the training in this area was organised also on the topics such as: "Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence - Istanbul Convention", workshop/seminar on "Learning Different Experiences of the Registered Partnership" etc.

Also, in 2014, the judicial officials had the opportunity to acquire and improve their knowledge through the methodology of distance learning courses i.e. e-learning course on anti-discrimination, in cooperation with the HELP program of the Council of Europe. Distance learning course on the subject of anti-discrimination attended 21 participants (10 judges and 11 prosecutors).

In addition, the Center conducts training on the European Convention on Human Rights and standards of protection, jurisprudence and practise of the European Court of Human Rights, the practice of the Constitutional Court in ruling upon constitutional complaint, then mobbing, human trafficking, domestic violence, legal aid, etc. Also the Centre regularly distributes to all courts and prosecution offices in Montenegro a Legal Bulletin - Human rights in Europe, which is a source of summaries of the latest decisions of the European Court of Human rights with comments. This long-standing practice of the Centre is implemented in cooperation with the AIRE Centre from London (Centre for legal assistance regarding the protection of human rights in Europe) and the Council of Europe.

Target groups of the Center are judges and prosecutors (including misdemeanour judges) and advisors in courts and prosecutors' offices; training activities in this area are implemented as part of a program of continuous training; participation in training is based on the interest of participants and the trainings are not mandatory.

The lecturers are judges and prosecutors who have undergone training for trainers in this field, judges and prosecutors who have undergone training on the ECHR and human rights experts in this field working in independent institutions and institutions involved in the fight against discrimination, and experts in the field of environment and abroad. The implementation of the curses on anti-discrimination project is based (founded by international donors).

The JTC centre does not have a knowledge if there are any specific handbooks developed or translated as a tool providing basic guidance to judges on identifying discrimination and rendering judgments but they consider that it would be useful.

#### **Anti-Discrimination Courses 2010-2015<sup>34</sup>**

## **4. Procedural Aspects in Discrimination Cases**

### **4.1 Mediation**

As above mentioned, the Law on Prohibition of Discrimination in its Article 21 paragraph 1 item 3 prescribes that the Protector of Human Rights and Freedoms (the OI) is competent to conduct the conciliation proceeding, with the consent of the person allegedly discriminated against, between that person and authority or other legal and natural person he/she considers to have performed discrimination, with the possibility of concluding a settlement out of trial, in accordance with the law regulating the mediation proceedings. This law does not prescribe any other legal basis for mediation.

Article 3 of the Law on Mediation<sup>35</sup> stipulates the rules for mediation procedure in civil disputes, including family disputes, commercial, labour and other property relations of natural and legal persons. The mediation proceedings is initiated on the basis of agreement (consent) between the parties, and if the judicial proceedings are initiated, upon the recommendation of the court. Analogous application of this Law, Center for mediation can carry out mediation proceedings in cases of discrimination based on the recommendation of the court, if the court proceedings began.

Following the reply of the OI, the criteria by which this institution is managed when deciding to start mediation is every case where the merits of concrete initiative are determined.

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<sup>34</sup> See Annex no. 4 for more details on the trainings and courses, as well as their short description.

<sup>35</sup> Official Gazette of Montenegro no. 29/12 and 30/15.



Center for Mediation, as an intermediary and other intermediaries have no information in this respect.

Examples of good practice were not mentioned by any of the respondents. The questions on how sustainable was the outcome in terms of preventing future discrimination, what are the major challenges for using mediation in discrimination cases and what kind of support would be needed improve the situation is left unanswered.

## 4.2 Evidencing Discrimination

Situation testing is determined in Article 30(3) which prescribes that "the lawsuit under Article 26 of this Law may also be filed by a person who, with intention to directly verify the application of the rules on non-discrimination, introduces him/herself as a person, or put in the position of a person who may be discriminated on the grounds referred to Article 2 of this Law".

Also, Article 33 as stated above, provides for the obligation of the bodies who decide on acts of discrimination, to keep separate records of the procedures and decisions made (special records).

Protector did not answer the question what are the main challenges in proving discrimination, as well as what kind of support would be necessary in order to improve the situation.

The Intermediaries do not have information in this regard.

Judges and judges of Misdemeanour Courts have no experience or knowledge in this respect.

## 4.3 Strategic Litigation

Article 21 paragraph 1 item 4 of the Law on Prohibition of Discrimination stipulates that the OI can initiate the procedure for protection against discrimination in court or appear in that proceeding as an intervener if the party makes probable, and the Protector assess that respondent performed discrimination by the treatment on the same ground toward a group of persons with the same personal characteristics.

Article 30 of the Law on Prohibition of Discrimination prescribes that the lawsuit referred to in Article 26, paragraph 1 items 1, 2 and 4 of this Law may be filed, on behalf of the discriminated person or group of persons, also by organizations or individuals who are dealing with the protection of human rights.

The OI stated that the criteria governing when deciding whether to go in the strategic litigation are: whether this is a case of discrimination which deserves a deeper attention, especially when it comes to multiple, repeated or prolonged discrimination, where is pointed to a disproportionate power relation between the victim and the discriminator, if discrimination is focused on the vulnerable and especially vulnerable groups, or if the act of discrimination is repeated several times.

On the question of what has been achieved in the case of strategic litigation, the OI gave an example that in 2014 appeared in three sets of civil proceedings in the role of an intervener on the side of persons with disabilities, relating to discrimination in the field of accessibility, and that in all three sets of proceedings before the Court of First Instance in Podgorica, direct discrimination was found.

To the questions - what are the main challenges in using strategic litigation in the fight against discrimination, and what kind of support would be needed in order to improve the situation, the OI did not give an answer.

The Intermediaries stated that they have no knowledge in this respect because they do not deal with strategic litigation.

#### 4.4 Class Action/*Actio Popularis*

As mentioned above, the Law on Prohibition of Discrimination allows that in certain circumstances the OI can initiate the procedure for protection against discrimination in court and in that case a consent of a victim is not needed, but only in cases when the Protector assesses that respondent performed discrimination by the treatment on the same ground towards a group of persons with the same personal characteristics. However, the OI stated that so far he has not independently initiated a court proceedings for protection from discrimination because they believe that the ex officio initiation of such proceedings would be complicated when national authorities are involved, because the same party would appear in dispute - state. For this reason the OI decided to participate in these proceedings always and exclusively as an intervener.

Law on Prohibition of Discrimination does not provide for the use of *Actio popularis*.

#### 4.5 Shifting of the Burden of Proof

Answering on this question, the OI indicated that, while respecting Article 29 of the Law on Prohibition of Discrimination, the standards of the European Court of Human Rights and the European Court of Justice, acting on all the initiatives, consistently follows the principle relating to "burden of proof", i.e. the switch of burden of proof on those for whom there are reasonable indications that they have committed an act of discrimination.

The OI is of the opinion that the application of the standard rules of evidence and the burden of proof applicable in the criminal and misdemeanor proceedings constitutes an obstacle for providing the effective protection against discrimination.

The OI did not answer the question of what are the main challenges and what kind of support is needed to improve the situation in this respect.

The Intermediaries indicated that they do not have that kind of information.

An objectively research in this respect could not be done because neither the courts nor the intermediaries have this type of information, and the only source of information is the opinion of the OI on its work.

#### 4.6 Remedies

Law on Prohibition of Discrimination stipulates that anyone who considers to be discriminated against by an act, action or failure to act made by an authority and other legal and natural persons, may address the Protector with a complaint or seek for the court protection, in accordance with the law. Prior to initiation or during the lawsuit proceeding referred to in Article 24 of this Law, upon the proposal of the party, the court may pass temporary measures, and in the dispute for protection from discrimination the revision shall be always allowed.

This law also prescribes that when during an inspection control is found that the law or other regulation is violated, in addition to the powers prescribed by the law, the inspector has the power to, on the request of a person who believes to be discriminated and who initiated the

proceeding for protection from discrimination before the competent court, temporarily postpone the enforcement of the decision, other act or action of the subject of control, until the final court decision.

On the questions which remedies are actually made use of, to what extent to the remedies contribute to preventing discrimination, what are the major challenges for identifying adequate remedies and guaranteeing their implementation and what kind of support would be needed in order to improve the situation, the OI or the Intermediaries did not answer.

#### 4.7 Follow-Up to Opinions and Recommendations

In accordance to the Law on Protector of Human Rights and Freedoms of Montenegro, the OI can issue individual legal acts of procedural and substantive nature. The decision of procedural nature are rendered if the OI decide not to start proceedings, and of substantive nature are the opinions stating that discrimination is not enforced and opinions with the recommendation, stating that discrimination is enforced in which case the Institution gives one or more recommendations.

The recommendations, views and opinions are not legally binding. Administrative authorities, however, have a legal obligation to cooperate with the OI, allow him access to their premises and make available all the information they hold, regardless of the degree of confidentiality (when it is of interest to the proceedings pending). Failure to follow these legal obligations is the basis for initiation of appropriate disciplinary and misdemeanour proceedings.

In case that discrimination is found, the recommendations are formulated so that the opposing side has to take concrete measures and actions to eliminate the violation and consequences which are result of discrimination.

The OI stated that when issuing recommendations, it ensures that they are enforceable, specific and concrete, and that with their implementation, taking into account all the circumstances of this case, the found discrimination can be eliminated in best way, preventing its further expression and reducing the effects of discrimination.

On the questions, are there follow-up procedures in place to monitor compliance with recommendations, are there any good practice examples of monitoring the implementation of recommendations, what are the major challenges for doing follow-up work and what kind of support would be needed in order to improve situation, the OI did not give answers.

The intermediaries, judges and judges of Misdemeanour Courts have no knowledge in this respect.

## 5. The Role of Universities in Combating Discrimination

### 5.1 Law Departments

The Faculty of Law of the University of Montenegro does not offer special courses on antidiscrimination. There are no such courses neither at other university units or police academy (which is not an institution of higher education, but a kind of a college).

However, under the regular accreditation procedure for all study programs at the University of Montenegro, Law Faculty has envisaged that special anti-discrimination course “European Anti-discrimination Law” will be established within the master degree study program, starting as of 2017. So far, obviously, the institution and the society in general - since the

University of Montenegro is the sole public institution offering higher education - were not aware enough of the importance of the problems raised by the discrimination and, more specifically, of the positive impact that such specific anti-discrimination courses may have on both personal and more general levels.

Having in mind the factual situation as of 2010, the anti-discrimination contents, both as a general concept and various regulatory and case-law "manifestations" of this concept, have been taught within various courses that are part of the officially recognized and approved curricula of the Faculty of Law.

More specifically, and having in mind that the actual higher education model is 3+1+1+3<sup>36</sup> those courses are the following:

1. Department of Legal Studies: at graduate level – “Contemporary Political Systems”, “Constitutional Law”, “Public International Law”, at postgraduate specialist level – “International Human Rights Law”, “International Humanitarian Law”, “International Legal Clinic” at the study program of “International Law”, at postgraduate master level – “European System of Human Rights Protection and Human Rights Implementation” at the study program of “International Law”, at doctoral level – the course of “International Protection of Human Rights” at the study program of International Law;
2. Department for Security and Criminalistics: at graduate level – “Security and Human Rights”.

Within the period of 2010 – 2015, the courses of the graduate level have been attended, on average, by approx. 250 students at each department, and at postgraduate specialist level the courses have been attended on average, by approx. 30 students. Concerning postgraduate master level the courses indicated have been attended on average, by approx. 20 students until 2012 since there was no enrolment for the study program where the courses are its part. Concerning the doctoral level, within the period 2010-2015, there was only one PhD student attending the indicated course, as a part of the study program of International Law.

The above/mentioned courses are available to a broad range of vulnerable groups, having in mind that the Faculty provided access to persons with handicaps, signs written in Braille.

Although, there is social and cultural need on introducing anti-discrimination courses in the curricula of the public university in Montenegro, having in mind that it is reachable to a great number of students, from all socio-economic structures. However, there are certain obstacles concerning such introduction. Namely, there are strict procedures for changing any single part of the curricula that are officially introduced as well as numerous instances, including the Council of the Faculty, the Senate of the University, the Council for Higher Education, the Ministry for Education that are supposed to support any significant change, such as introduction of a course. Also, there is still a significant gap between the modern tendencies and the official will of the bodies in charge of approving such changes, which are still mostly composed of academics who had their formal education during the period in which Montenegro was a communist country.

Concerning practical course encompassing antidiscrimination, there is compulsory course of International Legal Clinic at the level of specialist studies of the Faculty of Law. It promotes international anti-discrimination standards thorough debates, case study, analysis of legislation and case-law, moot court exercises. This course have been realized in cooperation

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<sup>36</sup> The structure is the following: 3 years of undergraduate studies + 1 year of specialist postgraduate studies + 1 year of master postgraduate studies + 3 years of doctoral studies.

with different international organizations, but the most successful is its long cooperation with the UNHCR Mission in Montenegro, based on the Memorandum on Cooperation.

The Faculty of Law representatives reported the established relations with most institutions relevant for promoting anti-discrimination rules and their implementing in Montenegro. This includes the OI, the JTC, Montenegrin Bar Association, Montenegrin State Prosecutor Office and several CSOs. The type of such cooperation varies, but it usually includes organising of joint round tables, short trainings for the professionals involved in implementing anti-discrimination rules of national and international law, as well as organizing public lectures. Such cooperation, though, at a larger scope, depends on the individuals more than on the institutional approach. Some CSOs reported that they would like to have better cooperation with the Faculty as the institution, commending at the same time cooperation with certain professors who have “better understanding for cooperation”.

Cooperation challenges are numerous, and among them the most mentioned are: the lack of awareness regarding the importance of the anti-discrimination rules, the lack of funding for joint programs, etc.

As a good example of cooperation, the Faculty representatives emphasized the clinical legal education, including trainings and exercises on implementing anti-discrimination rules, which were supported financially under the development project, financed by the Ministry of Education of the Government of Montenegro in 2012/2013.

In order to improve the cooperation with the relevant stakeholders, the Faculty of Law has recently signed the Memorandum of understanding with the JTC, which will allow the parties to get more involved in the activities of another party in the near future.

Challenges are mostly connected with financial aspect, having in mind that the University budget has been highly restricted in the indicated period of time. An additional obstacle for better cooperation is the fact that there are no many professors of the Faculty of Law that are both interested and competent enough to give lectures and lead courses on anti-discrimination.

And finally, unfortunately, there were no major, i.e. significant researches in this area, so far. The first such research is this one, in which the participation of the Faculty of Law was provided through the SEELS Network.

## 5.2 Other Departments

Special course on anti-discrimination provisions and standards has not been offered by other departments of the University of Montenegro.

However, the Faculty of Philosophy and the Faculty of Political Science offer certain courses in which anti-discrimination is integrated into.

The Faculty of Philosophy offers the following courses, which have antidiscrimination aspects:

- a) at Department of Education /Pedagogy - graduate studies: “Intercultural Pedagogy”, “Pedagogy of Children with Special Needs”, “Social Pedagogy”; postgraduate specialist study: “Intercultural Pedagogy”, “Social Pedagogy”; postgraduate master programs: “Education / Pedagogy”, “Educational Policy”, “Inclusive Education”;
- b) at Department of Pre-school Education: graduate studies: “Family Pedagogy”, “Fundamentals of Inclusive Education”, “Pedagogical Communication”, “Developing Issues in Inclusive Education”.

All these courses are compulsory.

In addition, it is to report that there are courses curricula focused on anti-discrimination activities at the Faculty of Philosophy, within the individual study programs. Among others, master programs for Inclusive Education and Educational Policy is, in its starting point with the idea of creating a supportive environment of teaching on diversity, overcoming the discrimination on all grounds. Both programs are constituted with the support of the European Commission, in the framework of Tempus networks. The Faculty also cooperates with the Council of Europe on the project “Travel Pass to Democracy and Teaching Controversial Issues“ which is undergoing.

Although there are no specific courses on antidiscrimination or courses integrating antidiscrimination at all departments of the Faculty, it is expected that the teaching of all subjects is based on humanistic approach enabling the students to develop non-discriminatory attitudes, as being said by one examinee.

There have been no researches in respect of antidiscrimination at the Faculty of Philosophy neither within the indicated period nor before or after.

The Faculty has cooperation with CSOs. The cooperation with NGO “Pedagogical Center” was emphasized having in mind their joint project for further training of teachers in Montenegro "Education for Social Justice-against Prejudice and Stereotypes". The program is certified in the Catalogue of advanced training of teachers since 2009.

A good practice example reported by the Faculty is the inclusion of students with disabilities in the entire education process. Students are engaged in practical activities in the resource and day centers. Also, the Roma students enrolled at the Faculty got significant support and motivation for participation in higher education through the project of student volunteerism. In addition, the student volunteers (including Roma students) keep organizing activities support to the children in learning process in eight primary schools in Podgorica and Nikšić, where the highest percentage of children belong to refugees and internally displaced persons.

The Faculty of Political Science offers different courses in which anti-discrimination is covered. Those are the following courses:

- graduate course “Human Rights” at the Departments of International Relations, “Journalism and Politicology”, attended by approx. 250 students,
- graduate course of “Journalism Ethics” at the Departments of Journalism, attended by approx. 50 students,
- graduate course “Public International Law” at Departments of International Relations and European Studies, attended by approx. 150 students,
- graduate course of “Social Work with Marginalized Social Groups” at the Departments of Social Work, attended by approx. 50 students,
- postgraduate specialist course of “Gender Study” at the Departments of Journalism, attended by approx. 50 students,
- graduate course of “Labour Law at the Departments of Social Work”, attended by approx. 50 students,
- graduate course “European Labour Law at Department of European Studies”, attended by approx. 50 students.

All these courses are compulsory.

The aforementioned courses are accessible to a broader public of vulnerable persons, having in mind the concerned described facilities. In addition, the good practice example is connected with voluntary students work in transposition of the printed teaching materials into Braille and audio materials in order to meet the needs of the blind or deaf students.

The cooperation with the relevant stakeholders is connected with organizing joint seminars and round tables with CSOs. Also, in 2013 the Faculty and UNICEF representation in Montenegro signed the Memorandum on Cooperation, which emphasized the promotion of rights of a child and, especially, the rights of children belonging to marginalized groups. Two professors in cooperation with UNICEF prepared two publications on “Media and Rights of a Child” – one is teaching material for students and the other is practicum for teachers.

Also, as of 2014, the Department of Journalism has an active cooperation with OSCE Mission in Montenegro, organizing ten workshops yearly on the topics of ethics in journalism, which covers antidiscrimination aspects.

At the Faculty of Political Science there have been no researches in respect of antidiscrimination since its establishment in 2006.

Finally, at the Police Academy, which does not have a status of a university unit but the status of a higher vocational school, there are two courses with incorporated antidiscrimination contents. Those are “Human Rights” and “Ethics and Codex”. The OI emphasized the good cooperation with this institution in regard to taking part in trainings and presenting by the staff of the OI.

### 5.3 Legal and Institutional Structures Combating Discrimination

There is a prohibition of discrimination in the Statute of the University of Montenegro,<sup>37</sup> which was brought on the basis of Article 36(2) of the Law on Higher Education<sup>38</sup> which was adopted by the Steering Board of the University of Montenegro on 04.02.2015.

According to the Article 3(1) of the Statute, the University should provide protection from discrimination on any ground, in accordance with the special law. According to the Article 3(2), the University regulates the basic moral and professional principles of academic and other staff in the Code of Ethics.

Anti-discrimination is also stipulated in the Article 91, according to which all academic promotion should be exercised on the basis of academic merits, without discrimination on any ground; as well as in the Article 141, according to which the rights and obligations of students, that are determined by law, shall be exercised in a way that every student has a special right to equality, diversity and protection against all forms of discrimination, in accordance with the law and the Statute.

The institution established by the Code of Ethics is the Court of Honor of the University of Montenegro, which establishes responsibility and imposes measures against violations of moral and professional principles established in the Code of Ethics.<sup>39</sup>

According to the Code of Ethics, the unacceptable appearance and behaviour within the University community, during teaching and professional work, are the following: corruption, discrimination, harassment, conflict of interest, disloyalty, irresponsibility, etc. (Article 1(6)).

Also, any form of discrimination against students on the basis of race, colour, national origin, social and ethnic origin, association with a minority or national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health status, disability, age, social status, marital and family status, membership in a group

<sup>37</sup> Available at: <http://www.ucg.ac.me/fajlovi/Statut%20Univerziteta%20Crne%20Gore%20.pdf> (29.03.2016.).

<sup>38</sup> Official Gazette of Montenegro no. 44/14.

<sup>39</sup> <http://www.ucg.ac.me/fajlovi/Eticki%20kodeks.pdf> (29.03.2016.).

or assumed membership in a group, political party or other organization, as well as other personal characteristics, shall be prohibited (Article 1(10)).

According to the Article 1(11) victimization is prohibited, stipulating that students cannot suffer the harmful consequences caused by reporting discrimination, testifying before the competent authority or the University body, as well as because of offering the evidence in examining the case of discrimination.

Finally, according to the Article 1(12), students' consent on discrimination does not relieve member of the academic and other staff who discriminates, gives the instruction or incites discrimination, from the responsibility.

The Court of Honor is independent in its work, as guaranteed in the Art 9 of the Code. Also, it has nine members and one of them is a student representative.

Although the legislative and institutional frameworks exist, and although its functioning is well known among the teaching staff and students, being very well covered by media, there has been no case on discrimination before the Court of Honor so far.

The courses and services offered by the University are easily accessible for a broad range of vulnerable groups. Such students are most often released from paying tuition. The Faculty of Law and Faculty of Political Science are equipped with special entrance ramps, elevator and signs in Braille in order to provide access for the students with disabilities.

Although it would be needed, no surveys have been conducted to map the level of awareness for discrimination among teaching staff and/or students as well as occurrences of discrimination at the University.

The principle of affirmative action is applicable also at the University. Due to such application, Roma students and students with disabilities do not pay tuition by the decision of the University Steering Board.

## 6. Developing a Culture of Rights

The general level of a human rights culture in Montenegro is low. This statement can be proven also in respect of the antidiscrimination culture. Having in mind aforementioned low figures of reported cases on discrimination, as well as the dominant patriarchal mentality, the conclusion on the need for development of such a culture is evident. This is stated in interviews with CSOs and other aforementioned stakeholders.

There is still an intolerance towards vulnerable persons, especially towards LGBT persons, Roma,<sup>40</sup> persons with disabilities,<sup>41</sup> as well as against women.<sup>42</sup> Latest attack on a

<sup>40</sup> Available at: <http://rae-portal.com/2012/05/diskriminacija-roma-u-crnoj-gori-i-dalje-problem/>, [http://www.unicef.org/montenegro/Studija\\_UNICEF-za-web-cg.pdf](http://www.unicef.org/montenegro/Studija_UNICEF-za-web-cg.pdf) (27.03.2016.).

<sup>41</sup> Available at: <http://www.disabilityinfo.me/component/k2/item/1135-dostupnost-zdravstvene-zaštite-za-osobe-s-invaliditetom-od-zakona-do-prakse>, <http://korak-hapi-step.eu/tuzba-m-m-i-za-diskriminaciju-protiv-skupstine-crne-gore-zbog-nepriustupacnosti/>, <http://www.vijesti.me/vijesti/invalidi-rome-i-egipcane-i-dalje-diskriminisu-pri-zaposljavanju-5772> (27.03.2016.).

<sup>42</sup> Available at: <http://www.vijesti.me/vijesti/svaka-treca-zena-u-crnoj-gori-je-zrtva-nasilja-834267>, <http://www.slobodnaevropa.org/content/alarm-za-cijelo-drustvo-diskriminacija-zene-i-prije-rodjenja/25198568.html>; [http://www.slobodnaevropa.org/content/diskriminacija\\_u\\_crnoj\\_gori\\_zene\\_teze\\_do\\_posla\\_i\\_unaprjedjenja/24508011.html](http://www.slobodnaevropa.org/content/diskriminacija_u_crnoj_gori_zene_teze_do_posla_i_unaprjedjenja/24508011.html); <http://www.prs.hr/attachments/article/752/Socioekonomski%20po%20lozaj%20zena%20u%20Crnoj%20Gori.pdf>



representative of the organization “LGBT Forum Progress”, that happened in January 2016, showed lowest level of tolerance and awareness of diversity, and consequently culture of rights.<sup>43</sup> There were many similar attacks earlier towards different LGBT persons.<sup>44</sup>

Having in mind that building a culture of rights, which encompasses culture of tolerance and understanding of diversities, is a long process because it means also the fight against prejudice and conservative value system approach, day to day work on creating conditions for all citizens of Montenegro to feel free and safe, without fear of being different is indispensable. In this regard, public authorities and institutions should have principle role, in accordance to their competences, in solving the problems of discrimination of those who are different from the majority in regard to their orientation or some other personal characteristic. That is why we are concerned in regards of the disestablishment of the governmental Council for Protection against Discrimination in times of need for building of anti-discriminatory culture.

## 6.1 Assessing the Levels of Awareness

Awareness for the legal provisions prohibiting discrimination in Montenegro as well as institutional protection concerned is satisfactory among the judges, prosecutors, police, CSOs, other intermediaries, public authorities, but unsatisfactory within the general public. It is of specific concern the fact that the persons belonging to vulnerable groups, especially Roma people, are not aware of their right not to be discriminated and sense of equality. This leads further to a low level of assertiveness in the general public.

There is huge level of social distance on the ground of ethnicity in Montenegro. Although nationally representative surveys of public opinion, which measured such distance in Montenegro, were conducted in 2004 and 2007,<sup>45</sup> the survey results showing the existence of social distance in all aspects of life, from intergroup to interpersonal distance and intolerance, are still valid.

The results of the research conducted in 2011 on discrimination against minorities and marginalized social groups,<sup>46</sup> which dealt with discrimination in the access to education, employment, health and justice, showed that, on average, members of the Roma and Egyptian populations are the most marginalized and discriminated against in Montenegro. When it comes to discrimination in access to education, according to the survey, Roma and Egyptians and persons with disabilities are the most vulnerable groups, since 53% and 40% of citizens claimed that Roma and Egyptians and persons with disabilities do not have the same treatment as the majority the population when it comes to access to education.

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[http://www.nomobing.me/index.php?option=com\\_content&view=article&id=45:diskriminacija-ena-naradnom-mjestu-u-crnoj-gori&catid=11:vjediskriminacija&Itemid=5](http://www.nomobing.me/index.php?option=com_content&view=article&id=45:diskriminacija-ena-naradnom-mjestu-u-crnoj-gori&catid=11:vjediskriminacija&Itemid=5) (25.03.2016.).

<sup>43</sup> Available at: <http://www.vijesti.me/vijesti/diskriminacija-govor-mrnje-i-nasilje-su-apsolutno-ne-prihvatljivi-869830> (25.03.2016.).

<sup>44</sup> Available at: <http://www.vijesti.me/vijesti/vujosevic-dobacivali-su-mi-da-ce-me-prebiti-126224>, <http://www.gaystarnews.com/article/montenegrin-lgbt-activist-verbally-abused-hometown060712/#gs.CfF64tc>, <https://ca.news.yahoo.com/blogs/daily-buzz/montenegrin-gay-rights-activist-seeks-refugee-status-canada-185100528.html?nf=1>; <http://www.reuters.com/article/us-montenegro-gay-idUSBRE96NOV120130724> (25.03.2016.).

<sup>45</sup> Center for Democracy and Human Rights – CEDEM (2004 and 2007) *Ethnic distance in Montenegro*

<sup>46</sup> CEDEM (2011) *Survey on Discrimination of Minorities and Marginalized Societal Groups* (<http://www.cedem.me/sr/programi/istraivanja-javnog-mnjenja/ostala-istraivanja/viewdownload/38-ostala-istraivanja/208-%20istraivanje-diskriminacije-manjinskih-naroda-i-marginalizovanih-drutevnihi-grupa-jun-2011.html>) (15.01.2016.).

Similar conclusions have been reached in some qualitative statements. The focus groups that were held in regard to enable the report on child poverty in Montenegro<sup>47</sup> show that the poor Roma and Egyptian children are often faced with unpleasant situations in school, which their parents associate more with the ethnic distance than with poverty. Another disturbing finding of the focus groups was that the Roma and Egyptian children do not receive the help and protection of their teachers when they report bullying.

Results of public opinion survey in Montenegro, conducted in November and December 2015, showed that 20,1% persons think that discrimination is very present, 44,4% think that discrimination is present in general, 31,1% think that discrimination is not present in general and 4,5% think that discrimination does not exist.<sup>48</sup>

## 6.2 Achievements in Awareness Raising

Almost all mentioned stakeholders, some more and some less, were involved in awareness raising activities. However, the most active in the indicated period were the Ministry for Human and Minority Rights, the OI and CSOs.

The already mentioned survey of CEDEM showed that the presence of discrimination in public opinion is lower in 2015 than in 2010, comparing that in 2010 when the percentage of 72,6% was in favor of existence of discrimination in society, and it is 64,4% in 2015.<sup>49</sup> Although the percentage is lower, still the difference is not as great as it should be having in mind the undertaken legislative and institutional measures in order to combat discrimination.

The Ministry has been campaigning, for a longer period of time, on the prohibition of discrimination and the promotion of anti-discriminatory behaviour and practices. The campaign has been carried out continuously since 2011, with the aim of promoting respect for all human rights, creating a supportive and tolerant environment, and respect of diversity. The campaign included different vulnerable social groups (Roma, women, persons with disabilities, LGBT persons, women, national minorities, elderly). During 2015, as part of implementation of the media campaign, the TV spot, newspaper advertisement, flyer and billboard were made, with the message "Respect diversity, reject discrimination, accepts the human being". The aforementioned activities were aimed to inform citizens and public officers about anti-discrimination legislation, but also to assess the factual situation regarding the presence of discrimination. Therefore, education and promotion of anti-discriminatory behaviour form continuous activities of the Ministry, since the adoption of the Law on Prohibition of Discrimination, with the aim of enabling the largest possible number of those who are directly and /or indirectly involved in the protection against discrimination.

The OI organizes round tables, conferences and other awareness raising events mostly in cooperation with CSOs, which have a leading role in this context according to OI's opinion, with civil society organizations improving through participation in joint project activities, the involvement of the Institution in different conferences, round tables, seminars, training sessions, lectures and others. In this respect, continued good cooperation was reported with the NGO "Civic Alliance", Alliance Association of Paraplegics of Montenegro, NGO "Association of Youth with Disabilities", NGO "Children First", NGO "Association of the Blind of Montenegro", NGO "Women's Safe House" NGO "Action for Human rights" NGO "Queer of Montenegro", NGO "Anima - Center for Women and Peace Education", NGO "Centre for Anti-Discrimination" Ekvista", NGO "Centre for Democracy and Human rights",

<sup>47</sup> UNICEF (2011) *Report 'Child Poverty in Montenegro'* ([http://www.unicef.org/montenegro/media\\_19760.html](http://www.unicef.org/montenegro/media_19760.html)) (15.01.2016.).

<sup>48</sup> CEDEM (2015) *Survey on Discrimination in Montenegro – November/December 2015*, p. 9.

<sup>49</sup> CEDEM (2015) *Survey on Discrimination in Montenegro – November/December 2015*, p. 9.

NGO “Center Democratic Tradition” and others.

Huge problem in combating the discrimination is the self-awareness. Civic Alliance emphasized that often discrimination happens in schools and neither the children nor the parents are aware of their rights to effective equality. For example, there are lot of complaints on teachers reporting that Roma children are directed to sit in the last bench, or teachers tell them that they steal, that they are dirty, etc. However, these things are difficult to prove and the Roma themselves have no encouragement, knowledge and opportunities to complain about such discriminatory behaviours and violation of human rights. In many cases, victims have no awareness that their rights are violated and they are discriminated against.

When it comes to the children with disabilities in Montenegro, the stigma is recognized as one of the main obstacles to their full educational inclusion and involvement in the life of local communities as a whole. To answer this problem, in 2010 the Government of Montenegro and UNICEF launched a joint campaign “It’s About Opportunity” to combat the stigma and create a positive public image of children with disabilities. The impression is that after that persistent campaign the situation is better. More children with disabilities are seen in public, on TV, in social events, etc. The organizers of the campaign have periodically conducted tests of knowledge, attitudes and behaviour in order to assess the impact of the campaign. The results, as of 2010, indicate a significant improvement in the attitudes of the public towards children with disabilities.<sup>50</sup>

One more achievement in respect of the awareness raising was realized by NGO CEDEM. Namely, in the context of its activities in 2014, it prepared the “Guide for Anti-discrimination Legislation”, as publication in which there is a comprehensive data analysis of the national and international legal and institutional framework that regulates the field of prohibition and protection against discrimination. This publication is intended for both lawyers-practitioners, and citizens who want to become more familiar with the main institutional mechanisms of protection against discrimination and obtain information about how to contact these institutions.

Finally, having in mind the numerous allegations in media and in the public about gender discrimination in employment, as well as discrimination based on age, Civic Alliance conducted the research in that regard and found lot of discriminatory cases in different instances (ex. in job advertisements, in application process, in work, etc).<sup>51</sup> In order to further raise the awareness, continuation of aforementioned activities is desired. Also, new stakeholders should be involved, such as independent public thinkers, lawyers, faculties, etc.

### 6.3 Preventing Future Discrimination

In order to combat the stereotypes and prejudices lot of activities have been undertaken as of 2010. However still, the gap between the legal provisions and practice is huge in terms of prohibition of discrimination. That is why new activities on promotion of equality and prohibition of discrimination have to be continuously realized.

In addition, specific strategies dealing with the protection from discrimination of the specific vulnerable groups in the society were adopted. They are: Strategy for Improving the

<sup>50</sup> Available at: [http://www.unicef.org/montenegro/Studija\\_UNICEF-za-web-cg.pdf](http://www.unicef.org/montenegro/Studija_UNICEF-za-web-cg.pdf) pp. 40, 41. (15.01. 2016).

<sup>51</sup> Civic Alliance (2015) *Survey on Discrimination on the Ground of Sex and Age in regard to Employment*.

Situation of Roma and Egyptians for the period 2012-2016, Strategy of Minority Policy, Strategy on Improvement the Quality of Life of LGBT Persons for the period 2013-2018, and Action Plan for Gender Equality 2013-2017.

Affirmative action measures have been undertaken to the aforementioned vulnerable groups. However, still the self-awareness and assertiveness of certain groups and individuals belonging to those groups is at a low level. That has a lot to do with the human dignity and misunderstanding of the basic concepts of contemporary democratic society and the principle of the rule of law. And that is responsibility of the society as a whole.

Also, it is to be emphasized that all interlocutors from the CSOs mentioned that the state support for their work in combating discrimination is needed, as well as the state support for improving human and financial resources to the OI. This aspect is also important in regard to improvement of the research tools for the judgments search in the databases.

Having in mind the outcomes of the research conducted, it is to be concluded that the activities in promotion of antidiscrimination legal standards and best practices should be undertaken, targeting broad social groups. Also, additional trainings of judges, prosecutors, police officers, public servants, educators and students are needed in order to adequately address the lack of understanding fully the European anti-discriminatory standards.



## 7. References

### Electronic documents available on the Internet

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- <http://www.prs.hr/attachments/article/752/Socio-ekonomski%20položaj%20žena%20u%20Crnoj%20Gori.pdf> (27.03.2016.)
- [http://www.nomobing.me/index.php?option=com\\_content&view=article&id=45:diskriminacija-ena-na-radnom-mjestu-u-crnoj-gori&catid=11:vjediskriminacija&Itemid=5](http://www.nomobing.me/index.php?option=com_content&view=article&id=45:diskriminacija-ena-na-radnom-mjestu-u-crnoj-gori&catid=11:vjediskriminacija&Itemid=5) (29.03.2016.)
- <http://www.vijesti.me/vijesti/diskriminacija-govor-mrznje-i-nasilje-su-apsolutno-neprihvatljivi-869830> (25.03.2016.)
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- <https://ca.news.yahoo.com/blogs/daily-buzz/montenegrin-gay-rights-activist-seeks-refugee-status-canada-185100528.html?nf=1> (29.03.2016.)
- <http://www.reuters.com/article/us-montenegro-gay-idUSBRE96N0V120130724> (29.03.2016.)

### **Publications of organisations**

- Civic Alliance (2015) *Survey on Discrimination on the Ground of Sex and Age in regard to Employment*
- Center for Democracy and Human Rights – CEDEM (2004 and 2007) *Ethnic distance in Montenegro*
- Center for Democracy and Human Rights – CEDEM (2011) *Survey on Discrimination of Minorities and Marginalized Societal Groups*
- Center for Democracy and Human Rights – CEDEM (2015) *Survey on Discrimination in Montenegro – November/December 2015*
- UNICEF (2011) *Report on Child Poverty in Montenegro*
- Sigurna ženska kuća (2015) *Analysis of compliance of legislative and strategic framework of Montenegro with the Council of Europe Convention on the prevention and elimination of violence against women and domestic violence*

## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from particular experience (relationship of people with the majority population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviours of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **CSO**

Civil society organization

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, Labor Inspectorates, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination.

Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counsellors, etc.).

#### **OI**

The Ombudsman Institution (official title: Protector of Human Rights and Freedoms)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination



## Annex 2 – Template for Good Practice Examples

<b>Area:</b> <sup>52</sup>	Procedural aspects (evidencing discrimination)
<b>Title (original language)</b>	
<b>Title (EN)</b>	
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Zaštitnik ljudskih prava i sloboda Crne Gore Crna Gora
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Protector of Human Rights and Freedoms (Ombudsperson Institution) Montenegro
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	/
<b>Internet link</b>	/
<b>Type of initiative</b>	Survey
<b>Main target group</b>	potential victims of discrimination
<b>Brief description (max. 1000 chars)</b>	During 2014 the OI had in work 17 complaints of discrimination undertaken by commercial subject providing catering services to guests / foreigners / asylum seekers, because of their presumed country of origin, or the fear of infection through transmission of the Ebola virus. Bearing in mind the specific facts and the legal basis for action, employees in the sector for anti-discrimination carried out a situation testing, were an act of discrimination was not found neither unjustified isolation only on the basis of assumptions about the country of origin of asylum seekers.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> <li><input checked="" type="checkbox"/> <u>yes</u> how?</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> <u>no</u></li> <li><input type="checkbox"/> yes who? and how?</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> above international/EU standards</li> <li><input checked="" type="checkbox"/> <u>effectiveness and impact</u></li> <li><input checked="" type="checkbox"/> <u>innovation</u></li> </ul> <div style="display: flex; justify-content: flex-end;"> <div style="margin-right: 20px;"><input type="checkbox"/> transferability</div> <input type="checkbox"/> <u>sustainability</u> </div>

<sup>52</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Annex 3 – Statistics Ombud Institution

	2010	2011	2012	2013	2014	2015
<i>Budget in €</i>	374.103,32	485.945,97	531.324,32	528.924,32	526.160,26	531.457,54
<i>Number of staff (full time equivalent)</i>	18	20	22	21	20	24
<i>Number of professional/legal staff (full time equivalent)</i>	/	/	/	/	/	/
<i>Complaints/queries received</i>	481	720	617	611	576	641
<i>Procedures (investigations, audits etc.) initiated by EB/OI at own initiative</i>	27 at own initiative	13 at own initiative	12 at own initiative	15 at own initiative	10 at own initiative	30 at own initiative
<i>Total number of cases (please break down according to different grounds)</i>	/	/	/	/	/	/
<i>Age</i>	/	/	/	1	1	/
<i>Belief</i>	/	/	/	/	/	1
<i>Disability</i>	1	3	5	6	7	6
<i>Ethnic origin</i>	4	12	21	10	8	15
<i>Gender</i>	2	2	12	3	3	8
<i>Gender identity</i>	/	/	/	/	/	/
<i>religion</i>	/	/	1	2	/	4
<i>Sexual orientation</i>	2	7	3	3	9	5
<i>Other grounds</i>	3	7	19	21	26	44
<i>Total number of cases (please break down according to different forms)</i>	/	/	/	/	/	/
<i>Direct discrimination</i>						
<i>Indirect discrimination</i>						
<i>Harassment</i>						
<i>Victimization</i>						
<i>Other forms</i>	/	/	/	/	/	/
<i>Number of surveys</i>	/	/	/	/	/	/
<i>Number of research projects</i>	/	/	/	/	/	/
<i>Number of awareness initiatives</i>	5	7	21	16	11	12
<i>Number of training actions</i>	2	3	3		3	8
<i>Number of promotional initiatives to support good practice</i>	3	4	4	5	4	5

## Annex 4 – Anti-Discrimination Courses (2010-2015)

Title of course	Description of content	Teaching aims	Target groups	Educators/lecturers/speakers	Mandatory (M)/elective (E)	Basic training (BT)/professional development training (PDT)	Number of participants	Date of implementation
"Values, gender relations and corruption " x 4 seminars	Traditional forms and corruption; Anachronism in male- female relationships; The moral crisis-the way to corruption, etc.;	The aim of the seminar is to present to participants the concept of corruption and integrity from the anthropological, sociological, cultural and political point of view.	judges and prosecutors	Lecturers were professors on Political Science: prof. dr Ratko Božović, prof. dr Čedomir Čupić, prof. dr Zoran Stojiljković, and Nada Drobnjak, president of the Board of Gender Equality	E	PDT	71 participants in total	-18 may 2010 -2 and 3 December 2010 -3. and 4 March 2011 and -2 and 3 June 2011
"The concept of gender equality and labor rights of women "	The seminar is part of the project "Improvement of labor and economic rights of women in Montenegro", the Department for Gender Equality of the Ministry for Human and Minority Rights implemented with the financial support of the Development Fund for Women United Nations - UNIFEM. Specific topics that were discussed were: Gender equality - concepts and theories ; The international legal framework for	The aim of the seminar is to educate judges and prosecutors on the protection of labor rights of women and gender - based discrimination.	judges and prosecutors and others	The lecturers were Mrs. Nada Drobnjak, Member of the Parliament of Montenegro and President of the Parliamentary Committee for Gender Equality, and Ms. Slavica Bajić, Deputy Secretary of the Secretariat for Legislation	E	PDT	9participants	-31. January 2011

	achieving gender equality; CEDAW - Convention on the Elimination of All Forms of Discrimination against Women ; Montenegrin legal framework for achieving gender equality; The European Court of Human Rights in Strasbourg ; Case Studies - group exercise							
"The general legal regime of prohibition of discrimination"	Specific topics were: equality, tolerance and non-discrimination; Legal definition of discrimination (5 constitutive elements defining discrimination); The forms of discriminatory behaviour (direct discrimination, indirect discrimination, victimization, bullying, hate speech, severe forms of discrimination. Cross-linked and multiple forms ) ; Typical cases of discrimination in certain segments of social life and cases of discrimination against particular categories of persons; The mechanism of legal protection against discrimination	These workshops are organized to strengthen the capacity of government institutions implementing the Law on Prohibition of Discrimination	judges, prosecutors and police representatives	Lecturers Prof. Dr. Saša Gajin, regional expert for discrimination issues and Siniša Bjeković, local expert from the Centre for Human Rights Law School in Podgorica	E	PDT	29 participants	-5 and 6 May 2011

"The prohibition of discrimination against the LGBT community"	Specific topics that were discussed were: The European Court of Human Rights - discrimination against the LGBT community; The prohibition of discrimination against the LGBT community in Croatia ; The European Court of Human Rights - all forms of discrimination; A detailed study of 3 cases before the European Court concerning the LGBT community.	These workshops are organized to strengthen the capacity of government institutions implementing the Law on Prohibition of Discrimination.	judges, prosecutors and the others	Lecturers were Mrs. Sanja Juras, Coordinator of Lesbian group Kontra and Mr. Goran Miletic, Civil Rights Defenders, Program Director for Western Balkans	E	PDT	29 participants	- 22 and June 2011
"The prohibition of discrimination against persons with disabilities"	Specific topics that were discussed were: Political Action and the legal framework of the European Union and the Council of Europe on the human rights of persons with disabilities; The jurisprudence of the European Court of Human Rights; Prohibition of discrimination against persons with disabilities - experience and lessons learned from Macedonia ; Anti-discrimination legislation in the Republic of Serbia; Prohibition of discrimination against persons with disabilities - experience	These workshops are organized to strengthen the capacity of government institutions implementing the Law on Prohibition of Discrimination	Besides the representatives of the judiciary, target groups were representatives of the Ministry of Health, Police Administration, Ministry of Sustainable Development and Tourism, etc.	The lecturers were: Mrs. Slobodanka Lazova Zdravkovska, Head of Department for protection and employment of persons with disabilities in the Ministry of Labour and Social Policy of the Former Yugoslav Republic of Macedonia and Mr. Vladimir Pesic, Deputy Minister of Labour and Social Affairs of the Republic of Serbia.	E	PDT	24 participants	- 6 and 7 October 2011

	and lessons learned from Serbia.							
"The prohibition of discrimination based on sex/gender"	Specific topics that were discussed were: the prohibition of discrimination based on sex/gender - international standards; The prohibition of discrimination based on sex / gender - the ECHR - Article 14 and 12 of the Protocol.; Domestic violence - the ECHR and its application ; Domestic violence - Legislation and Practice in Montenegro ; Anti-Discrimination Act and its application in Montenegro - focus on discrimination based on sex and gender; Trafficking - international standards; Trafficking - Legislation and Practice in Montenegro ; The position of women in Montenegro - Roma women, women belonging to LGBT and women with disabilities	These workshops are organized to strengthen the capacity of national institutions that implement anti-discrimination law	judges, prosecutors, state officials and NGOs	Lecturers were: Mrs. Saadiya Chaudary, expert AIRE Centre from London, Mrs. Biljana Zeković, SOS telephone for women and children victims of violence, Ms. Branka Vlahovic, the Ministry for Human and Minority Rights, Aida Petrović, Montenegrin Women's Lobby and Neđeljka Sindik, Libe rtask.	E	PDT	27 participants	- 24 and 25 November 2011
"Gender equality - national and international standards"	Topics that were discussed and debated at the meeting were as follows : Gender equality - The concept of gender equality;	The aim of the seminar was not only to expand knowledge of the judiciary about the basics of	judges and prosecutors	Lecturers were: Ms. Vesna Begovic, judges of the Supreme Court of Montenegro , Mrs. Nada	E	PDT	16 participants	- 28 and 29 March 2013

	<p>General domestic and international normative framework of gender equality - the Constitution, the Law on Gender Equality, the Law Against Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women / CEDAW ; Exercise ; Personal and property rights of women in marriage, extramarital and family community - acquisition and division of joint property of spouses, common-law partner / ki and members / ica family community ; Exercising the right to subsistence; Introduction to International Standards and in terms of personal and property rights of women in marriage, extramarital and family community ; The criminal legislation and gender equality - Criminal offenses against marriage and family ; Criminal offenses against sexual freedom ; Criminal offenses against labor rights ;</p>	<p>the theory of gender equality and forms of discrimination based on sex / gender, but also on domestic regulations and international standards when it comes to family, property and criminal law, related to this subject</p>		<p>Drobljak, president of the Committee for Gender Equality of the Parliament of Montenegro and Mr Ivan Petrović, Deputy Basic State Prosecutor in Podgorica.</p>				
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	Law on Protection from Domestic Violence							
The conference on the topic: 'Implementation of European standards against discrimination'	The Conference featured publication „Practical introduction to European standards against discrimination" containing material on the judgments of the European Court of Human Rights in relation to LGBT issues and other aspects of discrimination (sex, gender identity, LGBT, racial discrimination, Roma and Travellers, sexual orientation, etc.). The publication is also intended as a training material in the area of anti-discrimination by state bodies, educational institutions and non-governmental organizations dealing with the protection from discrimination	In addition to the presentation of publications, the Conference has organized a workshop at which all interested participants, representatives of state institutions and non-governmental organizations, had the opportunity to exchange experiences and practices in this area and talk with teachers.	judges and prosecutors		E	PDT	30 participants	1 October 2013
Workshop / seminar about learning different experiences of the Registered Partnership (Austrian, German, Dutch, British and Italian experience					E	PDT	5 participants	- 10 and 11 2014



and practice								
Conference on the topic "Anti-discrimination legislation in Montenegro with special emphasis on the obligations of Montenegro upon the CEDAW Convention and the Convention on the protection of domestic violence against women and	Concrete topics of the seminar were as follows: General normative framework of gender equality, with special emphasis on CEDAW Convention, the Optional Protocol to the Convention on the Protection from Domestic Violence Against Women and International resources and obligations of Montenegro, the Constitution, the law on gender equality, anti-discrimination laws and subsidiary legislation, national and international normative framework for protection against domestic violence and the elimination of discrimination based on sex, with reference to the law of the European Court of Human rights and the practice of domestic courts for the most serious forms of gender-based violence, Legal solutions, the European Court of Human rights and courts in	The aim was to improve knowledge of holders of judicial office, complete implementation and practical application of a uniform national regulations and international standards of protection in this area, primarily the Law on Protection from Domestic Violence, CEDOW Convention and the Istanbul Convention .	judges, prosecutors	Speakers at the seminar were: Ms. Branka Vlahovic, trainer for gender equality, Mr. Veljko Rutović, deputy special prosecutor for organized crime, corruption, terrorism and war crimes, Mr. Srdjan Djurovic, president of the Regional body for misdemeanours and Podgorica Mrs. Natasa Mededović from NGO SOS phone Noršić.	E	PDT	31 participants	-27 March 2015

	Montenegro, experiences in the application of the Protocol on the treatment, prevention and protection from domestic violence in terms of prosecution, application of the law on protection from domestic violence, Introduction to basic principles of legislative protection, Institutions dealing with protection from violence in the family role and cooperation, experiences from practice, examples from practice relating to the protection from domestic violence and experiences regarding implementation of the Protocol on the treatment, prevention and protection from domestic violence							
" The elimination of hate crimes and violence"	The topics were: Hate crimes and violence of prejudice, laws, rights and responsibilities, Strengthening community responsibility, experiences of Great Britain and Denmark, Experiences OSCE, ILGA, Canada, Great Britain and Denmark, panel discussions,	The aim of this training is to improve the knowledge of judges and prosecutors and police officers in the fight against discrimination, with a focus on hate crimes, crimes		Na skupu su govorili domaći i eksperti iz zemalja EU	E	PDT	17 participants	- 10 and 11 May 2015

	hate crime, A crime of prejudice, violence against members of the LGBT population - reasonable access to the prohibition of discrimination in Europe, Breaking stereotypes and tools in the education of the police and judiciary and others.	motivated by prejudice and violence against LGBTI people						
Seminar on the theme : " The fight against discrimination based on sex / gender, sexual orientation and disability "	More specifically the seminar theme, were as follows : The concept of discrimination in Montenegro - National legal standards - the Constitution, the law, regulations and case law ; The concept of discrimination in the EU - discriminatory and non-discriminatory legal framework, with a focus on the grounds of discrimination ; The application of national legislation to combat discrimination ( e.g. Polish ) ; EU legislation and relevant documents on the Directory of discrimination and harassment ; Discriminatory basis and reference cases of direct discrimination, the European	The aim of the seminar was to, in accordance with the measures of the Action Plan for Chapter 23- Judiciary and Fundamental Rights, to enable judges and prosecutors to improve their knowledge of the general standards of non-discrimination, the specific grounds of discrimination and vulnerable groups The institutional models to combat discrimination as well as inter-institutional cooperation in this field.	judges and prosecutors	The trainers were experts from the European Commission, EU member states (Poland, Austria, Greece and Slovenia ), as well as local experts in this field : Mr. Siniša Bjeković, Deputy OI in Montenegro ; Mr. Wojciech Sadownik, the Office of the OI, Poland ; Mrs. Maria Karageorgi, the Office of the OI, Greece ; Mr. Bostjan Šetinc, Protector principles of equality, Slovenija and Mrs. Wolfgang Schuster, Judge,	E	PDT	22 učesnika	-11. i 12. May 2015.

	<p>Court of Human Rights ; EU legislation and the relevant documents of indirect discrimination;</p> <p>The relevant case law of the European Court of Human Rights and the Court of Justice of the European Union on indirect discrimination;</p> <p>The relevant case law of the Court of Justice of the European Union in Luxembourg on direct discrimination;</p> <p>Shifting the burden of proof ; Case Study - practical exercise.</p>			<p>Court of labor and social rights, Austria</p>					
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## **Annex 5 – Relevant Legal Provisions**

### **Constitution of Montenegro**

#### **Article 6(3)**

Everyone shall be obliged to respect the rights and liberties of others.

#### **Article 7**

Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited.

#### **Article 8**

Direct or indirect discrimination on any grounds shall be prohibited.

Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.

### **Law on Prohibition of Discrimination**

#### **Article 2(1)**

Any form of discrimination, on any ground, shall be prohibited.

### **Law on Prohibition of Discrimination against Persons with Disabilities**

#### **Article 2(1)**

Every form of discrimination against persons with disabilities and group of persons with disabilities, on any ground, and any form of discrimination on grounds of disability, in the public and private sector, shall be prohibited.

### **Law on Prohibition of Harassment at Work (mobbing)**

#### **Article 4**

All forms of mobbing shall be prohibited, as well as the abuse of the right to protection against mobbing.

### **Law on the Protector of Human Rights and Freedoms of Montenegro**

#### **Article 1**

This law shall regulate the competency, authorizations and manner of working and procedure of the Protector of Human Rights and Freedoms of Montenegro (hereinafter referred to as: the Protector) regarding the protection of human rights and freedoms guaranteed by the Constitution, law, ratified international human rights treaties and generally accepted rules of international law, as well as other issues of relevance to the work of the Protector.

**Article 2**

The Protector shall autonomously and independently, on the principles of justice and fairness, take measures to protect human rights and freedoms, when they are violated by the act, action or failure to act of state bodies, state administration bodies, bodies of the local self-administration and local administration, public services and other holders of public powers (hereinafter referred to as: authorities) as well as measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for protection from discrimination.

**Law on Gender Equality****Article 1**

This Law regulates the method of providing and implementing rights on the basis of gender equality, in accordance with international regulations and general rules of international law, as well as measures to eliminate discrimination based on sex and establishment of equal opportunities for women and men as well as persons of different gender identities in all fields of social life.

**Law on the Movement of Persons with Disabilities with the Help of a Dog Helper**

Law on the movement of persons with disabilities with the help of a dog helper governs the rights of persons with disabilities to use the dog helper in the means of transport by road, rail, maritime and air transport, have free access and stay in public place and free access and stay in the work area.

**Law on Professional Rehabilitation and Employment of Persons with Disabilities****Article 5**

Any direct and indirect discrimination in professional rehabilitation, employment as well as during the employment of persons with disabilities shall be prohibited.

**The Law on the Protection and Exercise of the Rights of the Mentally Ill Persons****Article 3(1)**

Discrimination of the mentally ill persons shall be prohibited.

**The Law on Health Care****Article 4**

In implementation of entitlements to health care, all citizens shall be equal regardless to nationality, race, gender, age, language, religion, education, social background, material status and any other personal characteristic.

## **The Health Insurance Law**

Provides, inter alia, that the insured persons are provided health care services to the full extent from the funds of the mandatory health insurance for medical technical aids for pupils and students by the end of their education, but not later than 26 years of age; as well as medical technical aids for persons suffering from multiple sclerosis, muscular dystrophy, cerebral palsy, paraplegia and quadriplegia, chronic renal failure (dialysis), systemic autoimmune disease, people with congenital absence of upper or lower extremities, as well as those with severe impairment of at least 70 % in terms of specific regulations; the mentally ill and persons with the developmental disabilities in accordance with the criteria regulated by special regulations; blind and hearing and speech impaired people.

## **Law on Social and Child Protection**

### **Article 7(1)(1)**

Social and child protection is based on principles of non-discrimination (prohibiting discrimination) of users (beneficiaries) based on race, gender, national origin, social background, sexual orientation, religion, political and trade union or other orientation, economic (material) status, culture, language, disability, the nature of social exclusion, membership of a particular social group or other personal characteristics.

## **Law on Pension and Disability Insurance**

This law stipulates that a disability exists when the insured, due to changes in health condition, which cannot be eliminated by treatment or medical rehabilitation, suffers complete loss of working capacity. Disability exists when the insured due to a change in health condition that cannot be eliminated by treatment or medical rehabilitation, suffers partial loss of working capacity of 75%. Also, the law determines the degree of physical impairment. Physical impairment exists when the insured suffered a loss, significant damage or considerable disability of certain organs or body parts, which hinders the normal activity of the body and requires greater efforts in achieving the necessities of life, regardless of whether it causes or does not cause disability.

## **Labour Law**

### **Article 5**

Direct and indirect discrimination of persons seeking employment, as well as the employed persons based on gender, birth, language, race, religion, skin color, age, pregnancy, health state, that is, disability, nationality, marital status, family duties, sexual orientation, political or other affiliation, social background, material status, membership in political and trade union organizations or some other personal characteristic shall be prohibited.

Direct and indirect discrimination

### **Article 6**

Direct discrimination, in the sense of this law, shall represent any action caused by any of the grounds defined in Article 5 of this law by which the person seeking employment, as well as

the employed person is put in a less favourable position as compared to other persons in the same or similar situation.

Indirect discrimination, in the sense of this law, shall exist when a certain provision, criterion or practice puts or would put into a less favourable position the person seeking employment or an employed person, as compared to other persons, due to a specific characteristic, status, orientation or conviction.

Discrimination on several grounds

### **Article 7**

Discrimination from Articles 5 and 6 of this law shall be prohibited with regard to the following:

Employment requirements and selection of candidates for the performance of a specific job;  
Working conditions and all rights based on employment relationship;  
Education, capacity building and training;  
Promotion at work;  
Cancellation of the labor contract.

Provisions of the labor contract defining discrimination on any of the grounds from Articles 5 and 6 of this law shall be null and void.

Harassment and sexual harassment

### **Article 8**

Harassment and sexual harassment at work and in relation to work shall be prohibited.

Harassment, in the sense of this law, shall represent any unwanted behaviour caused by one of the grounds from Articles 5 and 6 of this law, as well as harassment via audio and video surveillance, aimed at or constituting violation of dignity of the person seeking employment, as well as an employed person, and which causes fear or creates hostile, humiliating or insulting environment.

Sexual harassment, in the sense of this law, shall represent any unwanted verbal, non-verbal or physical behaviour aimed at or constituting violation of dignity of the person seeking employment, as well as the employed person in the sphere of sexual life, and which causes fear or creates hostile, humiliating aggressive or insulting environment.

Employee shall not suffer harmful consequences in case of reporting, that is, testifying because of harassment and sexual harassment at work and in relation to work in the sense of Paragraphs 2 and 3 of this Article.

Positive discrimination

### **Article 9**

Making the difference, exclusion or giving priority with regard to a specific job shall not be considered discrimination if the nature of business is such or if the job is performed in such conditions that characteristics related to one of the grounds from Articles 5 and 6 of this law constitute a real and decisive factor for the performance of job and if the purpose that should be achieved in that manner is justified.



Provisions of the law, collective agreement and labor contract regarding special protection and assistance to certain categories of the employed persons, and especially the ones regarding the protection of the disabled persons, women during pregnancy and maternity leave and leave from work in order to care for a child, that is, special care for a child, and the provisions regarding the special rights of parents, adoptive parents, guardians and foster parents shall not be considered discriminatory.

## **Law on Civil Servants and State Employees**

### **Article 7**

In performing tasks, civil servant and state employee must not discriminate citizens on the grounds of their race, skin colour, nationality, social or ethnic origin, links to a minority ethnic group or national minority, language, religion or convictions, political or other opinion, gender, gender identity, sexual orientation, health condition, disability, age, material status, marital or family status, group affiliation, or assumption about group affiliation, political party or other organization affiliation, as well as on the grounds of other personal features.

## **Law on Employment and Exercising Rights with Respect to Unemployment Insurance**

### **Article 5**

The exercise of rights based on unemployment is based on the following principles:

- 1) freedom of choice of occupation and workplace;
- 2) prohibition of discrimination;
- 3) gender equality;
- 4) affirmative action aimed at less employable persons;
- 5) The impartiality of the leading factor of employment;
- 6) gratuitousness conducting employment

## **General Law on Education**

### **Article 9**

Regardless of the national affiliation, race, gender, language, religion, and social background and of other personal characteristics, all citizens of Republic shall be equal in the exercising of the right of education.

Foreign nationals who have been granted temporary stay or permanent residence in Montenegro are equal in exercising their right to education with the citizens of Montenegro in accordance with the special regulation.

### **Article 9a**

In institution is not allowed: physical, psychological and social violence; abuse and neglect of children and students, corporal punishment and personal insults or sexual abuse of students or employees or any other form of discrimination within the meaning of the law.

## Media Law

### Article 2

The Republic of Montenegro (hereinafter referred to as: the Republic) shall guarantee the right of free founding and undisturbed work of media based on: the freedom of expression; freedom of investigation, collection, dissemination, publicising and receiving information; free access to all sources of information; protection of man's personality and dignity and free flow of information.

The Republic shall guarantee equal participation in information to both domestic and foreign legal and natural persons in compliance with both this Law and the Broadcasting Law.

### Article 3(1)

The Republic shall provide a part of the funding for realisation of the citizens' right to be informed as granted by the Constitution and law, without any discrimination whatsoever and on the basis of programmes important for:

- science and education development;
- development of culture;
- informing people with hearing and sight impairments.

## Electronic Media Law

### Article 3

The relations in the field of AVM (audiovisual media) services shall be governed by the following principles:

- 1) freedom, professionalism and independence;
- 2) prohibition of any form of censure;
- 3) balanced development of public and commercial AVM service providers;
- 4) free and equitable access to all AVM services providers;
- 5) development of competition and pluralism;
- 6) adherence to international standards;
- 7) objectivity, prohibition of discrimination, and transparency

## Criminal Code

"Criminal offences against freedom and rights of man and citizens" (Article 158 until Article 183)

### Article 159

The person who, because of national or ethnic origin, membership of a race or religion or due to absence of such affiliation or difference in political or other beliefs, sex, language, education, social status, social origin, sexual orientation, gender identity, economic status or any other personal feature, denies or restricts the rights and freedoms provided by the Constitution, laws or other regulations or general acts or ratified international treaties or on the basis of these differences grants privileges or advantages, shall be punished with imprisonment up to three years.

If the offense referred to in paragraph 1 of this Article was committed because of hatred toward member of the group determined on the basis of race, color, religion, descent or national or ethnic affiliation, shall be punished with imprisonment from three months to five years.

If the offense referred to in paragraph 2 of this Article committed by an official in discharge of duty, shall be punished by imprisonment of one to eight years

## **Law on Free Legal Aid**

### **Article 8**

Creation and use of the right to free legal aid in accordance with this law shall be secured without discrimination on grounds of ethnic origin, race, color, language, religious or political beliefs, gender, sexual orientation, health, disability or other personal characteristics.

## **European Convention on Human Rights and Fundamental Freedoms (Article 14 and Article 1 of the Protocol 12 to the Convention)**

### **Article 14 of the ECtHR - Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **Article 1 of the Protocol 12 to the Convention - General prohibition of discrimination**

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### **Article 20 § 1 (1) of the Law on Prohibition of Discrimination**

"Grave form of discrimination, on any ground referred to in Article 2, paragraph 2 of this Law shall be deemed to be discrimination committed against the same person or the group of persons on multiple grounds referred to in the Article 2, paragraph 2 of this Law (multiple discrimination)"

Article 2(5) of the Law on Prohibition of Discrimination provides that:

"Inciting, helping, giving instructions as well as announced intent to discriminate specific person or group of persons on any ground referred to in paragraph 2 of this Article, shall be as well considered to be discrimination"

### **Article 10(2) of the Law on Prohibition of Discrimination**

The right to use the facilities/buildings and areas in public use may be restricted only in accordance with the law.

### **Article 16(3) of the Law on Prohibition of Discrimination**

Distinction, exclusion or giving preference is not considered to be discrimination if so require the peculiarities of the particular work in which personal characteristic of a person represent real and decisive condition of doing the work, if the purpose to be achieved that way is justified and if the condition is proportionate, as well as taking measures of protection according to certain criteria of persons referred to in paragraph 2 of this Article.

**There are no conflicting legal provisions preventing the effective implementation of the prohibition of discrimination** - The conclusion is the result of not only the legal assessment of the expert, but also a survey carried out among all respondents.

In order to collect comprehensive data from the relevant stakeholders in the fight against discrimination, data are requested from:

All First-Instance Courts in Montenegro and its presidents, all Misdemeanours Courts in Montenegro and its presidents, the High Courts in Montenegro and its presidents, as well as the Misdemeanour Council (second instance) of Montenegro, then from the Judicial Council of Montenegro, the Constitutional Court of Montenegro, Centre for judicial training of Montenegro, OI of Montenegro, University of Montenegro, the Center for Mediation and NGO CEDEM, HRA (Human rights Action - Action for Human rights), the Center for women's rights, UMHCG (Association of Youth with disabilities) CGO (Center for Civic Education), GA (Civic Alliance), JUVENTAS, Queer Montenegro, Progress Montenegro, NGO "Mladi Romi" (Young Roma).

Out of total forwarded questionnaires, the following stakeholders responded:

- out of total of 135 judges of the first instance as well as the presidents of courts of first instance at the national level - the questionnaires were answered by 50 judges together with presidents, which means 37% of the total number of judges of the first instance,<sup>53</sup>
- out of total of 57 misdemeanour judges and presidents of misdemeanour council at the national level, the questionnaire was answered by a total of 30 judges together with the presidents, which means 52% of the total number of misdemeanour judges and presidents of misdemeanour courts,<sup>54</sup>
- Secretariat of the Judicial Council of Montenegro - as institution, which keeps records on cases of discrimination
- Center for education of judicial institutions in Montenegro,
- the OI,
- Ministry of Human and Minority Rights,
- 15 professors of different University of Montenegro units.

Out of all intermediaries asked to answer the questionnaires, only the following ones provided their replies:

- Mediation Center, NGO CEDEM, the Civic Alliance, NGO Young Roma, as relevant stakeholders – intermediaries.

### **Article 33 of the Law on Prohibition of Discrimination of Montenegro**

The courts, the state prosecutor's offices, misdemeanour authorities, the authority responsible for police affairs and inspection authorities are obliged to keep separate records on filed complaints, initiated proceedings and decisions taken within their own jurisdiction in relation to discrimination. The authorities referred to in paragraph 1 of this Article shall deliver data from the separate records to the Protector not later than 31st of January of the current year for the previous year, and at the request of the Protector they shall deliver the data from these records as well for a certain shorter period during the year.

\* Data on the number of cases before the Constitutional Court of Montenegro could not be collected, as well data on cases in the criminal proceedings. Furthermore, according to the

<sup>53</sup> The total number of judges of the courts of the first instance of Montenegro was officially given by the Secretariat of the Judicial Council, which maintains records in that direction.

<sup>54</sup> The total number of judges of misdemeanour courts of Montenegro was officially given by the Secretariat of the Judicial Council, which maintains records in that direction.

current Regulations on the content and manner of keeping separate records in cases of reported discrimination ("Official Gazette" No.50/14) and Article 33 of the Law on Prohibition of Discrimination, the data were submitted by the Judicial Council of Montenegro, which gave information only in respect of civil courts (do not have information related to the criminal proceedings, or misdemeanour courts, since they were not courts before 2015) as well as the OI, who gave information about civil and misdemeanour courts. For this reason, two statistics Tables are given.

## **Law on the Protector of Human Rights and Freedoms of Montenegro**

### **Article 20**

The Protector in the exercise of his/her function acts in a way that: points, warns, criticizes, proposes or recommends.

At the request of the authorities the Protector may give an opinion on the protection and promotion of human rights and freedoms.

### **Article 21**

The Protector deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organizations and institutions dealing with human rights and freedoms.

### **Article 22**

The Protector is not authorized to alter, suspend or annul the acts of the authorities.

Protector cannot represent the party in the proceedings, or file on its behalf legal remedies, except in the case referred to in Article 27 paragraph 2 of this Law.

### **Article 41**

Upon completion of examining the violation of human rights and freedoms, the Protector shall issue an opinion on whether, how and to what extent the violation of human rights and freedoms occurred.

When the Protector finds that the violation of human rights and freedoms occurred, the opinion shall also contain a recommendation on what needs to be done to remedy the violation, as well as the deadline for its remedy.

### **Article 42**

The Head or the person managing the authority on whose work refers the recommendation, shall be obliged to, within the provided deadline, submit the report on actions taken to carry out the recommendations.

If the Head or the person managing the authority fails to comply with the recommendation within a specified deadline, the Protector may inform the immediate superior authority, submit a special report or inform the public.

### **Article 43**

About the results of the examination of the violation of human rights and freedoms, the Protector shall notify the complainant by submitting the opinion.

# **Legal Protection against Discrimination in Serbia**

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Belgrade, March 2016

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# Table of Contents

<b>Executive Summary.....</b>	<b>405</b>
<b>1. Legal Framework Prohibiting Discrimination.....</b>	<b>407</b>
1.1 Overview of Constitutional and Legal Provisions.....	407
1.2 Assessment of the Legal Framework .....	408
<b>2. Institutional Framework for Combating Discrimination .....</b>	<b>410</b>
2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination.....	410
2.2 Stakeholders Putting Combating Discrimination into Practice .....	411
2.2.1 <i>Equality Body/Bodies</i> .....	411
2.2.2 <i>Ombud Institution(s)</i> .....	412
2.2.3 <i>Intermediaries</i> .....	412
2.2.4 <i>Police</i> .....	413
2.2.5 <i>Other Relevant Stakeholders</i> .....	414
2.3 Mapping the Cooperation among Stakeholders .....	414
2.3.1 <i>Equality Body/Bodies</i> .....	414
2.3.2 <i>Ombud Institution(s)</i> .....	415
2.3.3 <i>Intermediaries</i> .....	415
2.3.4 <i>Police</i> .....	415
2.3.5 <i>Other Relevant Stakeholders</i> .....	416
<b>3. The Role of Courts in Combating Discrimination.....</b>	<b>416</b>
3.1 Capacities of Courts in Combating Discrimination.....	416
3.2 Quantity and Quality of Judgments in Cases of Discrimination .....	418
3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies ....	420
<b>4. Procedural Aspects in Discrimination Cases.....</b>	<b>422</b>
4.1 Mediation .....	422
4.2 Evidencing Discrimination.....	423
4.3 Strategic Litigation.....	424
4.4 Class Action/Actio Popularis .....	425
4.5 Shifting of the Burden of Proof.....	426
4.6 Remedies.....	427
4.7 Follow-Up to Opinions and Recommendations .....	428
<b>5. The Role of Universities in Combating Discrimination.....</b>	<b>428</b>
5.1 Law Departments .....	428
5.2 Other Departments .....	430
5.3 Legal and Institutional Structures Combating Discrimination .....	431
<b>6. Developing a Culture of Rights .....</b>	<b>431</b>
6.1 Assessing the Levels of Awareness .....	431
6.2 Achievements in Awareness Raising .....	433
6.3 Preventing Future Discrimination .....	435
<b>7. References .....</b>	<b>439</b>



**Annexes .....441**  
Annex 1 – Glossary .....441  
Annex 2 – Template for Good Practice Examples .....442  
Annex 3 – Statistics EB - Commissioner for the Protection of Equality .....449  
Annex 4 – Relevant Legal Provisions .....450

## Executive Summary

In the past ten years, the Republic of Serbia introduced a set of anti-discrimination legislations, which are primarily based on the standards set out in the jurisprudence of the European Court of Human Rights, as well as on the provisions of the relevant EU anti-discrimination directives.

The Law on the Prohibition of Discrimination (LPD), adopted in 2009, is an important milestone in securing equality and providing protection from discrimination in Serbia. It prohibits a wide range of discriminatory actions. The LPD applies in all areas of public and private life, and introduces an open clause in relation to personal characteristics. The LPD recognizes severe forms of discrimination, as well as discrimination in some special cases.

The Strategy for the Prevention of and Protection from Discrimination was adopted at the end of 2013 and was followed by the Action Plan, adopted in October 2014. These two documents are designed to support the Government in combating discrimination in Serbia.

The Commissioner for the Protection of Equality (CPE) was established by the LPD as an independent, autonomous and specialized public body which has a wide mandate in promoting equality and anti-discrimination in all spheres of society. It has two main responsibilities: the prevention of and protection from discrimination. The CPE's Office has a range of measures at its disposal, but from the position of the victim of discrimination the most relevant are: to receive and consider claims regarding discrimination, to initiate strategic litigation and to file offence and criminal charges.

Many other stakeholders play an important role in combating discrimination. NGOs are very valuable partner in preventing and combating discrimination. They are active in submitting complaints and initiating lawsuits. They also perform situation testing, cooperate with independent institutions, write handbooks and reports, as well as take part in consultation processes concerning the adoption of relevant laws and strategies.

However, although the anti-discrimination legislation is numerous, some level of social distance towards certain groups still exist in Serbia. Breaking of deeply rooted stereotypes and prejudices is a long lasting process, and the role of media and education should not be undermined. Therefore, Serbia has to implement some additional measures in order to eliminate the causes for discrimination, to raise the level of awareness of the public and to improve equality of certain vulnerable groups.



# 1. Legal Framework Prohibiting Discrimination

## 1.1 Overview of Constitutional and Legal Provisions

The Serbian Constitution,<sup>1</sup> adopted in 2006, contains several non-discrimination provisions. Article 21 proclaims equality of all before the law and the right to equal legal protection, without any discrimination. Article 15 guarantees gender equality and provide that “The State shall guarantee the equality of women and men and develop equal opportunities policy.” It also contains Article 62 which guarantees the equality of spouses. Finally, Article 76 prescribes equality before the law and equal legal protection for national minorities and prohibits any discrimination on the grounds of affiliation to a national minority.

The Serbian constitution places the international law immediately below the constitutional provisions and Article 16(2) provides that the generally accepted rules of international customary law and the ratified international treaties are an integral part of the national legal system and should be applied directly. Article 18 prescribes that the human rights provisions have to be interpreted pursuant to valid international standards regarding human and minority rights, as well as the practice of international institutions that supervise their implementation. Serbia has ratified all the major universal and regional international human rights conventions, particularly the European Convention on Human Rights (ECHR), which in Article 14 and Article 1 of 12 Protocol prohibits discrimination.

Anti-discrimination constitutional provisions are further elaborated in several anti-discrimination laws.

The Republic of Serbia has adopted the Law on Prohibition of Discrimination (LPD) in 2009,<sup>2</sup> establishing a comprehensive system of protection from discrimination within the country's legal system.

The Law on Prevention of Discrimination against Persons with Disabilities (LPDPD)<sup>3</sup> prohibits discrimination on the ground of disability and aims to promote their inclusion in all spheres of the society. It addresses various forms of discrimination against persons with disabilities, which were previously included piecemeal in a number of different laws (such as social security, employment and labor laws, family law, public health care laws, public education laws, pension and invalidity fund laws, etc.). This Law is supported by the Law on Professional Rehabilitation and Employment of Persons with Disabilities,<sup>4</sup> which was adopted with the aim to create a possibility for persons with disabilities to be included in a larger number in the open labour market, and to improve quality of their employability and/or the employment quality.

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<sup>1</sup> Official Gazette of the Republic of Serbia, no. 98/2006.

<sup>2</sup> Official Gazette of the Republic of Serbia, no. 22/2009. It was adopted on 26 March and entered into force on 3 April 2009.

<sup>3</sup> Official Gazette of the Republic of Serbia, no. 33/2006. It was adopted on 17 April 2006 and entered into force on 1 January 2007.

<sup>4</sup> Official Gazette of the Republic of Serbia, no. 36/2009, 32/2013.

The Gender Equality Act (GEA)<sup>5</sup> proclaims gender equality in Serbia in all areas of public and the private life.

The Law on Protection of Rights and Freedoms of National Minorities<sup>6</sup> provides protection to national minorities from all forms of discrimination in exercising their civil rights and freedoms, and a duty of the public officials to sustain from acts and regulations that are discriminatory towards them. It further creates instruments that guarantee and protect special rights of minorities to minority self-governance in the fields of education, use of language, media and culture.

The Labour Law<sup>7</sup> provides specific provisions against discrimination at work and related to the employment.

Many other laws also contain anti-discrimination provisions, such as the Law on the Fundamentals of the Education and the Upbringing System,<sup>8</sup> which introduces an inclusive education and prohibits discrimination in education, the Law on Youth<sup>9</sup> the Law on Preschool Education,<sup>10</sup> the Law on Churches and Religious Communities,<sup>11</sup> the Law on Sports,<sup>12</sup> etc.

## 1.2 Assessment of the Legal Framework

Serbia has introduced a set of anti-discrimination legislations, which are primarily based on standards set out in the jurisprudence of the European Court of Human Rights (ECtHR), as well as the provisions of two EU Directives, EC Race Equality Directive<sup>13</sup> (Race Directive) and EC Framework Employment Directive<sup>14</sup> (Framework Directive) from 2000. As it is found in EU Progress Report for Serbia for 2012, “Serbia’s anti-discrimination legislation is broadly in line with European standards”.<sup>15</sup> However, in 2013 Progress Report, the European Commission found that some provisions of the Law on the Prohibition of Discrimination have yet to be aligned with the *acquis*. This particularly concerns the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the

<sup>5</sup> Official Gazette of the Republic of Serbia, no. 104/2009. It was adopted on 11 December and entered into force on 25 December 2009.

<sup>6</sup> Official Gazette of FRY, no. 11 of 27 February 2002, Official Gazette of Serbia and Montenegro, no. 1/2003 – Constitutional Charter, Official Gazette of the Republic of Serbia, no. 72/2009 – other law, Official Gazette of the Republic of Serbia, no. 97/2013 – decision of the Constitutional Court. It was adopted on 27 February and entered into force on 7 March 2003.

<sup>7</sup> Official Gazette of the Republic of Serbia, no. 24/05, Official Journal of the Republic of Serbia, no. 61/05, Official Gazette of the Republic of Serbia, no. 54/2009, Official Gazette of the Republic of Serbia, no. 32/2013, Official Gazette of the Republic of Serbia, no. 75/2014. It was adopted on 15 March and entered into force on 23 March 2005.

<sup>8</sup> Official Gazette of the Republic of Serbia, no. 72/09, 52/2011, 55/2013.

<sup>9</sup> Official Gazette of the Republic of Serbia, no. 50/011.

<sup>10</sup> Official Gazette of the Republic of Serbia, no. 18/010.

<sup>11</sup> Official Gazette of the Republic of Serbia, no. 36/006.

<sup>12</sup> The Official Gazette of the Republic of Serbia, no. 24/2011, 99/11 – other laws.

<sup>13</sup> Council Directive 2000/43/EC of (29.06.2000) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000.

<sup>14</sup> Council Directive 2000/78/EC of (27.11.2000) establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303*, 02 December 2000.

<sup>15</sup> European Commission (2012) *Serbia 2012 Progress Report*, Brussels, 10 October 2012, p. 16.

obligation to provide reasonable accommodation for disabled employees.<sup>16</sup> The same conclusion was included in subsequent reports of the Commission.<sup>17</sup>

The Constitution does not provide a definition of discrimination, but prohibits both forms of discrimination - direct and indirect. It contains anti-discrimination clause which prohibits “any direct or indirect discrimination on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability.” It provides the prohibition of discrimination on any ground, not just those explicitly mentioned in Article 21, meaning that this list of prohibited grounds is not exhaustive. In Article 21(4) the Serbian Constitution recognizes affirmative action providing that “special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.” Although it is praiseworthy that the Constitution recognizes “special measures” which can help the discriminated groups to achieve substantial equality, this provision lacks the temporal restriction, which is necessary for the assessment of the proportionality of affirmative action measure. Also, Article 76 recognizes positive measures in economic, social, cultural and political life for the purpose of achieving full equality of members of a national minority, but those measures must be provisional and must be aimed at eliminating extremely unfavorable living conditions which particularly affect them.

The LPD recognizes seven forms of discrimination: direct and indirect discrimination, violation of the principle of equal rights and obligations, the prohibition of calling to account (instruction to discriminate), association for the purpose of discriminating, hate speech, disturbing and humiliating treatment and severe forms of discrimination. Victimization is enshrined in the LPD as a special form of discrimination. Article 9 protects the victim of discrimination, as well as the witness, someone who helps the victim of discrimination to bring a complaint.

The LPD Article 2(1) prohibits discrimination based on the grounds of “race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics”. It also follows the modern approach as the list of prohibited grounds for discrimination is not closed with wording “and other personal characteristics”, whether they are real or presumed, which is of particular significance for some grounds of discrimination, e.g. sexual orientation. In other words, it recognizes assumed discrimination. However, the associative discrimination is recognized in the LPD, but its application is limited only to “members of families” and persons close to those being discriminated.

The personal scope of the anti-discrimination law covers the natural and the legal persons for the purpose of protection against discrimination and applies in all areas of life, although the LPD recognizes special cases of discrimination.

According to Article 13 of the LPD, multiple discrimination is recognized as a severe form of discrimination. This means that more severe penalty should be imposed in a case of multiple or intersecting discrimination.

<sup>16</sup> European Commission (2013) *Serbia 2013 Progress Report*, Brussels, 16 October 2013, pp. 36, 45.

<sup>17</sup> See also European Commission (2014) *Serbia 2014 Progress Report*, Brussels, 8 October 2014, p. 44, 54; European Commission, (2015) *Serbia 2015 Progress Report*, Brussels, 10 November 2015, p. 56.

## 2. Institutional Framework for Combating Discrimination

### 2.1 Overview of Legal Provisions Determining Stakeholders in Combating Discrimination

By adopting the LPD, the Republic of Serbia has introduced an institution of a national Commissioner for the Protection of Equality (CPE) which according to Article 33 has preventive role, as well as the role to protect victims of discrimination. This is an institution, responsible for providing assistance to the victims of discrimination, for ‘receiving and reviewing complaints pertaining to violations of provisions of this law, providing opinions and recommendations in the specific cases, filing charges on the behalf of the person discriminated against, submitting misdemeanor notices on account of discrimination, warning the public of the most frequent, typical and severe cases of discrimination. Although the CPE is primarily tribunal-type equality body, it also has elements of promotional-type body.

The LPD stipulates that the “Ministry in charge of human and minority rights shall monitor the implementation of this Law”. In 2008, the Ministry of Human and Minority Rights was established and mandated to monitor and coordinate other governmental ministries within the scope of human and minority rights. It was transformed into Office for Human and Minority Rights, with responsibility to draft legislation on human and minority rights, monitor the harmonization of national legislation with international instruments on human and minority rights; as well as to implement the anti-discrimination policy. Under the Sector for Promotion and Protection of Human Rights, the Group for Antidiscrimination Policy was adopted.

In July 2009 the Government established the Social Inclusion and Poverty Reduction Unit (SIPRU). It is mandated to strengthen the Government’s capacities to develop and implement social inclusion policies based on good practices in Europe. It also provides support to the Government to coordinate, monitor and report on the efforts of the Government of Serbia in the field of social inclusion. The Unit supports the building of capacities and processes with the aim of a more effective development and implementation of social inclusion policies in all public administration bodies.

In October 2014, the Government also established a Coordination body for Gender Equality (CBGE), with the aim to consider all questions concerning gender equality, as well as to coordinate the work of the public authorities in relation to gender equality.

The National Assembly is responsible for the adoption and supervision of existing laws. It’s specialized body, Committee on Human and Minority Rights and Gender Equality, under Article 52 of the Rules of Procedure of the National Assembly, considers laws and proposals of other general acts, as well as a realization and protection of human rights and freedoms and the rights of the child; implementation of ratified international treaties which regulate the protection of the human rights; exercising of the freedom of religion; the status of churches and religious communities; realization of the ethnic minority rights and inter-ethnic relations in the Republic of Serbia. The Committee considers laws and proposals of other general acts from the aspect of the advancement and achievement of the gender equality, and carries out the review of policies pursued by the Government, execution of laws and other general acts by the Government and other authorities and public officials accountable to the National Assembly, from the aspect of respecting the gender equality.

The Committee cooperates with National Minority Councils, which are established under the Law on the Councils for Inter-Ethnic Relations,<sup>18</sup> composed of representatives of the national and the ethnic communities, with competencies to review issues related to the achievement, protection and promotion of the ethnic equality.

Although the Strategy for Development of a Free Legal Aid System in the Republic of Serbia was adopted in 2010 with the aim to secure a comprehensive, functional and efficient system of free legal aid, and several working groups were established since 2004 in order to prepare the text of the future Law, it has not been adopted yet. However, some specific laws contain provision on free legal aid. The Law on Local-Self Governments from 2007 governs in Article 20(31) that primary jurisdiction of the municipality is to organize a legal aid office to citizens.<sup>19</sup> The Law on Advocature<sup>20</sup> in Article 73 proclaims that the bar association can organize free legal aid to citizens, alone or under the contract with the local self-government. Article 10 (2) determines that a free legal aid to asylum seekers is provided by UNHC, which financially supports NGOs that deal with the rights of refugees and other migrant groups.<sup>21</sup> In practice, free legal aid in discrimination cases is provided by NGOs who have the capacity and special knowledge to deal with these cases. Also, it is important to mention that the complaint procedure before the CPE is free of charge.

## 2.2 Stakeholders Putting Combating Discrimination into Practice

### 2.2.1 Equality Body/Bodies

The CPE is an autonomous and independent public body with a broad range of authorities, which makes it the central national institution specialized in preventing and combating all forms and types of discrimination. It is elected by the National Assembly, whom it helps to supervise the implementation of the laws in the area of the protection of equality and prohibition of discrimination. The CPE does not have legislative nor repressive authority, and cannot act *ex officio*, which presents one of the deficiencies of this system.

The CPE is authorized to receive and review complaints pertaining to discrimination, provide opinions and recommendations and publicly announce the existence of a violation in case the violator fails to implement the recommendations. Furthermore, the CPE is also authorized to initiate strategic litigation of public interest to protect from discrimination, as well as to submit misdemeanor and criminal charges and proposals for assessing constitutionality and legality of acts. The CPE provides information to the complainant on the manners of protection of the right of non-discrimination and is also authorized to recommend mediation if assesses that the case is eligible for mediation. The CPE has three sectors: Sector for Acting upon Complaints, Sector for Improvement of Protection of Equality, International Collaboration and Projects and Sector for General Affairs. The CPE's work is regulated by the Rules of Procedure, adopted in 2011.<sup>22</sup>

The CPE adopted a three-year strategy for the development of the Institution for the period of 2012-2015. The strategy is a result of the need for defining the priorities of the CPE's work. It recognizes several principles: independence, respecting diversity, professionalism and transparency, permanent education of the employees, accessibility and inclusivity. The

<sup>18</sup> Official Gazette of the Republic of Serbia, no. 72/2009, 20/2014 - decision CC and 55/2014.

<sup>19</sup> Official Gazette of the Republic of Serbia, 29 December 2007.

<sup>20</sup> Official Gazette of the Republic of Serbia, 31/2011, 2 May 2011.

<sup>21</sup> Official Gazette of the Republic of Serbia“, 24 November 2007.

<sup>22</sup> Rules of Procedure, Official Gazette of the Republic of Serbia“, no. 34/2011. Text available at <http://www.ravnopravnost.gov.rs/rs/o-нама/акти-повереника>, 27.03.2016.



priorities established in this three year period were: efficient combating and protection from discrimination; raising visibility and accessibility of the institution of the Commissioner; raising awareness of the public on discrimination; and an efficient and functional CPE's service.

However, since its establishment, the CPE's office has been marked with insufficient space for its work that prevented hiring and led to insufficient number of employees. This limitation directly caused limited educational and promotional activities. Another consequence is that the admission office is opened at another location. All this factors influence the efficiency and quality of work of the CPE, who, despite these obstacles, preformed its task in a great manner.

### 2.2.2 Ombud Institution(s)

The Protector of Citizens (PC, Ombudsman) is an independent and autonomous governmental body, adopted by the National Assembly, responsible for the protection and promotion of human rights. The Protector particularly focuses on the protection of: national minorities, children rights, rights of persons with disabilities, rights of people deprived of liberty and gender rights. The PC controls, by checking the allegations of complaints or by acting on its own initiative, whether state administration bodies, Republic Public Attorney, bodies or organizations exercising public authority, treat the citizens of Serbia in accordance with the law and other regulations of the Republic of Serbia, or in compliance with the principles of good administration. Its responsibility is limited to the control of the public officials and only if other legal remedies are resorted. If it finds that the actions of the official or the employee of the administration body contain the elements of criminal or some other punishable act, the PC is authorized to submit to the competent body a request for initiating a criminal, misdemeanour or some other applicable procedure. Although in his daily work the Protector deals with questions that have equality dimension, he is concentrated on the legality and proportionality of the public official's acts. Thus, the PC does not have jurisdiction to deal with discrimination cases due to the fact that special body that deals with this matter exists in Serbia, although close partnership between the two independent institutions exists. Thus, in 2015 both institutions had a joint activity in the form of the submission of proposal for assessing constitutionality of the Law on the Manner of determining the maximal number of the employees in the public sector.<sup>23</sup> Also, the CPE in its annual reports mentions the most important activities of the PC in relation to certain vulnerable groups, its relevant reports and researches, as well as those published by the Provincial Ombudsman.

### 2.2.3 Intermediaries

The role of the intermediaries as social partners in combating discrimination is extremely valuable, as they play an important role in ensuring compliance with the LPD. The role of the NGOs must be underlined, especially their role in providing free legal aid to the victims of human rights violations, due to the absence of the Law on Free Legal Aid. NGOs started to provide free legal aid some 25 years ago, and they obtained a significant specialization for the following topics: family law (particularly domestic violence), property rights (mainly for refugees and IDPs), violation of human rights (particularly torture, freedom of expression and the right to work), human trafficking and obtaining documentation, as well as discrimination. Their work is very important as they accept a holistic approach and deal not

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<sup>23</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2015*, 15 March 2016, Belgrade, p. 75.

only with a particular violation, but try to identify and to reacting a case of the systematic violations, the uneven practice in conducting judicial and administrative proceedings, inefficiency in processing applications, and the inadequate legal framework. They also take part in providing trainings for judges on anti-discrimination, publishing of reports, handbooks and other relevant materials. Furthermore, the NGOs have an important role in submitting of the strategic cases to the court and in providing evidence that discrimination occurred using the situational testing.

On the other hand, only few attorneys are specialized to deal with discrimination cases. They lack adequate knowledge on the anti-discrimination legal framework and the relevant international standards, and some additional training must be provided to them, as well. Also, the trade unions are not so active in providing protection to the victims of discrimination. However, there are some positive examples. Thus, on the 8<sup>th</sup> of October 2015, the Constitutional Court revoked the discriminatory Article 20 of the Law on Maximum of Employees in Public Sector, which provided that all women aged 60 years and 6 months working in the sectors of education, health sector and public administration, will retire, although the pensionable age for women is 65. The consequence of this Article was that 3.500 of women teachers in Serbia were supposed to retire. The pressure against this provision was exerted by the Teachers Union of Serbia, and later supported by other unions, with support from Educational International. They sent a protest letter to the Serbian public authorities, which provoked the Commissioner for the Protection of Equality and the Ombudsman to challenge the constitutionality of this provision by the Constitutional Court.<sup>24</sup>

#### 2.2.4 Police

The role of the police in combating discrimination is very important, but the police officers are not always capable to recognize discrimination and to react in the cases of discrimination. Also, very often they act discriminatorily towards the citizens, despite the fact that they should protect them from discriminatory acts. Therefore, several trainings were organized for police officers. In June 2013, the seminar “Ministry of the Interior in Prevention and Combating Discrimination” was held, for the officers of the Ministry of Interior who have leadership positions. The CPE explained the concept and the mechanisms for the protection against discrimination, and presented the complaints submitted against the Ministry of the Interior, as well as the recommendations issued to this body.<sup>25</sup> In July that year, a meeting of the CPE with the head of the Basic Police Training Centre and the representatives of the Department for Professional Education Training of the Ministry of Interior was held. The meeting focused on the necessity to include the anti-discrimination topics into the curricula of the Basic Police Training Centre. As a result of this cooperation, in October 2013, a two-day advanced training for the representatives of the Ministry of Interior was held in Sremska Kamenica, and was aimed at developing professional competences for working with the vulnerable social groups in cases of discrimination.<sup>26</sup>

In 2014, very important research was conducted on the Attitudes of the police officers toward discrimination.<sup>27</sup> This research showed that 92% of the respondents believe that all citizens deserve equal treatment in regard with the application of law, and 79% believes that the discrimination is present in Serbian society. The most prominent social distance was towards the members of LGBT population and of people living with HIV, while the least

<sup>24</sup> Serbia: Trade struggle contributes to ending discrimination against female public servants, 20 October 2015, available at [http://www.ei-ie.org/en/news/news\\_details/3763](http://www.ei-ie.org/en/news/news_details/3763), 31.03.2016.

<sup>25</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, June 2014, Belgrade, p. 119.

<sup>26</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, June 2014, Belgrade, p. 120.

<sup>27</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2014*, June 2015, Belgrade, p. 42.

social distance existed towards the impoverished poor, people with a physical disability and the refugees, since the police officers believe that these groups are in unenviable position in relation to the rest of the citizens. It is interesting to note that even 47% of the respondents answered that they had no opinion on what is the essence of discrimination. It was concluded that the lack of an adequate knowledge on discrimination could have multiple consequences in the case of the police work, and that it is necessary to provide educational programmes and seminars in this area of law. In 2015, this research was repeated by the Criminalistics – Police Academy, and it was found that 49% of the respondents (traffic police and police of general jurisdiction) do not know what the essence of discrimination is.<sup>28</sup> The most prominent social distance was shown towards the members of LGBT population (39%), the migrants (37%) and the people living with HIV (37%). Majority of respondents believed that the media, the political parties, the NGOs and the Government are responsible for the existence of discrimination and are the most influential for combating it. However, they believed that the police is not responsible and does not have influence for the existence of discrimination. Further, even 54% of the respondents did not know if there is an institution that protects equality of citizens,<sup>29</sup> demonstrating that the CPE is not visible enough.

### 2.2.5 Other Relevant Stakeholders

The Faculty of Law, University of Belgrade established in 2009 a Legal Clinic on Anti-Discrimination. Not only that students learn about discrimination, but they also develop their professional skills in providing free legal aid to the victims of discrimination. Students do referrals, oral advices and write simple applications to real clients. Students also do the policy work as they write letters to different institutions and indicate that some situation should be treated as discrimination. In such a way, two goals are achieved: a provision of the legal aid to the victims of discrimination and the increase of the professional skills and anti-discrimination knowledge among the students.

## 2.3 Mapping the Cooperation among Stakeholders

### 2.3.1 Equality Body/Bodies

The CPE initiated the cooperation with the representatives of the NGOs which have been recognized as partners in the protection from discrimination and improving equality. This cooperation was established at a meeting on November 2010, when the CPE met with 50 NGO representatives.<sup>30</sup> The CPE informed them about the establishment of the CPE's Office and they were invited to contribute with proposals and suggestions for cooperation. During the years, various forms of cooperation with numerous NGOs were established: partnerships in projects implementation, participation at events and manifestations, inclusion of the representatives of the civil society organizations in the CPE's working groups, etc. Furthermore, in August 2012, a public call was issued with the aim of granting funds to NGOs for the purpose of implementing the situational testing of discrimination. A total of 23 NGOs were selected, which appointed two representatives that participated in three training sessions for a situational testing of discrimination.<sup>31</sup> Due to situational testing performed by NGOs, the CPE submitted some lawsuits in strategic cases. For example, in 2013, due to situation testing, it has been established that the agency refused to provide services and offer an apartment to a volunteer discrimination tester who is a member of the Roma national

<sup>28</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2015*, 15 March 2016, Belgrade, p.58.

<sup>29</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2015*, 15 March 2016, Belgrade, p. 59.

<sup>30</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2010*, 10 March 2011, Belgrade, p. 75.

<sup>31</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2012*, March 2013, Belgrade, p. 104.

minority and who wanted to rent an apartment.<sup>32</sup> He has been denied the service with the explanation that the agency “had no apartments matching his request.” One hour later, the controller of the situational testing – a young man who is not a member of the Roma national minority – went to the agency and he was provided the service.

### 2.3.2 Ombud Institution(s)

The CPE has a good cooperation with other independent state organs, especially with the PC. Although the PC is not responsible to deal with the discrimination cases, in some cases, PC and the CPE can perform joint activities. For example, all the media reported on the joint statement of the Protector of Citizens and the Commissioner for Protection of Equality on the importance of holding the Pride Parade.<sup>33</sup> In 2012, they established two joint working groups, for Analyzing Regulations of Importance for the Position of Persons with Disability in Legal Transactions and Procedures before Public Authority Organs, and for Analyzing Regulations of Importance for the Legal Position of Transsexual Persons.<sup>34</sup> There are also some other joint activities, such as the organization of seminars. Mostly, these activities are organized in cooperation with NGOs.

### 2.3.3 Intermediaries

The Faculty of Law, University of Belgrade, who organizes Legal clinic on Anti-Discrimination, has a very significant cooperation with other intermediaries. For example, the practical training for students is organized by the CPE’s Office and students can volunteer in the Office, but due to the limited space, this activity will be extended to new premises after the moving. Also, the Faculty of Law cooperates with NGOs that also provide seminars and trainings to law students, bringing closer interesting cases from practice to them. The students also have training on mediation, and one segment was dedicated to mediation in discrimination cases, provided also by NGO representatives.

### 2.3.4 Police

As it was already explained, the CPE has a good cooperation with the Ministry of Interior. Thus, several trainings were organized for the police officers in order to increase their capacities to understand the concept of discrimination and to recognize it in practice. Also, it is worth mentioning that majority of recommendations issued to the Ministry of Interior were fulfilled. One case is particularly interesting. In this case, the Commission for Selecting Candidates for Professional Training at the Centre for Basic Police Training of the Ministry of the Interior of the Republic of Serbia rejected the application of M. S. for entry of candidates from Classes VII and VIII in the Centre for Basic Police Training because, as stated, he did not prove that he did not have a dual citizenship. The application submitted by M. S. was rejected, allegedly for his failure to comply with the requirements pertaining to citizenship, but the decision was not based on an established fact or piece of evidence, and was made on the basis of the assumption that M. S. had a dual citizenship, for he was registered in the Register of Yugoslav citizens only in 1998. However, the CPE found discrimination based on a presumed personal characteristic - dual citizenship.<sup>35</sup> The recommendation issued in this case was followed.

<sup>32</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, June 2014, Belgrade, p. 50.

<sup>33</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, June 2014, Belgrade, p. 86.

<sup>34</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2012*, March 2013, Belgrade, p. 106.

<sup>35</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2014*, June 2015, Belgrade, p. 42.

It is also worth mentioning that the police can cooperate with the NGOs. On September 2012, the training on discrimination on the grounds of sex and gender was held in Ivanjica, within the seminar Representing the Rights of Female Beneficiaries before Centres for Social Work and the police – the Jurisdiction of Institutions and Complaint Mechanisms”, organized by the Autonomous Women’s Centre.<sup>36</sup>

### 2.3.5 Other Relevant Stakeholders

The cooperation between the CPE and the law faculties is significant. The CPE organizes annual Moot Court competition for law students, extending their knowledge in anti-discrimination law and practice and inspiring their research on different complex anti-discrimination instruments and institutes.

## 3. The Role of Courts in Combating Discrimination

### 3.1 Capacities of Courts in Combating Discrimination

After the adoption of the LPD, a special procedure for discrimination cases was introduced and basic courts had jurisdiction to hear the cases. Several trainings were introduced in order to help them to adequately deal with discrimination cases. The Law on the Amendments of the Law on Courts<sup>37</sup> had changed the court’s jurisdiction in the discrimination cases from the basic courts to a higher court in November 2013. Although Article 23(1)(7) states that the higher court has a jurisdiction for "disputes for protection against discrimination and harassment at work," the majority of higher court judges took the view that this provision means that they have jurisdiction to decide only in cases of discrimination at work and in relation to work, while the basic courts retain the jurisdiction to discrimination in other cases. This view caused confusion in the application of this provision, but today it should be clear that the higher courts administer justice in all cases of discrimination.<sup>38</sup> Another set of trainings were introduced for judges of higher courts. Furthermore, in May 2014, the Law on Amendments to the Law on Civil Procedure<sup>39</sup> changed Article 35 by prescribing the rule that in the anti-discrimination court procedures an individual judge should preside.

Although the special procedure was introduced for discrimination cases, some particularities reserved for this proceeding has not been applied adequately in practice. For example, cases are not treated as urgent in practice as they should be according to Article 41(3) of the LPD and usually 3 to 4 years pass before final judgments rendered, sometimes even longer. Thus, the CPE issued on 14 June 2012 a general recommendation to all courts of general jurisdiction to undertake all the necessary measures, to ensure that the proceedings in discrimination cases are carried out efficiently and to be completed as soon as possible.<sup>40</sup> The

<sup>36</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2014*, June 2015, Belgrade, p. 102.

<sup>37</sup> Official Gazette of the Republic of Serbia ", no. 101/2013.

<sup>38</sup> Appellate Court in Belgrade, P. 103/15, 1 July 2015.

<sup>39</sup> "The Official Gazette of the Republic of Serbia ", no. 55/14.

<sup>40</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2012*, March 2013, Belgrade, p. 70. The CPE also found in 2011 that the courts show extreme slowness and inefficiency in processing cases of violence against LGBT population. Commissioner for Protection of Equality, *Regular Annual Report for 2011*, March 2012, Belgrade, p. 44. It also found in the *Report for 2010 and 2011* that the court proceedings for protection against violence, women are exposed to secondary victimization and they are not provided with proper psycho-social support. See Commissioner for Protection of Equality, *Regular Annual Report for 2010*, 10 March 2011, Belgrade, p. 41; Commissioner for Protection of Equality, *Regular Annual Report for 2011*, March 2012, Belgrade, p. 31.

first court judgment under the LPD initiated in 2011 was the “Pfeiffer“ judgment, where the court found that the management of the national airline company discriminated its pilot, based on his ethnic and religious background as being a German and a Catholic.<sup>41</sup> Unfortunately, this proceeding has not been completed yet, as, *inter alia*, the proposal for audio and optical recording during the hearing was denied because the pilot claimed that he was insulted and subjected to discrimination during the proceedings by the company representative. Although this is the first judgment in which discrimination was found, the delay in the proceedings certainly have a deterrent character and is not in accordance with the provision on the urgency. Misdemeanor courts also dealt inefficiently with the requests for initiating misdemeanor proceedings submitted by the CPE. In some cases no steps have been taken for more than a year, in some a request for supplementing the misdemeanor charge was forwarded seven months after the request for initiating misdemeanor proceedings had been submitted.<sup>42</sup> Further delay was initiated in September 2014, due to the strike of attorneys in Serbia that lasted for several months.

Another problem identified in practice was the rejection of the complaints in the cases where it was submitted by an authorized NGO only due to the fact that the authorized representative, through which the party takes legal actions in the proceedings, has to be an attorney. On 27 September 2011, the CPE gave an opinion about Article 85 of the Law on Civil Procedure which provisioned this rule. The CPE stated that this provision puts in an unequal position the persons, who are not able for any given reason to take the proceedings in civil court by themselves, or who do not have enough financial means to pay the fees for representation.<sup>43</sup> In May 2014, this provision has been changed and now the authorized subject could be a lawyer, a cousin, a brother, a sister or a spouse, or a representative of the legal aid service of the local self-government who is a graduate lawyer and has a passed bar exam.

Also, in the implementation of the non-discrimination legislation it is important to apply the provisions on the reverse burden of proof, which are aimed at facilitating the position of the victim of discrimination who should only make it probable that discrimination has taken place. Then the burden of proof switches to the economically stronger party to prove that the discrimination did not occur. However, most judges consider that this policy undermines their impartiality, as during the course of the proceeding they should take a side, and as a consequence do not adequately apply this concept in practice. Judges expressed this attitude during the continuous non-discrimination trainings and in an interview conducted for the purpose of this report.

It is also unclear how much the CPE’s opinion bounds the judge. As judges are independent, majority of them believe that the opinion of the CPE is not compulsory for the court. Although it is true, in a case where the judge departs from the previously given opinion of a specialized body dealing with discrimination case(s), it would be necessary that the judges give well reasoned grounds for their opinion. Further, it would be necessary to rely on CPE’s opinions in other cases, as this body builds harmonized practice in the area of discrimination. Except for the Constitutional Court, it can be said that the judges also do not rely enough on the jurisprudence of the ECtHR.

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<sup>41</sup> He claimed that he was discriminated for both personal characteristics, because he is German and Catholic.

<sup>42</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2012*, March 2013, Belgrade, p. 80.

<sup>43</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2011*, March 2012, Belgrade, p. 84.

However, the court can set a temporary measure, and usually the court will order it, if requested.<sup>44</sup>

### 3.2 Quantity and Quality of Judgments in Cases of Discrimination

In Serbia, it is difficult to give an estimate of discrimination jurisprudence as there is no unified and centralized system of monitoring of the functioning of the system of the legal protection against discrimination, nor the courts are obliged to publish the jurisprudence and make it available. A great number of courts do not register these cases under the rubric of discrimination, but usually under labor disputes, harassment at work, or any other section, which negatively influences the success of analyses of the judgment and, consequently, the assessment of the application of mechanisms for protection against discrimination and its effects.<sup>45</sup> Also, judgments are not published online and are not available. In some databases, it is possible to find just sentences from the reasoning of the judgment. Thus, reliable statistic is available only in relation to the CPE's jurisdiction.

In 2010, 124 complaints were submitted to the CPE (32 on the grounds of sexual orientation and 19 for discrimination based on nationality and ethnical origin) and only in four cases discrimination was found.

In 2011, 335 complaints were submitted (discrimination on the grounds of nationality (20.6%), marital and family status (6%), financial status (5.7%), age (4.5%), disability (3.2%), sexual orientation (2.8%) and other grounds (46.9%).

In 2012, even 602 complaints were submitted as a result of different promotional events (76 complaints were submitted on the grounds of disability, 68 on the grounds of national affiliation or ethnic origin, 42 on the grounds of sex, 32 on the grounds of political and religious beliefs, 31 on the grounds of age, 26 on the grounds of membership in political, trade union or other organizations, 22 on the grounds of marital or family status, 22 on the grounds of financial status, 18 on the grounds of state of health, and 8 on the grounds of sexual orientation, 145 complaints were lodged without stating the grounds for discrimination).

In 2013, 716 complaints were submitted to the CPE (health conditions 16,5 %, nationality and ethnic origin 12,2%, age 10,3%, disability 10%, marital and family status 9,1%, gender 7,3%, financial situation 6,8%, sexual orientation 3,8%, etc.).

In 2014, 666 complaints were submitted to the CPE (nationality and ethnical origin 18%, health condition 14,1%, age 11,3%, disability 10,1%, membership in political, syndicate or other organization 8,4%, gender 7,7%, marital and family status 7,5%, etc.).

Finally, in 2015, the CPE received 797 complaints (gender 22,1%, nationality or ethnical origin 18,4%, disability 11,3%, age 9,4%, religious beliefs 5,4%, sexual orientation 4,8%, etc).

What can be undoubtedly concluded on the basis of the available judgments is that the number of cases submitted to the courts does not correspond to the number of cases of discriminatory practices, indicating a widespread discrimination, and this number is especially different when compared to the number of complaints before the CPE, which may indicate a certain degree of distrust in the judiciary as well. However, in some cases the complaints were filed against the courts and prosecution offices to the CPE, mostly by

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<sup>44</sup> See, e. g., a lawsuit that was filed against an employer for discrimination against the members of Roma national minority. Commissioner for Protection of Equality, *Regular Annual Report for 2014*, June 2015, Belgrade, p. 76.

<sup>45</sup> See, e. g., Commissioner for Protection of Equality, *Regular Annual Report for 2012*, March 2013, Belgrade, p. 76.

persons who lost the court procedure or were not completely successful in the procedure. Out of 11 complaints in 2011, not one of the proceedings established discrimination,<sup>46</sup> which can be good indicator that the judges deliver proper judgments.

On the other side, available judgments lack an appropriate explanation, and some of them demonstrate that the practice has to be harmonized. Therefore, in some judgments, the court found discrimination despite the fact that the personal characteristics as grounds for discrimination are missing.<sup>47</sup> Also, an identified problem is that the judges often mix the discrimination on grounds of sex with the harassment at work.<sup>48</sup> One of the problems is also the overlap of the three anti-discrimination laws, and the question under which law the case should be preceded if it involves discrimination against persons with disabilities, or gender discrimination. While the relevant practice under the Law on Gender Equality is still missing, the cases of discrimination against people with disabilities are mostly processed by the Law on the Prevention of Discrimination against Persons with Disabilities. Although this is a specialized law, it should be taken in consideration that certain procedural provisions are less favorable compared to other non-discrimination laws, such as the provision on the burden of proof. Until now, the largest number of cases referred to discrimination against persons with disabilities involves transportation, where they were exposed to insult and harassment by bus drivers. In majority of the cases, the courts have found discrimination and ordered a compensation for material damage, but considered that it is not necessary to determine a non-pecuniary damage, or had assigned a symbolic amount compared to some other cases (e.g. defamation and insult).<sup>49</sup> This fact indicates a lack of understanding of the phenomenon of discrimination and its harmful consequences.

Furthermore, the prevailing view in the case law is that the provision of access to public facilities and areas requires substantial financial resources, and that it is still acceptable that many institutions are not accessible, or that people with disabilities can move only in certain areas.<sup>50</sup>

Although a hate speech is present in the Republic of Serbia, there were only few cases in which the court found its existence. The Higher Court in Belgrade handed down its first judgment for hate speech under Article 11 of the Law on the Prohibition of Discrimination due to very negative readers' comments on the website of a daily newspaper as a reaction to the published article. It was found that the newspaper acted discriminatory towards the LGBT population, allowing the publication of defamatory comments.<sup>51</sup> Although this judgment is very important as it establishes the limits of tolerance for speech that may be offensive to members of certain groups, the rejection of the claim for damages demonstrates a lack of understanding of the harmful effects of such speech. Moreover, in one case the lower and higher court have expressed diametrically opposing views regarding the apparent hate speech.<sup>52</sup>

The courts have, thus far, not had much opportunity to deal with measures of positive action. However, in one case the court found no discrimination for an advertised post for the

<sup>46</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2011*, March 2012, Belgrade, p. 58.

<sup>47</sup> Supreme Court of Cassation, Rev2 687/2012, 27 December 2012.

<sup>48</sup> See, for example, Appellate Court in Novi Sad, judgement GŽ1. 2261/11, 30 March 2012.

<sup>49</sup> See Republic of Serbia/Vrhovni Kasacioni Sud Republike Srbije / Rev. 3602/10, 16 December 2010; Republic of Serbia/Vrhovni Kasacioni Sud Republike Srbije/ Rev. 66/12, February 2012.

<sup>50</sup> Republic of Serbia/Vrhovni Kasacioni Sud Republike Srbije, Rev 99/11, 10 February 2011.

<sup>51</sup> Belgrade Center for Human Rights, *Human Rights in Serbia in 2011*, pp. 265, 266. This decision was upheld by the Appellate Court in February 2012.

<sup>52</sup> See the First Basic Court in Belgrade, 73. P. no. 15378/2012, 17 September 2013; Appellate Court in Belgrade, GŽ. 2426/14, 11 June 2014.



position of a counter that was opened only for women. The court concluded that "giving priority to female workers in retail outlets for preparing and selling food, the respondent did not discriminate against men who, as is a well-known fact ... have possibility to find jobs in incomparably greater number, due to the women's natural reproductive function, who more frequently employ, and whom defendant in this case did not deny the right to work."<sup>53</sup> This example shows a lack of understanding of what positive action is and when and under which conditions it applies.

Bearing in mind that a specialization of judges is needed, as well as their capacity and sensitivity to deal with complex issues, the training for trainers was introduced at the beginning of 2016 in order to provide comprehensive knowledge on anti-discrimination, as well as to provide workshops on breaking of the stereotypes and the prejudices.

### 3.3 Anti-Discrimination within Educational Programs of Judicial Training Academies

In 2010 and 2011, Judicial Academy (JA), in cooperation with UN Women, organized a training on "Economic and Social Rights of Women", as a basic program of protection against discrimination for judges and judicial assistants. This training focused on the gender discrimination, and did not include a general aspect of discrimination.

On the initiative and with the support of the OSCE Mission in Belgrade, JA as of 2011 organizes a four-day seminar on the application of non-discrimination legislation in the Republic of Serbia for beneficiaries of the initial training. The seminar is usually held in May in Zlatibor. On the first day of the seminar, participants learn about the concept, types and forms of discrimination, and then focus on the gender equality and take an active part in the workshops that serve to reveal and break gender stereotypes and prejudices. On the second day, participants receive a basic knowledge on the universal and European standards and mechanisms of protection against discrimination, through an analysis of the text of the relevant international instruments, but also through the presentation of the most important practice of international courts. Afterwards, they have a lecture on the use of the sign language in the court. Particular attention is dedicated to the institution of the CPE, its procedures and practices through a case study. On the third day of the seminar, participants have a workshop on the mechanisms of discrimination against people with disabilities. The next block is devoted to analysis of the relevant non-discrimination legislation, followed by the presentation and analysis of the domestic jurisprudence. On the last day, participants learn about the criminal law protection in cases of discrimination. The seminar is held by professors, NGO activists, and independent experts, as well as judges of the Supreme Court of Cassation and Deputy Appellate Prosecutor from Belgrade.

In addition to these trainings, in early October 2014, the JA organized two workshops for students of the second, third, and fourth year on discrimination and domestic violence. Firstly, the participants got an overview of the existing legal framework in the field of discrimination and violence. Afterwards, they were divided into four groups with the task to analyze a hypothetical case and the application of domestic laws, as well as the relevant jurisprudence of the ECtHR which they received several days in advance in order to better prepare for the workshop. The aim of the workshop was to understand the legal framework in the field of the domestic violence and its proper application in practice; and to understand the concept of discrimination, the possibilities of civil law protection from discrimination, the role of the gender stereotypes and prejudices and the obligations of their elimination; to

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<sup>53</sup> First Basic Court in Belgrade, judgment from 7 March 2013. The judgement was delivered based on the request for free access to information, but the number of judgments was marked.

learn to incorporate international standards and norms binding on the Republic Serbia, into the text of the judgment. Participants had the task to prepare the judgment and present it in front of other participants, after which they participated in a discussion on some complex legal issues.

After the successful initiation of the non-discrimination program for the initial training, and the publication of handbook “Judicial Civil Protection from Discrimination”<sup>54</sup> in October 2012, it was agreed to also organize 10 one-day trainings for judges of the Higher Magistrates' Courts in Belgrade, Novi Sad, Kragujevac and Nis during 2013. This training was also extended for judges of Magistrates' Courts in Novi Pazar, Cacak, Vranje, Nis, Subotica, Novi Sad, Kladovo, Sabac and Belgrade. All these trainings were completed in 2013, with the aim to enable judges to adequately decide on the minor offenses stipulated in Articles 50-60 of the LPD by acquiring necessary knowledge in the field of non-discrimination. Judges received a basis on the concept and forms of discrimination, and the relevant international standards in the field of non-discrimination. Another part of the training focused on the legislative framework of the Republic of Serbia, the practice of courts of general jurisdiction (criminal and civil), and the role of the CPE. The last part of the training was dedicated to the legal framework and the European practice on misdemeanor protection. The training was delivered by professors and judges, staff of the CPE, as well as judges of the High Magistrate Court in Belgrade.

In December 2012, the JA, in cooperation with the CPE and with the support of the Democratization Department of the OSCE Mission to Serbia, decided to organize a two-day seminar for the judges of the civil courts. The first pilot program was held in Vrdnik in December 2013 for judges from the territory of the Autonomous Province of Vojvodina, and included 30 judges and judicial assistants from the following basic courts: Novi Sad, Zrenjanin, Kikinda, Sombor, Sremska Mitrovica and Subotica. The training was delivered by a professor, a judge of the Supreme Court of Cassation, Deputy Appellate Public Prosecutor and the staff from the Office of the CPE plus one NGO representative. The aim of this training was to obtain a specific knowledge of the civil legal protection from discrimination. The participants received an overview of the relevant international standards in the field of civil law protection from discrimination. Another aspect of the training had focused on particularities of the civil legal proceeding in the discrimination cases, particularly to evidence (the practical application of statistical data as evidence, the role of voluntary discrimination testers - testers and the reverse burden of proof). Also, a training program aimed to deepen the knowledge of judges to the specific roles of the CPE, its jurisdiction and procedure, and the CPE's position in strategic litigation. Also, the participants had an opportunity to become familiar with statistical data related to the number of cases in the field of protection against discrimination in Serbia. Finally, this program included the deepening of the knowledge about other forms of legal protection against discrimination - criminal and misdemeanor - and their differentiation from the civil protection. At the end of the seminar, participants were informed of the results of the research conducted in 2012 by the NGO YUKOM on the number of civil discrimination cases. Not only that topics for the seminar were carefully chosen, but also the methodology had been changed compared to the previous trainings. Thus, in addition to the interactive lectures, the participants were engaged in a group work, and through the case studies they were supposed to answers very specific questions concerning the recognition of the existence of discrimination, identification of forms of discrimination (direct or indirect), finding of the comparator, the basis for discrimination, etc.

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<sup>54</sup> N. Petrovic (ed.) (2012) ‘Judicial Civil Protection from Discrimination’, Belgrade: Commissioner for Protection of Equality, Judicial Academy, OSCE.

The Law on the Amendments of the Law on Courts<sup>55</sup> had changed the court's jurisdiction in discrimination cases from basic courts to a higher court in November 2013. As a reaction, in 2014 four seminars for judges of higher courts were organized – in March 2014 in Vrsac for judges from the territory of Vojvodina (Novi Sad appeal), in March 2014 in Belgrade (Belgrade appeal), in October 2014 in Vrnjacka Banja (Nis appeal), and in Arandjelovac (Kragujevac appeal).

In 2015, JA selected 8 judges of the higher courts from Serbia who will undergo training for trainers consisting of 5 one to three days seminars during 2016. The training program is very comprehensive and contains interpretation of the domestic legal framework through the case law analyses (judgments of the ECtHR and CJEU, CPE's opinions, court judgments). One of the aims of this training is to harmonize the court practice in the discrimination cases by specializing judges of different courts who will become recognized authorities in the field and who will have possibility, in the follow-up activities, to exchange ideas and discuss the controversial legal issues with judges of higher and appellate courts.

## 4. Procedural Aspects in Discrimination Cases

### 4.1 Mediation

The Law on the Peaceful Resolution of Labour Disputes<sup>56</sup> prescribes the jurisdiction of the National Agency for the Peaceful Resolution of Labour Disputes in the procedures in both individual and collective disputes.

Mediation is also prescribed by the Law on Mediation,<sup>57</sup> which made some improvements and advancements to the existing system, dated from 2005, and brought changes in terms of the refinement and improvement of the existing solutions which have proven inefficient in practice. The basic principles of mediation are that it is conducted on a voluntary basis; in a procedure with strictly personal participation of the parties where the equal treatment of the parties, the privacy of the procedure, the confidentiality, the neutrality, the urgency and the prohibition of the use of evidence in other proceedings are guaranteed. The agreement in the mediation procedure is achieved with the assistance of the mediators who are appointed by and registered with the Ministry of Justice and Public Administration. The legal effectiveness of the agreement reached in the mediation procedure is equal to that of a court decision and the agreement is enforceable through the enforcement proceedings. Initiating mediation causes an interruption in the running of the statute of limitation for a period of 60 days in a court proceeding.

The CPE is also entitled, but not obliged, to suggest or recommend mediation after an assessment of whether the case is suitable for mediation. On the other hand, the Commissioner is required to recommend mediation to the parties before taking the first action in the proceedings on the complaint. If both parties accept the mediation, the complaint procedure is suspended until the end of the mediation procedure. If the parties reach an agreement, the procedure is completed, whereas if there has been no agreement reached through the mediation procedure, the complaint procedure before the CPE is continued.

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<sup>55</sup> "The Official Gazette of the Republic of Serbia ", no. 101/2013.

<sup>56</sup> Official Gazette of the Republic of Serbia, no. 125/2004, 104/2009, 22 November 2004.

<sup>57</sup> Official Gazette of the Republic of Serbia, no. 55/2014, 23 May 2014. It was adopted on 31 May 2014 and came into force on 1 January 2015.

In 2012, the CPE established a Working group which prepared a mediation model adjusted to the characteristics of discrimination cases.<sup>58</sup> This model is based on the following principles: voluntariness, confidentiality, impartiality and neutrality. However, some special rules have been created. Thus, this form of mediation is based on the concept of restorative justice, as for the most part there is no conflict, but the matter revolves around emotional or other injury inflicted by one party to the other. This model also contains a specific criteria and the manner of selecting cases suitable for mediation. Therefore, it has to be first analyzed if the case is suitable for conducting a strategic lawsuit, as the strategically important cases of discrimination should receive an epilogue before a court. Also, the principle of the mediator's neutrality has been redefined, in the sense that it must not be morally neutral towards the discrimination itself, but must quite clearly show that it is morally unacceptable. In order to ensure that the conditions for mediation are effective and that they satisfy the needs of both parties, the CPE's service supplies all the relevant information on the mediation procedure and on the standard procedure of acting upon a complaint to both parties, thus giving them an opportunity to review the advantages of either procedure and to choose the one which can satisfy their interests.

The mediation procedure is conducted by a mediator appointed by an authorized official of the CPE, from the list of authorized mediators. Only qualified persons, who are not employed with the CPE can be included in the list of mediators, provided they meet the criteria and closely defined requirements established by the CPE.

A special training programme for mediators has been prepared for those interested in entering the CPE's list of authorized mediators. During 2012, the first training was conducted and successfully completed by 22 persons.<sup>59</sup> In 2013, the list was extended with additional 17 persons, making a total of 39 mediators. During the 2013 – 2015, the CPE organized training and published a handbook for mediators for conducting mediation in discriminating cases, as well as the training for employees in order to recognize discrimination cases suitable for mediation.<sup>60</sup>

In 2013, the mediation was offered in two cases and it was accepted in none.<sup>61</sup> In 2014, the mediation was offered in four cases, but accepted in none. However, in 2015 the mediation was offered and accepted for the first time, and was successfully concluded in both of the cases.<sup>62</sup>

## 4.2 Evidencing Discrimination

In "Krsmanovaca case", decided by the Serbian Supreme Court in 2004, three Roma youngsters were prevented on 8 July 2000 from entering into the swimming pool facilities only because they were Roma.<sup>63</sup> The court found that the defendant's behaviour caused emotional damage to the plaintiffs, provoking feelings of inferiority and hurt because they were being treated differently due to their ethnic origin. This decision sets important legal precedent being the first decision by a Serbian court against Roma discrimination regarding access to public facilities. It also provided direction for subsequent cases and confirmed that

<sup>58</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2012*, Belgrade, 15 March 2013, p. 90.

<sup>59</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2012*, Belgrade, 15 March 2013, p. 92.

<sup>60</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2012*, Belgrade, 15 March 2013, p. 16.

<sup>61</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2013*, Belgrade, June 2014, p. 39.

<sup>62</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2015*, Belgrade, 15 March 2016, p. 73.

<sup>63</sup> Republika Srbija/Vrhovni Kasacioni Sud Republike Srbije Rev. 229/2004/1 dated 21 April 2004.

a "situational testing" standard (accepted for the first time by a Serbian court in this case) represents court-admitted evidence.<sup>64</sup>

The LPD does not contain any specific rule in relation to the statistics, and the Civil Procedure Code does not mention statistical evidence as evidence before the court.<sup>65</sup> It just says in Article 7 that parties are obliged to present all the facts on which they base their claim and to propose evidence which determine that fact. However, the GEA contains several provisions which relate to statistical data, but not to statistical evidence.

Although judges are reluctant to use the statistical data as evidence in court in cases of discrimination, statistical evidence in order to establish indirect discrimination is used by the CPE, but not so widely, as most cases fall within the definition of the direct discrimination. It is illustrative to mention one complaint before the CPE, where the applicant stated that she was transferred to a lower-ranked post that did not fit her qualifications immediately after returning from maternity leave, while the post she had previously occupied was not abolished.<sup>66</sup> Following the procedure of acting upon the complaint, it was established that the employer, by transferring the complainant to a lower-ranked post, committed an act of indirect discrimination on the grounds of sex. It was requested from the employer to forward a list of all female employees who had taken a maternity leave in the past three years, along with an information on which posts they occupied before taking the maternity leave or sick leave for the purpose of tending to their children, what posts they were given after returning to work, and also what posts they occupied six months after returning to work. Having reviewed the submitted documents, it was found that in the last three years, 89 female workers used a maternity leave, and 31 workers are still on a maternity leave. Taking into account only the position of the employees who have returned to their jobs after the maternity leave, it was found that out of a total of 58 workers, 14 of them moved to lower positions after returning from maternity leave (24.14%). However, this percentage is even higher when deducting 18 female workers who were employed at the lowest jobs (cashiers, cleaning ladies and coffee makers), and after returning from the leave were not able to be moved to a lower position. On the basis of this complaint and data submitted, a strategic litigation was initiated.

### 4.3 Strategic Litigation

Under Article 46 of the LPE, the CPE has a legal standing to initiate a discrimination lawsuit. The CPE can initiate a lawsuit in a strategic case that demonstrates frequent and wide spread discrimination in respect of which there are good prospects for success. The litigation is initiated and conducted in the general public interest, in order to contribute to the consistent implementation of the legislation and improvement of the legal practice, to further encourage the victims of discrimination to initiate the anti-discrimination litigation, to uphold the rule of law and to contribute to the improvement of the access to justice.

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<sup>64</sup> This was based on another, the "*Club Acapulco*" case decided in 2007. Here, the Fourth Municipal Court sentenced a security agent of a night club "Acapulco" in Belgrade to 2 years of imprisonment because he banned 3 Roma from entering the club due to their ethnic origin. After this event, NGO "Humanitarian Law Center" made a survey on 25 July 2003 which confirmed that the security agents were directly discriminating against the Roma population based on their ethnic origin. IV Municipal Court, No. III K – 1432/04, Judgment of 19 April 2007.

<sup>65</sup> Official Gazette of the Republic of Serbia, no. 72/2011, 49/2013 – decision CC, 74/2013 – decision CC and 55/2014.

<sup>66</sup> See Commissioner for the Protection of Equality, *Annual Report for 2012*, Belgrade, March 2013, p. 68. See also *A.C.M. v. N. A. A. V.*, complaint no. 715, opinion from 7 June 2012, where the Commissioner found no discrimination using statistical data.

However, in order to initiate a lawsuit, the Commissioner needs the consent of the person who has experienced discrimination. It was previously unclear whether the CPE needs consent in the case of two or more persons, and *argumentum a contrario* leads to the conclusion that in these situations the Commissioner does not require the explicit consent of the people who have experienced discrimination.<sup>67</sup> Some courts rejected this argument. In September 2014, the Supreme Court of Cassation put an end to this debate and held that the Commissioner did not need a written consent as the case affected a group of people - children of Roma origin.<sup>68</sup> In this case, the CPE initiated a lawsuit against a fast-food restaurant, because a security worker did not allow the children of Roma origin to enter the restaurant with a woman who wanted to buy them food. The Supreme Court of Cassation noted that the complaint was not directed at the Commissioner's finding of discrimination against a particular individual, in which case the Commissioner would be required to obtain written consent to the filing of the lawsuit, but it was needed to establish the existence of discrimination against a group of people.

In the period 2010 to 2015, the CPE initiated lawsuits in 13 strategic cases: 7 for discrimination against Roma, 3 for sex discrimination, 1 for discrimination based on disability, and 2 for multiple discrimination.<sup>69</sup> Thus far, in 6 proceedings the court delivered the judgment in the favour of the CPE and accepted its requests. The CPE cannot claim only for a compensation for pecuniary and non-pecuniary damages, which can be demanded by the victims of discrimination when they initiate a lawsuit on their own. In 2 cases, the CPE has withdrawn the lawsuit, in one it was terminated, while 2 cases are submitted to the Appellate Court in Belgrade, and one is submitted to the Higher Court in Belgrade.<sup>70</sup> Only in one case, the CPE's claim was rejected.

#### 4.4 Class Action/Actio Popularis

In Serbia, the national law does allow associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.<sup>71</sup> The Civil Procedure Code from 2011 introduced so-called organisational claims for the protection of the collective rights and interests,<sup>72</sup> but in 2013, the Constitutional Court proclaimed the articles which regulate this procedure to be unconstitutional. As a consequence of this decision, on 23 June 2014, the Third Basic Court in Belgrade rejected the first collective claim submitted by an association of bank clients on the issue of foreign currency loans in Swiss Francs which covered 10 000 clients.<sup>73</sup>

<sup>67</sup> N. Petrušić, I. Krstić, T. Marinković (2014) *Commentary on the Law on the Prohibition of Discrimination*, Belgrade: Commissioner for Protection of Equality, Judicial Academy, p. 915.

<sup>68</sup> N. Petrušić, I. Krstić, T. Marinković (2014) *Commentary on the Law on the Prohibition of Discrimination*, Belgrade: Commissioner for Protection of Equality, Judicial Academy, p. 915.

<sup>69</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2015*, Belgrade, 15 March 2016, p. 171.

<sup>70</sup> Commissioner for the Protection of Equality, *Regular Annual Report for 2015*, Belgrade, 15 March 2016, p. 171.

<sup>71</sup> For more on the collectivisation of legal remedies, see B. Babovic (2012) 'Collectivisation of legal redress against discrimination', in *Pravni život*, Vol. 11/2012, p. 1013-1023.

<sup>72</sup> They were introduced for the protection of collective rights and interests and for the protection of consumers (Articles 495-505). Official Gazette of the Republic of Serbia, no. 72/2011, 28 September 2011.

<sup>73</sup> See Efektiva, 'Kolektivna tužba odbačena kao nedozvoljena!?' ('Collective claim rejected as unadmitted?'), 8 July 2014, <http://efektiva.rs/aktuelnosti-krediti/kolektivna-tuzba-odbacena-kao-nedozvoljena>, 25.03.2016.

The Law on Consumer Protection from 2014 regulates the protection of the collective interests of the consumers, but this protection has been moved from the civil (as it was regulated in the Civil Procedure Code from 2011) to the administrative procedure.

In Serbia, the national law allows associations, organizations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*). This right is not recognized in the LPD, but derives from the Law on Contract and Torts,<sup>74</sup> which in Article 156 establishes a duty to eliminate a danger of injury or loss. This provision means that everyone can demand that appropriate measures be taken to prevent damage to them or to an unspecified number of people. This is particularly applicable in discrimination cases.<sup>75</sup>

However, thus far there are no class actions or *actio popularis* in the discrimination cases.

#### 4.5 Shifting of the Burden of Proof

The LPD prescribes a shift of the burden of proof in the civil proceedings. Thus, Article 45(1) provides that “if the court establishes that a direct act of discrimination has been committed, or if that fact is undisputed by the parties to the lawsuit, the defendant may not be relieved of responsibility by supplying evidence that they are not guilty.” If the complainant proves the likelihood of the defendant’s having committed an act of discrimination, the burden of providing evidence that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant. (Article 45(2)).

The case law still does not provide clear rules on the application of this principle. It also seems from the textual interpretation of the relevant articles that this rule applies only in cases of direct and indirect discrimination. However, it must be interpreted to mean that the rule on the burden of proof also applies to harassment.<sup>76</sup>

However, the rules on the burden of proof, despite being enshrined in the procedural part of the LPD, are not procedural in their nature, but substantive. As a consequence, the court decides whether particular conduct constitutes discrimination, and it is declared only in the explanation of the verdict. Thus, the defendant does not know if the complainant proved the likelihood of discrimination and if the burden of proof shifted to them.

This situation is further exacerbated by the fact that the Civil Procedure Code (which applies as *lex generalis*) imposes a duty to present all the facts necessary to justify its submission at the preparatory session or at the first hearing, to submit evidence, to take a stand on the allegation and the evidence provided by the opposing party, as well as to propose a time frame for the implementation of the procedure (Article 308).

The LPDPD, does not provide a rule on reversing the burden of proof from complainant to defendant in cases of discrimination based on disability.

<sup>74</sup> Official Gazette of the SFRJ\*, no. 29/78, 39/85, 45/89 - decision CCJ and 57/89, Official Gazette of the SRJ, no. 31/93 and Official Gazette of the Republic of Serbia SCG, no. 1/2003 – Constitutional Charter, 1 July 1978.

<sup>75</sup> Article 156 prescribes that everyone may demand from another to eliminate a source of danger threatening considerable damage to them or to an unspecified number of persons, as well as to refrain from an activity causing disturbance or risk of loss, should the ensuing disturbance or loss be impossible to prevent by adequate measures (para. 1). On the request of an interested person, the court shall order adequate measures to be taken to prevent the emergence of damage or disturbance, or to eliminate the source of risk – at the expense of the individual who is the source of the risk, should they fail to act accordingly (par. 2).

<sup>76</sup> See N. Petrušić, I. Krstić, T. Marinković (2014) *Commentary on the Law on the Prohibition of Discrimination*, Belgrade: Commissioner for Protection of Equality, Judicial Academy, p. 188.

#### 4.6 Remedies

In Serbia, there is a range of applicable sanctions in discrimination cases. Article 43(4) of the LPD expressly allows compensation for material and non-material damage in discrimination cases, except in a case when the lawsuit is submitted by the CPE, organization or tester. The principles set out in the Law on Contract and Torts apply for determining the type of damage, and a causal link between the discriminatory act and the damage. However, the average amount in the current jurisprudence cannot be deemed appropriate in comparison to the amount of compensation in some other areas. This particularly applies to the compensation of non-pecuniary damages.

The complainant can also demand the following: a ban to be imposed on an action that poses the threat of discrimination, a ban on a proceeding with a discriminatory action, or a ban on the repeating a discriminatory action; that the court establish that the defendant has treated the complainant or another party in a discriminatory manner; for steps to be taken to redress the consequences of the discriminatory treatment; and that the decision passed on any of the lawsuits referred above be published. Thus, the LPE, together with other anti-discrimination laws, provides different measures, from the prohibition of the discriminatory act, to the compensation and the publication of the court decision, which has proved to be a very effective measure in Serbia. The same is indicated in the practice of the CPE, whose opinions are mostly respected, in order to prevent their publication.

The LPE prescribes that the complainant may demand temporary measures, and its request must prove the necessity of doing so in order to eliminate the risk of violence or irreparable damage. The court is obliged to issue its decision on a request for the adoption of a temporary measure immediately or within 3 days.

Some acts can be considered to be criminal acts, for which it is possible to impose monetary fines or imprisonment. The most important is Article 128 (violation of equality) and a violator can get up to three years' imprisonment while for the more severe form three months' to five years' imprisonment.

The LPD in Articles 50-60 prescribes the fines which can be imposed in the misdemeanor proceedings, as well as some other laws that contain anti-discrimination provisions. However, monetary fines range from between RSD 10 000 and RSD 50 000 (EUR 80 to EUR 400) for individuals (Articles 50-60), to the sum of between RSD 10 000 and RSD 100 000 (EUR 80 to EUR 800) for legal entities (Articles 52-60), which cannot be considered to be dissuasive, especially bearing in mind that the judges will order a minimal fine. An illustrative example is a case of segregation of the Roma children in a primary school. In this case, for several years Roma children attended separate classes in an old building, located in the same court yard as the new building, where the other pupils studied.<sup>77</sup> The judge imposed a fine of RSD 30 000 (EUR 250) on the school and RSD 5 000 (EUR 45) on the principal. This shows that, despite the fact that the knowledge among judges about the prohibition of discrimination has increased, they are still not fully aware of the detrimental effect of the discriminatory acts.

Although Article 41(2) of the LPD provides urgent for proceedings in discrimination cases, in practice, they are not treated as urgent. It usually takes more than three years to receive a final decision, which influences the effectiveness of the sanctions, and this practice has to be changed as soon as possible.

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<sup>77</sup> See Court for Misdemeanours in Novi Pazar, Pr. br. 684/12-69, 13 September 2013; see also Court for Misdemeanours in Novi Pazar, Pr. br. 7 – 4162/ 13-67, 14 May 2014.



#### 4.7 Follow-Up to Opinions and Recommendations

The proceeding before the CPE is initiated by filing the complaint. Based on the results of established facts, according to Article 39(1) the CPE passes a decision in a form of an opinion on whether the discrimination has been performed or not. Besides the opinion about the discrimination, the CPE gives a recommendation to the person stated as acting discriminatory about the ways of eliminating the right violation (Article 38(2) of the LPD) by giving the violator a deadline of 30 days to act on the recommendations and to redress the right of the violation.

The person given the recommendation is obliged to act on the recommendation and redress the violation in 30 days from receiving the recommendation, as well as to inform the CPE. If the violator does not act on it, the CPE is authorized to pass a decision that gives a warning to the discriminator and additional 30 days for redressing the violation. The decision is final and complaint against it is not allowed. If the discriminator does not eliminate violation in additional 30 days, the CPE is authorized, according to Article 40, to inform the public publishing it in a daily newspaper with a national circulation.

The CPE is also authorized to issue recommendations to the public administration and other bodies for fulfilling equality and improving the protection against discrimination. The CPE is obliged to monitor the implementation of the legislation in the area of equality protection and discrimination prohibition, to give an opinion on the draft laws and by-laws, and to initiate adoption of the new and changes of the current legislation (Article 33 of the LPD).

### 5. The Role of Universities in Combating Discrimination

#### 5.1 Law Departments

In Serbia, only the Faculty of Law, University of Belgrade offer several anti-discrimination courses. On undergraduate level, the students can opt for the Legal Clinic on Anti-Discrimination, that is the one of the two optional courses in the 4th year of studies. Each year, starting from 2008, a group of 20 students attend this program. This program was included in the regular curricula with two aims: to improve the knowledge of the students in anti-discrimination law and to improve their practical skills as future practicing lawyers; as well as to provide a free legal aid to marginalized groups. The program is very intensive and consists from the theoretical part where students learn about the concepts and forms of discrimination, the different grounds for discrimination and the areas in which discrimination usually occurs. The lectures are interactive and oriented towards analyses of court decisions and CPE's opinions. The lectures and workshops are provided by professors, practitioners and NGO activists. OSCE mission in Serbia also supports the one day training on combating prejudices and stereotypes. The practice is obtained either through the work with real clients (in the form of referral, information, oral advice) or through the practice in partnering institutions (CPE or NGOs). Also, the Faculty of Law offers Legal Clinic on Combating Human Trafficking, Legal Clinic on Asylum and Refugee Law and Legal Clinic on Family Law, where some discrimination topics are covered as well.

Another course worth mentioning is a third year optional course on Gender studies. In this course, the students learn about gender equality, the position of women in different areas of the public and the private life, domestic violence and sex exploitation. Usually, around 30 students opt for this course, but this academic year (2015/2016) even 80 students opted for this course.

International Human Rights Law course, which is a third year course compulsory for students who opted for International Law courses, also offers several classes about discrimination (as one of the main human rights principles, jurisprudence of the ECtHR in relation to discrimination cases, sex discrimination, hate speech, use of religious symbols, asylum, etc.). Around 300 students pass this exam each year.

On a master level, students who enroll at the EU Integration master course in English can opt for a course in EU Anti-Discrimination Law. In this course, the accent is on the EU anti-discrimination standards, and primarily the analyses of several relevant EU anti-discrimination directives, as well as on the jurisprudence of the CJEU and ECtHR in relation to several grounds: gender, race and ethnicity, religion, sexual orientation, age and disability. Each year around 15 students attend this course. Another course, EU Human Rights Law includes several classes on discrimination and the use of religious symbols.

Students of master and doctoral studies also learn about the Anti-discrimination Law within two courses: International Human Rights Law and International Jurisprudence, where they primarily analyze some interesting anti-discrimination cases and present them in front of the group: discrimination of Roma in education, use of religious symbols in classrooms, paternity leave, etc.

The cooperation between the Faculty of Law and the JA exists and professors who are teaching the anti-discrimination courses also take part in the trainings organized by the JA. Sometimes, the students and beneficiaries of the initial training attend the lectures together and exchange ideas and views on different complex matters. Experience in work with the beneficiaries of the initial training shapes the curricula at the Faculty of Law, as well as the experience in providing training for judges. For example, this experience has led to introducing workshops on breaking the stereotypes and prejudices for students of the Legal Clinic on anti-discrimination and students attending the Gender Studies course.

The Faculty of Law, University of Nis does not have a specialized course on anti-discrimination, but offers a Legal Gender Studies as an elective course for students of the third and fourth year of undergraduate studies. In this course, students learn about the CEDAW, gender equality and the social context of the gender discrimination, the domestic violence, the standards and mechanisms to achieve gender equality, as well as institutional mechanism for gender equality in Serbia. Also, within International Human Rights Law course, which is elective course in the third year of studies, as well as a master course, one class is dedicated to the principle of the prohibition of discrimination. On the doctoral studies, the Faculty of Law from Nis offers two elective courses: Human Rights and the European Human Rights Law, and one to two classes are dedicated to the principle of the prohibition of discrimination, as well as the jurisprudence of the ECtHR in relation to some discrimination cases.

The Faculty of Law, University of Kragujevac does not offer any specialized course on anti-discrimination, and does not teach the students about Anti-discrimination Law in any of the existing courses.

It is important mentioning that each year the CPE organizes Moot Court competition in the area of the protection against discrimination for law students, starting from 2013. From June to December 2013, the first competition was organized in partnership with the JA and with the support of UNDP.<sup>78</sup> That year, 22 teams from all nine accredited law schools from the whole Serbia took part, as well as a team of one NGO. The judges at the Moot Court

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<sup>78</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, June 2014, Belgrade, p. 122.

competition were the judges of the Supreme Court of Serbia, Appellate Court in Niš, the lawyers and other reputable legal professionals. The topic was related to sex discrimination.

In 2014, USAID supported the second national competition organized by the CPE in collaboration with the JA and the Foundation for Open Society.<sup>79</sup> The topic was discrimination on the basis of sexual orientation. For the competition applied 17 teams, from all accredited Law Faculties in the Republic of Serbia. The competition was held in the building of the Constitutional Court in Belgrade, in December 2014. The judges for the simulation were lawyers, judges and law experts.

Finally, in 2015, the third competition was organized with the same partners, and for the law students of undergraduate and master studies. In total, 27 teams applied for the competition (75 students), that is 40% higher number than in 2014.<sup>80</sup> The competition was held in the building of the Administrative Court, and the topic was religious discrimination.

## 5.2 Other Departments

Other public law faculties, members of SEELS and Police Academies, do not offer special courses on the International, European and national legal provisions prohibiting discrimination. However, some specialized courses, mainly on gender issues, do exist. Also, anti-discrimination is integrated into other courses, albeit only in one or two classes.

Thus, Police Academy offers Human Rights as an elective course in the third year of the undergraduate studies, as well as the Police and Human Rights course on a master level, but discrimination is not in the focus of these courses, where only the equality principle and prohibition of discrimination is mentioned.

The Faculty of Political Sciences, University of Belgrade has Gender studies as a compulsory or elective course, depending on the selected group of courses. In this course, students learn about the feminist movements, feminist theories, contemporary feminism, the question of identity and differences, politics of identity, problem of intersectionality, equality and equal opportunities, as well as mechanisms of gender equality and gender sensitive language. Also, the same faculty offers the Politics of Gender Equality course as an elective course on a master level, within which the students learn about the mechanisms of gender equality, the CEDAW, gender equality in education, Millennium goals, violence, reproductive rights, economic position of women, women's health and new biotechnology, women in politics, as well as gender perspective of the national plan of actions.

Faculty of Philosophy, department for Sociology, University of Belgrade also offers three interesting courses: Sexuality and Culture (elective course for undergraduate students where students learn to understand terms 'gender' and 'sex', and learn about the social construct of gender, social power and identity, feminism, the politics of sexual differences, women and religion, violence and religion, as well as popular culture), Gender Studies (elective course in the master studies, where students learn about the theories and practice of women's movement on a global level and in Serbia, with particular emphasis on feminism and national, economic, political, legal, cultural position and violence of women in Serbia), and Gender studies (an elective course on doctoral level, where students learn about the same issues, through comparative perspective and contemporary practice).

<sup>79</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2014*, Belgrade, June 2015, p. 181.

<sup>80</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2015*, Belgrade, 15 March 2016, p. 237.

### 5.3 Legal and Institutional Structures Combating Discrimination

There is no legal document issued by the university providing for the prohibition of discrimination. However, a university Ombudsman was established in order to control the work of the University acting under the complaints or on its own initiative.<sup>81</sup> The university Ombudsman protects the rights, freedom, interests and human rights guaranteed by the Constitution and the relevant international instruments.<sup>82</sup> The Ombudsman can give advices on the available legal remedies, mediates among members of university community and University, and conduct proceedings for determining if there is a violation of rights, freedoms and interests, when it undertakes adequate measures for their protection. In a case of violation, he will order the University to eliminate irregularities within 15 days. If it is not done, he can inform the public about the violation. However, in practice, the mandate of the Ombudsman is not well known, and it proves to be an inefficient tool as the proceeding last for several years and there is no case that the Ombudsman used publicity as a pressure to impose his opinions and recommendations.

Thus far, there is no survey conducted to map the level of awareness for discrimination among the teaching staff and/or the students, as well as to define the occurrences of discrimination.

Courses and services provided by the university are not always easily accessible as some buildings are still not fully accessible to students with disabilities and to their needs.

## 6. Developing a Culture of Rights

### 6.1 Assessing the Levels of Awareness

The first survey on “Citizens’ Attitudes on Discrimination in Serbia” was conducted in 2009, and repeated in 2010 and 2012.<sup>83</sup>

During 2012, the CPE, with the support of UNDP, organized a public opinion poll entitled “The Attitude of Citizens towards Discrimination in Serbia.”<sup>84</sup> The results of the opinion poll showed that discrimination is condemned by 32% of the citizens, whereas only 18% of the respondents manifested a tendency towards discrimination, while 50% of the citizens do not manifest a tendency towards either discrimination or condemnation of discrimination. Although citizens are acquainted with the notion of discrimination, even one quarter of the population has no idea or does not have an attitude towards this issue. More than 60% of the respondents were of the opinion that discrimination does exist in Serbia, to a great or considerable degree. Also, as many as one-fifth of the respondents do not know that discrimination is prohibited, and even 55% doubt that the regulations are properly implemented as the laws are applied selectively. The survey also showed that the greatest social distance exists towards the LGBT population and HIV positive persons, while the greatest degree of ethnic distance is manifested towards Albanians.

<sup>81</sup> University Ombudsman, available at: <http://www.bg.ac.rs/sr/organi/ombudsman/ombudsman.php> (25.03.2016).

<sup>82</sup> See Rules of Procedure of the University’s Ombudsman, available at: <http://www.bg.ac.rs/files/sr/univerzitet/univ-propisi/PravilnikUniverzitetskiOmbudsman.pdf> (25.03.2016).

<sup>83</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2012*, Belgrade, March 2013, p. 30.

<sup>84</sup> Available at: [http://www.ravnopravnost.gov.rs/files/Izvestaj\\_diskriminacija\\_\\_CPE\\_CeSID\\_UN-DP\\_decembar\\_2012.pdf](http://www.ravnopravnost.gov.rs/files/Izvestaj_diskriminacija__CPE_CeSID_UN-DP_decembar_2012.pdf) (25.03.2016).

At the end of 2013, the CPE, in cooperation with the UNDP, conducted two surveys: “Citizens’ Attitudes on Discrimination in Serbia” and “Attitude of Public Administration Representatives towards Discrimination in Serbia”.

The first survey was conducted by CeSID at the end of 2013 and was the fourth of its kind.<sup>85</sup> It again showed that the greatest predisposition for discrimination exist in relation to the LGBT population, as well as the members of ethnic and religious communities. The majority of respondents expressed their view that Serbia is a discriminatory society, and that the most discriminated groups are: women (42%), Roma (41.5%), persons with disabilities (28.4%), the poor (27%) the elderly (24.5%), children (18.6%) and sexual minorities (16.4%). More than one third of respondents believed that the discrimination is most present in the area of employment. The survey again showed the greatest ethnic distance towards the Albanians, but also Croats, Bosnians and Roma, and the greatest social distance towards the LGBT population and people living with HIV.

The second survey was conducted by IPSOS Strategic Marketing in October 2013 and was first of its kind in Serbia.<sup>86</sup> The surveys provided insight to the extent the representatives of legislative, executive and judicial authorities at the national, provincial and local level are familiar with discrimination, revealed their attitudes towards discrimination, the social groups they recognized as the most discriminated, as well as how familiar they are with the anti-discrimination instruments and mechanisms of protection against discrimination.<sup>87</sup> It is worth mentioning that 74% of respondents believe that discrimination is present in Serbia. They also believe that discrimination is the most present in the area of employment, and that the most discriminated groups are: the poor, the Roma, the persons with disabilities, as well as the LGBT population. However, it is important to emphasize that the respondents had very partial knowledge on anti-discrimination instruments, and that they not differ between discrimination and prejudice, and discrimination and mobbing. Even 41% of them did not recognize the indirect discrimination in given examples, although they are familiar with the concept. The 40 % believe that the representatives of the public authorities have prejudices against certain groups, especially LGBT population, members of small religious communities, HIV persons, Roma and children with developmental disabilities. Even 1/3 believes that the representatives of public authorities do not treat all citizens equally, and even 1/2 considers that their colleagues acted discriminatorily or had discriminatory remarks towards members of certain groups. However, only 2/3 of those who had this experience were ready to react, and only 5 % was ready to report this behavior. Also, 53 % believe that the state is more responsible for combating discrimination, while 39 % stand that the citizens are more responsible. However, the worrying fact is that 48% of respondents believe that the discriminated groups are responsible for their position. Majority of respondents, even 73%, think that public authorities deals with discrimination less than necessary, due to the lack of political will (32%) and existence of other priorities (31%). Among the three the most responsible institutions for combating discrimination respondents see the National Assembly (47%), the Government (46%), the courts (32%), the family (31%) and the media (24%). On the other hand, the institutions that the most contribute to combating discrimination are: the

<sup>85</sup> Survey on Attitude of citizens towards discrimination in Serbia, Commissioner for Protection of Equality, UNDP, CeSID, 2013, available at [http://www.ravnopravnost.gov.rs/jdownloads/files/izvestaj\\_diskriminacija\\_cesid\\_undp\\_poverenik\\_2013\\_v\\_\\_21\\_02\\_2014\\_final\\_sajt.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/izvestaj_diskriminacija_cesid_undp_poverenik_2013_v__21_02_2014_final_sajt.pdf), (26.03.2016).

<sup>86</sup> Survey on Attitude of Public Administration officers towards discrimination in Serbia, Commissioner for Protection of Equality, UNDP, IPSOS, 2013, available [http://www.ravnopravnost.gov.rs/jdownloads/files/izvestaj\\_odnos\\_predstavnik\\_javne\\_vlasti\\_prema\\_diskriminacijiji\\_u\\_srbiji\\_fin\\_al.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/izvestaj_odnos_predstavnik_javne_vlasti_prema_diskriminacijiji_u_srbiji_fin_al.pdf), (26.03.2016).

<sup>87</sup> Commissioner for Protection of Equality, *Regular Annual Report for 2013*, Belgrade, June 2014, p. 10.

family (36%), the media (33%), NGOs (32%), the Ombudsman (30%), the CPE (28%), and the school (26%). They also see the following tools for combating discrimination: education, better implementation of the existing legal instruments, improvement of living conditions of discriminated groups and more severe sanctions for the discriminatory acts.

## 6.2 Achievements in Awareness Raising

One of the tasks of the CPE is also to promote the principle of equality by taking various actions that will raise awareness about the detrimental effect of discriminatory acts, and alleviate the stereotypes and deeply-rooted prejudices as the most common causes of discrimination which elimination is the most difficult and requires the passage of time.

In 2010, the CPE provided many lectures and presentations for raising public awareness about discrimination, informing the public about the international standards, solutions given in the anti-discrimination legislation, as well as the roles, competencies and authorities of the CPE and the complaint proceedings.<sup>88</sup> Also, the CPE can warn other institutions for violation of their duty to protect equality. Thus, on 23rd December 2010, the CPE issued the public admonishment about typical and frequent discrimination against the women in the media, warning the public that “the portraying of women in the media is frequently very inappropriate and represents flagrant violation of the media obligation to respect and protect human dignity and gender equality. It is also completely contrary to the media obligation to raise awareness about gender equality in their programmes and take suitable measures to change the social and the cultural patterns, customs and any other practice that breeds stereotypes, prejudice and discrimination against women.”<sup>89</sup> In 2011, the CPE organized numerous activities in cooperation with NGOs that raised public awareness about discrimination and protection mechanisms, and enhanced the visibility of the CPE.<sup>90</sup> In cooperation with the Centre for Modern Skills, the CPE conducted public awareness campaign “Trust in the Commissioner” with the objective of making the institution more familiar to the public. As part of the campaign, in many municipalities and cities in Serbia (Sabac, Novi Pazar, Zajecar, Vranje, etc.) promotional activities were held with the support of the local self-governments and local NGOs.

In addition, the CPE organized series of lectures and presentations at events organized by the public institutions and NGOs.<sup>91</sup> This year, the CPE also published different brochures and leaflets, and a complaint application, in Serbian and the languages of the national minorities that were distributed to the NGOs and during the public awareness campaign.<sup>92</sup> Also, on 10 June 2011, the CPE issued a recommendation to the Ministry of Education and Science, National Educational Council and the Institute for Improving the Quality of Education for removing discriminatory contents from the curriculum and teaching practice and for promotion of tolerance, respect to diversity and human rights. The CPE highlighted that it is necessary to take all necessary measures to ensure that “1. the content of the teaching materials and teaching practice and methodology develop students’ awareness about diversity, promote non-violent values, equality and non-discriminatory practice, and principles of democratic society based on the respect of the human rights; 2. there is an awareness raising about diversity, inter-cultural and common values by presenting the important individuals from different ethnic and religious groups and cultures; ... 4. the

<sup>88</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, p. 63.

<sup>89</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, p. 67.

<sup>90</sup> Commissioner for Protection of Equality, *Regular Annual report for 2011*, Belgrade, March 2012, p. 11.

<sup>91</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, p. 88, 94.

<sup>92</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, p. 100.

stereotyped gender roles/professions are to be removed and that the diversity is encouraged.”<sup>93</sup>

In 2012, the CPE organized a set of different information and educational programmes and campaigns, with the support of international organizations and the European funds, in cooperation with other state institutions, NGOs and the media. The CPE published numerous books, brochures and handbooks.<sup>94</sup> It is worth mentioning that the debate “LGBT and the Role of Institutions” was organized on 1<sup>st</sup> October 2012 in Belgrade during the Pride Week, with the view to raising awareness of the citizens concerning the position of the sexual minorities in society.<sup>95</sup> Also, the campaign organized on 22<sup>nd</sup> April 2012, within the frames of the jubilee of the 25<sup>th</sup> Belgrade Marathon under the slogan “To the Finish Line on an Equal Footing” attracted the attention of the public and the media, with the aim to point the problems faced by persons with disability and the women in sports caused by discrimination.<sup>96</sup>

In 2013, the CPE together with the Office for Human and Minority Rights jointly implemented activities aimed at raising level of awareness among citizens in combating discrimination within the Project Implementation of the Anti-Discrimination Policy in Serbia (IPA 2011).<sup>97</sup> The CPE also issued several announcements on the international days dedicated to certain discriminated groups with the aim to raise the awareness among citizens on their position in the society and globally. These activities continued in 2014, and the European Commission in its Progress Report for 2014 underlined that the CPE contributed in raising the awareness of the discrimination and mechanisms for protection against discrimination in Serbia.<sup>98</sup> Although numerous activities were organized, it is worth mentioning that the call for the best photography for pupils was announced in the second half of the year under the title “We are All Equal and We Can Do It Together!” with the aim to raise awareness and sensitivity for discrimination recognition among children.<sup>99</sup>

In 2015, the CPE continued with issuing recommendations and announcements, where it underlined the position of vulnerable groups and the necessity of organizing public awareness campaigns. In September last year, the European Commission gave its positive opinion on the Draft Action Plan for the chapter 23, which defines measures and deadlines for the planned reform in the area of the judiciary, the human rights and the fight against corruption in order to harmonize with *acquis communautaire*, and finds that the CPE due to its dedicated work led to a significant increase of the awareness level concerning discrimination.<sup>100</sup>

Although many awareness campaigns were organized in the past several years by the CPE, who cooperated with other public institutions, NGOs and international organizations, it is important to continue with their organization of similar events, especially on local level and in the least developed parts of Serbia.

<sup>93</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, p. 77.

<sup>94</sup> Commissioner for Protection of Equality, *Regular Annual report for 2012*, Belgrade, March 2013, p. 8.

<sup>95</sup> Commissioner for Protection of Equality, *Regular Annual report for 2012*, Belgrade, March 2013, p. 97.

<sup>96</sup> Commissioner for Protection of Equality, *Regular Annual report for 2012*, Belgrade, March 2013, p. 126.

<sup>97</sup> Commissioner for Protection of Equality, *Regular Annual report for 2013*, Belgrade, June 2014, p. 125.

<sup>98</sup> Commissioner for Protection of Equality, *Regular Annual report for 2014*, Belgrade, June 2015, p. 160.

<sup>99</sup> Commissioner for Protection of Equality, *Regular Annual report for 2014*, Belgrade, June 2015, p. 174.

<sup>100</sup> Commissioner for Protection of Equality, *Regular Annual report for 2015*, Belgrade, March 2016, p. 28.

### 6.3 Preventing Future Discrimination

With the aim of acting preventively, the CPE is authorized to warn the public about the most common and severe types of discrimination. Thus, its work includes preventive measures and contributes to the advancement of equality. According to Article 33 of the LPD, in order to carry out these tasks, the CPE is authorized to:

1. issue general recommendation aimed at achieving equality to public authorities and other bodies;
2. monitor the implementation of the legislation in the area of equality and prohibition of discrimination;
3. initiate the adoption of new regulations, or amendments of the existing legislation;
4. give an opinion on the provisions of draft laws and other regulations; and
5. cooperate with authorities responsible for achieving equality and the protection of human rights.

The general recommendations for undertaking certain measures are supposed to preventively influence public authorities with a view to prevent and eliminate the structural and the institutional discrimination. Public authorities are also alerted to the need for undertaking positive measures for the purpose of achieving full equality, protection and progress of those who are in unequal position. In 2010, the CPE issued 2 general recommendations. The CPE and the Province Ombudsman gave joint recommendation to the National employment service regarding the discriminatory conditions in announced public call for employment, as well as recommendation issued to the Ministry of Finance regarding the situation of unequal treatment of persons with disability for tax exemption for usage, holding and bearing goods.<sup>101</sup> It also issues several warnings and announcements, mostly in relation to discrimination against LGBT population and the people with disabilities, Roma and women. In the warnings, the CPE points to discriminators, the manner of committing acts of discrimination, those exposed to the most frequent and typical forms of discrimination, and their consequences. The CPE also provided many lectures, presentations and realized many participations at different events.

In 2011, the CPE issued 17 recommendations to the public administration bodies on taking measures to improve equality, gave 4 opinions and initiatives for changing the legislation, and published 29 announces, as well as seven public information about non-adhering to the Commissioner's recommendations.<sup>102</sup>

In 2012, the CPE issued 11 general recommendations, as well as 2 warnings and 17 announcements to the public.<sup>103</sup> One recommendation was sent to universities in order to issue new documents to persons who undergo gender reassignment, and other was sent to all Courts of General Jurisdiction to conduct efficiently discrimination proceedings.

In 2013, the CPE issued 24 general recommendations, 6 expert opinions on the draft laws and other regulations and 10 public warnings.<sup>104</sup>

However, in 2014, the CPE issued even 198 general recommendations, as well as 2 opinions on the draft laws, 20 announcements and 6 warnings.<sup>105</sup>

<sup>101</sup> Commissioner for Protection of Equality, *Regular Annual report for 2010*, Belgrade, 10 March 2011, pp. 63-64.

<sup>102</sup> Commissioner for Protection of Equality, *Regular Annual report for 2011*, Belgrade, March 2012, p. 7.

<sup>103</sup> Commissioner for Protection of Equality, *Regular Annual report for 2012*, Belgrade, March 2013, p. 87.

<sup>104</sup> Commissioner for Protection of Equality, *Regular Annual report for 2013*, Belgrade, June 2014, p. 9.

<sup>105</sup> Commissioner for Protection of Equality, *Regular Annual report for 2014*, Belgrade, June 2015, p. 15.



Finally, in 2015, the CPE issued even 215 general recommendations, 17 opinions on the draft laws and other regulations, and issued 35 announcements and 9 warnings.<sup>106</sup>

While the recommendations given under the complaint procedure are highly respected, it cannot be said for the general recommendations. The CPE also acknowledges this fact, and wrote in its Report for 2014 that a number of recommendations were included in the previous reports, and that their repetition is caused by the fact that they were not fully implemented or not implemented at all.<sup>107</sup> It is illustrative to mention that in 2013, the CPE issued a recommendation to the City of Belgrade regarding an issue of providing of locations for the purpose of building social apartments, where beside vulnerable social groups, members of Roma national minority from the temporary container settlements would be also accommodated. The CPE explained what standards must be fulfilled during the resettlement procedure, but this recommendation has not been implemented.<sup>108</sup>

In March each year the CPE submits their regular annual report on the work done to the National Assembly. These reports contain evaluation of the situation in Serbia concerning the protection of equality, and activities done by the CPE. Also, the CPE can prepare and submit special reports on its own initiative, or upon the request of the National Assembly. In the period 2010-2015 several special reports were published: Report on Discrimination of Persons with Disability from April 2013, Report on Accessibility of Buildings of Public Authorities to persons with disability from May 2013, Report on discrimination of children from November 2013 and Report on discrimination of women from May 2015.<sup>109</sup> These reports contain analyses of the position of the certain discriminated groups and the recommendations for the improvement of that position by undertaking of measures for combating discrimination more effectively. Thus far, special reports were prepared only on the initiative of the CPE. Furthermore, there are no follow-up procedures in place to monitor the impact of such reports, although it would be logical that supervision is provided by the National Assembly.

It was already said that many of the CPE's activities are oriented towards removal of stereotypes and prejudices. For example, in 2011, the CPE sent a recommendation to the Ministry of Education, National Education Council and Institute for improving the quality of the education, to work continually and systematically and change the existing models in education that further enforce stereotypes about family patterns and gender roles. Consequently, several institutions, such as Judiciary Academy, Criminal and Police Academy and Service for Staff Management of the Republic of Serbia introduced some specialized curricula on gender equality.<sup>110</sup>

In 2012, in cooperation with the Council of Europe Office in Belgrade a project "A Living Library" was established with the aim to reduce the influence of the negative stereotypes and prejudices as the main causes of discrimination.<sup>111</sup> This innovative concept means that books are living people carefully selected from social groups, which are often exposed to prejudices. That year, 6 "Living Libraries" were held (in Smederevo, Pančevo, Kragujevac, and 3 in Belgrade), and more than 120 volunteers have participated in their realization, and the overall number of readers was around 2,000.

<sup>106</sup> Commissioner for Protection of Equality, *Regular Annual report for 2015*, Belgrade, March 2016, p. 8.

<sup>107</sup> Commissioner for Protection of Equality, *Regular Annual report for 2014*, Belgrade, June 2015, p. 10.

<sup>108</sup> Commissioner for Protection of Equality, *Regular Annual report for 2013*, Belgrade, June 2014, p. 51.

<sup>109</sup> Reports are available at <http://www.ravnopravnost.gov.rs/rs/извештаји/извештаји>, 26.03.2016.

<sup>110</sup> Commissioner for Protection of Equality, *Regular Annual report for 2011*, Belgrade, March 2012, p. 31.

<sup>111</sup> Commissioner for Protection of Equality, *Regular Annual report for 2012*, Belgrade, March 2013, p. 121.

In 2013, on the occasion of the International Women's Day, the CPE issued an announcement stating that "women are still exposed to different forms of discrimination and traditional, patriarchal stereotypes of the social role of women and man still prevail."<sup>112</sup> In the following year, the CPE issued an announcement on the occasion of the International Day of Persons with Disabilities, stating that persons with disabilities and their families are "usually exposed to stigmatization and segregation due to the deeply rooted and widely spread prejudice and lack of information."<sup>113</sup> Many issued recommendations concern stereotypes, such as one issued for sexism and prejudice in a textbook on Criminology for the course at the Faculty of Law, University of Kragujevac, for the statement that fathers cannot stay in hospital rooms with their children, warning regarding the texts on the new members of the National Assembly, etc. Also, last year, the CPE issued several opinions and announcements tackling stereotypes, such as announcement regarding media presentation of certain female politicians and regarding the offensive statement of the Ministry of Interior concerning women.

In Serbia, Strategy for Preventing and Protection against Discrimination was prepared by the Office of Human and Minority Rights and it was adopted on 27<sup>th</sup> June 2013 for the period 2013-2018.<sup>114</sup> This document represents a consolidated set of public policy measures, conditions and instruments to be implemented with an aim to prevent or reduce all forms and specific cases of discrimination, in particular against vulnerable groups. Those groups are: national minorities, women, LGBT persons, persons with disabilities, elderly persons, children, refugees, internally displaced persons and other vulnerable migrant groups, members of religious communities and any person discriminated against on the basis of their health status. The Strategy determines a distinct response to how these vulnerable groups will be further protected, how the principle of equality will be ensured, which fields the cases of discrimination against vulnerable social groups are most common and how the state of play in some areas may be enhanced, directions for further legislative reforms and the adoption of by-laws to advance their protection. The Office for Human and Minority Rights is responsible for preparing a Report on Monitoring the Implementation of the Strategy, pursuant to individual reports of all relevant state administration bodies, report of the CPE and Ombudsman, as well as alternative reports prepared by CSOs. It is also responsible for an internal evaluation of the implementation of this Strategy. The Strategy is supplemented by the Action Plan for the implementation of the Strategy of Prevention and Protection against Discrimination for the period from 2014 to 2018. It was promised that these two documents will help to enhance the statistic parameters and the establishment of a database for monitoring court proceeding concerning cases of violation of prohibition of discrimination, which is currently lacking in Serbia.

<sup>112</sup> Commissioner for Protection of Equality, *Regular Annual report for 2013*, Belgrade, June 2014, p. 74.

<sup>113</sup> Commissioner for Protection of Equality, *Regular Annual report for 2014*, Belgrade, June 2015, p. 102.

<sup>114</sup> Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?DocumentId=09000016801e8db9>, 26.03.2016.



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## Annexes

### Annex 1 – Glossary

#### **Accommodation of diversity**

Adjustments made in accordance with different needs in relation to such as language, physical impairment or disability, financial resources, age, religious-cultural-ethnic-social-political-educational backgrounds, gender, sex and/or sexual orientation. These specific needs arise from the particular experience (relationship of people with the majority of population and the institutions of society), situation (economic, political and social status of people) and identity (the norms and values held that shape attitudes and behaviors of people) of groups that experience inequality.

#### **Class action**

Claim presented in the general interest of a group, seeking justice beyond the individual case.

#### **Culture of rights**

Culture within the general population that is aware of discrimination and inequality and that is supportive of: equality and the case for a more equal society; diversity and the different groups that make up society rights and the importance of people exercising rights; equality legislation and the institutions established to implement this legislation.

#### **Equality Bodies v. other similar entity**

Institutions formally functioning as Equality Bodies v. institutions relevant to dealing with cases of discrimination that can be approached by victims such as National Human Rights Institutions, Ombudsman, court, Special Tribunals or in absence of this all, the regular court system.

#### **Intermediary**

Any public institute, organisation or person who functions as intermediary between victims of discrimination and securing justice by playing roles in providing information on rights and how to make a claim, providing legal advice and assistance and other supports to victims of discrimination, and building a positive disposition to equality and right to non-discrimination. Potential intermediaries are: lawyers, representatives of CSOs, victim support organizations, trade unions and other professionals (e.g. mediators, company counselors, etc.)

#### **Promotional-type Equality Body**

These Equality Bodies spend the bulk of their time and resources on a broader mix of activities that encompass supporting good practice in organizations, raising awareness of rights, developing a knowledge base on equality and non-discrimination, and providing legal advice and assistance to individual victims of discrimination.

#### **Tribunal-type Equality Body**

These Equality Bodies spend the bulk of their time and resources hearing, investigating and deciding on individual instances of discrimination brought before them. They are impartial in this work.

#### **Vulnerable groups**

Groups at risk of discrimination

## Annex 2 – Template for Good Practice Examples

### Example 1

<b>Area:</b> <sup>115</sup>	Implementation of relevant laws
<b>Title (original language)</b>	Trening za trenere u oblasti anti-diskriminacije
<b>Title (EN)</b>	Training for Trainers for Anti-Discrimination Law and Practice
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Pravosudna akademija
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	Judicial academy
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	OSCE, Commissioner for the Protection of Equality
<b>Internet link</b>	
<b>Type of initiative</b>	increasing of knowledge among judges, unification of the court practice, better enforcement of the law
<b>Main target group</b>	judges
<b>Brief description (max. 1000 chars)</b>	<p>The Judicial Academy, with the support of the OSCE, developed in 2015 a training program for judges with the aim: 1) to strengthen the capacity of future trainers by transferring professional skills, knowledge and information; 2) to increase knowledge in the field of non-discrimination, including the national legal framework and applicable international law, and 3) the harmonization of court practice in the area of discrimination by specializing judges of different courts who will become recognized authorities in this field and who will have a possibility, in the <i>follow-up</i> activities, to exchange ideas and discuss controversial legal issues with other judges of higher and appellate courts.</p> <p>The first preparatory meeting with future trainers was organized on 8 and 9 December 2015 in Arandjelovac. The meeting was attended by eight future trainers in the field of non-discrimination. At the meeting, an analysis of current case law was presented, together with a review of the former trainings on non-discrimination which defines future training needs. Afterwards, the future training program in the field of non-discrimination was presented, as well as the role and responsibilities of future trainers in 2016. The program contains of 5 two and three day seminars, as well as the visit to the ECtHR and CJEU.</p>
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> innovation and cooperation</li> </ul>

<sup>115</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 2**

<b>Area:</b> <sup>116</sup>	Cooperation of Stakeholders
<b>Title (original language)</b>	Initiative for the Examination of Constitutionality of Article 20 of the Law on Maximum of Employees in Public Sector
<b>Title (EN)</b>	Inicijativa za ocenu ustavnosti člana 20. Zakona o načinu određivanja maksimalnog broja zaposlenih u javnom sektoru
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Poverenik za zaštitu ravnopravnosti i Zaštitnik građana
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Commissioner for the Protection of Equality and the Protector of Citizens (Ombudsman)
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	trade union
<b>Internet link</b>	
<b>Type of initiative</b>	improvement of the legal framework, protection of the potential victims of discrimination
<b>Main target group</b>	general public, women over 60 years employed in the public sector
<b>Brief description (max. 1000 chars)</b>	In July 2015, the Law on Maximum Number of Employees in Public Sector was adopted. This provision prescribed that all women age 60 years and 6 months working in the sectors of education, health sector and public administration, will retire, although the pensionable age for women is 65. The consequence of this Article was that 3.500 of women teachers in Serbia were supposed to retire. The pressure against this provision was exerted by the Teachers Union of Serbia, and later supported by other unions, with support from Educational International. They sent protest letter to the Serbian public authorities, which provoked the Commissioner for the Protection of Equality and the Ombudsman to challenge the constitutionality of this provision by the Constitutional Court. Due to this initiative, on 8 October 2015, the Constitutional Court revoked discriminatory Article 20.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> cooperation</li> </ul>

<sup>116</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.



### Example 3

<b>Area:</b> <sup>117</sup>	Cooperation of Stakeholders
<b>Title (original language)</b>	Tematska godišnja konferencija
<b>Title (EN)</b>	Thematic annual conference
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Poverenik za zaštitu ravnopravnosti
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Commissioner for the Protection of Equality
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	government, civil society, university, media
<b>Internet link</b>	
<b>Type of initiative</b>	cooperation of stakeholders,
<b>Main target group</b>	general public, potential victims of discrimination
<b>Brief description (max. 1000 chars)</b>	Each year, starting from 2014, the annual conference “Serbia on the way to Tolerance and Non-discrimination: the Experiences of the Commissioner for Protection of Equality” is held on 16 November (International Tolerance Day). This conference is attended by more than 200 participants, with the attention of media, since all relevant stakeholders, whose strategic goals and priorities are dedicated to the fulfillment of human rights, and non-discrimination are present. Those are the President of the minis, ministers and state secretaries, ambassadors, diplomats of international organizations, as well as a large number of representatives from the civil sector, judiciary and university. The whole event is broadcast live by the public media service, and all stakeholders dedicate themselves to better enforcement of anti-discrimination legislation and practice. In 2015, the annual journalist award has been established and is granted at the conference.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> cooperation</li> </ul>

<sup>117</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 4**

<b>Area:</b> <sup>118</sup>	Procedural aspects
<b>Title (original language)</b>	Trening medijatora i razvijanje modela medijacije u slučajevima diskriminacije
<b>Title (EN)</b>	Training of mediators and development of mediation model in anti-discrimination cases
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Poverenik za zaštitu ravnopravnosti
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Commissioner for the Protection of Equality
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	
<b>Internet link</b>	
<b>Type of initiative</b>	training of mediators
<b>Main target group</b>	mediators, parties in dispute
<b>Brief description (max. 1000 chars)</b>	<p>In 2012, the CPE established a Working group which prepared a mediation model adjusted to the characteristics of discrimination cases. This model is based on the following principles: voluntariness, confidentiality, impartiality and neutrality. However, some special rules have been created. This form of mediation is based on the concept of restorative justice, and also contains specific criteria and the manner of selecting cases suitable for mediation. Also, the principle of the mediator's neutrality has been redefined, in the sense that it must not be morally neutral towards discrimination itself, but must quite clearly show that it is morally unacceptable. In order to ensure that the conditions for mediation are effective and that satisfy the needs of both parties, the CPE's service supplies all the relevant information on the mediation procedure and on the standard procedure of acting upon a complaint to both parties, thus giving them an opportunity to review the advantages of either procedure and to choose the one which can satisfy their interests.</p> <p>The mediation procedure is conducted by a mediator appointed by an authorized official of the CPE, from the list of authorized mediators. Only qualified persons, who are not employed with the CPE can be included in the list of mediators, provided they meet the criteria and closely defined requirements established by the CPE.</p> <p>A special training programme for mediators has been prepared for those interested in entering the CPE's list of authorized mediators. Trainings were conducted from 2013 to 2015. Also, the CPE published a handbook for mediators for conducting mediation in discriminating cases, as well as the training for employees in order to recognize discrimination cases suitable for mediation.</p>
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> improvement of knowledge and practical skills</li> </ul>

<sup>118</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Example 5

<b>Area:</b> <sup>119</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Živa biblioteka
<b>Title (EN)</b>	Living library
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Poverenik za zaštitu ravnopravnosti
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Commissioner for the Protection of Equality
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	
<b>Internet link</b>	
<b>Type of initiative</b>	Raising Awareness Campaign
<b>Main target group</b>	general public, potential victims of discrimination, policy makers, etc.
<b>Brief description (max. 1000 chars)</b>	The Commissioner for the Protection of Equality has a successful cooperation with the Office of the Council of Europe in Belgrade, as the coordinator of their joint project “ <i>Don’t judge a book by its cover – Living Library in Serbia</i> “. The aim of this project is lessening of the effect of negative stereotypes and prejudice, as key causes of discrimination in the society. In living libraries the readers have an opportunity to “take and read” some of the “living books”, i.e. to talk to persons who belong to social groups towards which there is the highest level of prejudices and discriminatory attitudes. The support to this project is given by the Ministry of Youth and Sport of the Republic of Serbia. Living library was held four times at the Book fair. The most popular “books” were gay, Chinese, a person living with HIV, a person with disability, Muslim and atheist.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> innovation and cooperation</li> </ul>

<sup>119</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

**Example 6**

<b>Area:</b> <sup>120</sup>	Combating discrimination at universities
<b>Title (original language)</b>	Pravna klinika za pitanja diskriminacije
<b>Title (EN)</b>	Legal Clinic for Non-discrimination
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Pravni fakultet Univerziteta u Beogradu
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Faculty of Law, University of Belgrade
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	civil society
<b>Internet link</b>	
<b>Type of initiative</b>	free legal aid, improvement of practical skills and knowledge among students
<b>Main target group</b>	victims of discrimination, policy makers
<b>Brief description (max. 1000 chars)</b>	<p>The Faculty of law, University of Belgrade established in 2009 Legal Clinic on Anti-Discrimination. Each year, around 20 students attend the Legal clinic. Its work consists from three phases. Phase one contains lectures on professional ethics, and techniques of interviewing clients, as well as from 20 classes dedicated to definition of discrimination, different forms of discrimination and discrimination on certain grounds. Phase two consists of writings of legal documents and simulation of cases. Phase three is dedicated to the work with real clients.</p> <p>Not only that students learn about discrimination, but they also develop their professional skills in providing free legal aid to the victims of discrimination. Students do referrals, oral advices and write simple applications to real clients. Students also do the policy work as they write letter to different institutions and indicate that some situation should be treated as discrimination. In such a way, two goals are achieved: provision of legal aid to the victims of discrimination and the increase of professional skills and anti-discrimination knowledge among the students.</p>
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> innovation and legal aid</li> </ul>

<sup>120</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

### Example 7

<b>Area:</b> <sup>121</sup>	Developing a Culture of Rights
<b>Title (original language)</b>	Živa biblioteka
<b>Title (EN)</b>	Living Library
<b>Organisation (original language)</b> Resp. for implementation Resp. for financing	Poverenik za zaštitu ravnopravnosti
<b>Organisation (EN)</b> Resp. for implementation Resp. for financing	The Commissioner for the Protection of Equality
<b>Government / Civil society</b> Resp. for implementation Resp. for financing	
<b>Internet link</b>	
<b>Type of initiative</b>	Raising Awareness Campaign
<b>Main target group</b>	general public, potential victims of discrimination, policy makers, etc.
<b>Brief description (max. 1000 chars)</b>	The Commissioner for the Protection of Equality has a successful cooperation with the Office of the Council of Europe in Belgrade, as the coordinator of their joint project “ <i>Don’t judge a book by its cover – Living Library in Serbia</i> “. The aim of this project is lessening of the effect of negative stereotypes and prejudice, as key causes of discrimination in society. In living libraries the readers have an opportunity to “take and read” some of the “living books”, i.e. to talk to persons who belong to social groups towards which there is the highest level of prejudices and discriminatory attitudes. The support to this project is given by the Ministry of Youth and Sport of the Republic of Serbia. Living library was held four times at the Book fair. The most popular “books” were gay, Chinese, a person living with HIV, a person with disability, Muslim and atheist.
<b>Evaluation or quality control</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> no</li> </ul>
<b>Involvement of stakeholders</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> yes</li> </ul>
<b>Why good practice?</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> innovation and cooperation</li> </ul>

<sup>121</sup> Specify whether the initiative was taken in the area of Tools guiding implementation of relevant laws, Cooperation of stakeholders, Procedural aspects (mediation, evidencing discrimination, implementation of recommendations), Combating discrimination at universities or Developing a Culture of Rights.

## Annex 3 – Statistics EB - Commissioner for the Protection of Equality

	2010	2011	2012	2013	2014	2015
<i>Budget in €</i>	371.000	945.000	792.000	607.200	601.500	602.500
<i>Number of staff (full time equivalent)</i>	5	18	18	19	19	26
<i>Number of professional/legal staff (full time equivalent)</i>						
<i>Complaints/queries received</i>	124	335	602	716	666	797
<i>Recommendations</i>	2	22	117	24	198	215
<i>Lawsuit</i>		3	5	3	2	
<i>Opinions on legal acts</i>		2	3	6	2	17
<i>Misdemeanor charges</i>		2	6	2	1	
<i>Initiatives to the Constitutional Court</i>			1	2	3	1
<i>Legal initiatives</i>		2	1			
<i>Warnings</i>	1	8	2	10	6	9
<i>Announcements</i>	4	22	17	15	20	35
<i>Total number of cases (please break down according to different grounds)</i>						
<i>Age</i>	2	16	31	68	78	61
<i>Belief</i>		12	32	22	36	35
<i>Disability</i>	7	11	76	66	70	73
<i>Ethnic origin</i>	19	72	68	81	124	119
<i>Gender</i>	6	36	42	48	53	143
<i>Gender identity</i>		4		4	5	21
<i>Religion</i>	9				28	
<i>Sexual orientation</i>	32	10	8	25	18	31
<i>Other grounds</i>	29	30	78	45	31	57
<i>Total number of cases (please break down according to different forms)</i>						
<i>Direct discrimination</i>						
<i>Indirect discrimination</i>						
<i>Harassment</i>						
<i>Victimization</i>						
<i>Other forms</i>						
<i>Number of surveys</i>			1	2		
<i>Number of research projects</i>		3	7	7	9	11
<i>Number of awareness initiatives</i>	4	2	2	9	13	20
<i>Number of training actions</i>	7		30	18 + 30 manuals	20 + 6 manuals	15
<i>Number of promotional initiatives to support good practice</i>	10		3	12	20	25

## **Annex 4 – Relevant Legal Provisions**

### **Constitution of Serbia**

#### **Article 15**

The State shall guarantee the equality of women and men and develop equal opportunities policy.

#### **Article 21**

All are equal before the Constitution and law.

Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.

#### **Article 76**

Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection.

Any discrimination on the grounds of affiliation to a national minority shall be prohibited. Specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them.

### **Law on the Prohibition of Discrimination**

#### **Article 2 (1)**

the terms “discrimination” and “discriminatory treatment” shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics.

#### **Article 6**

Direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission.

#### **Article 7**

Indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act,

action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.

#### **Article 8**

A violation of the principle of equal rights and obligations shall occur if an individual or a group of persons, on account of his/her or their personal characteristics, is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or a similar situation, are not denied to or imposed upon another person or group of persons, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them.

#### **Article 9**

Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment.

#### **Article 10**

It is forbidden to associate for the purpose of exercising discrimination; that is, this Law prohibits activities of organisations or groups that are aimed at violating freedoms and rights guaranteed by the Constitution, rules of international law and the law, or at inciting nationally, racially, religiously or otherwise motivated hatred, divisions or enmity.

#### **Article 11**

It is forbidden to express ideas, information and opinions inciting discrimination, hatred or violence against an individual or a group of persons on account of his/her or their personal characteristics, in public organs and other publications, in gatherings and places accessible to the public, by writing out and displaying messages or symbols, and in other ways.

#### **Article 12**

It is forbidden to expose an individual or a group of persons, on the basis of his/her or their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of his/her or their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment.

#### **Article 33**

The Commissioner:

1. shall receive and review complaints pertaining to violations of provisions of this Law, provide opinions and recommendations in specific cases, and pass measures in accordance with the provisions of Article 40 of this Law;

2. shall provide information to the person lodging a complaint concerning his/her rights and the possibility of initiating court proceedings or some other proceedings for the purpose of protection, or recommend reconciliation;

3. shall file charges in accordance with Article 43 of this Law, pertaining to violations of rights guaranteed by this Law, in his/her own name, and with the agreement and on behalf of the person discriminated against, unless proceedings before a court of law have already been initiated or concluded by passing an enforceable decision;

4. shall submit misdemeanour notices on account of violations of rights guaranteed by this Law;



5. shall submit an annual report and special reports to the National Assembly about the situation concerning the protection of equality;
6. shall warn the public of the most frequent, typical and severe cases of discrimination;
7. shall monitor the implementation of laws and other regulations, initiate the passing or amending of regulations for the purpose of implementing and developing protection against discrimination, and provide opinions concerning the provisions of draft laws and other regulations pertaining to the prohibition of discrimination;
8. shall establish and maintain cooperation with organs authorised to ensure equality and the protection of human rights on the territory of an autonomous province or a local government;
9. shall recommend measures to public administration organs and other persons aimed at ensuring equality.

## **Gender Equality Act**

### **Article 1**

This law prescribes the establishment of equal opportunities to accomplish rights and obligations, undertaking of special measures to prevent and eliminate gender-based discrimination and the procedure of legal protection of persons exposed to discrimination.

### **Article 2**

Gender equality means equal participation of women and men in all fields of public and private sector, in accordance with generally accepted rules of international law, recognized international treaties, the Constitution of the Republic of Serbia (hereinafter: the Constitution) and laws, which are to be respected by all.

Gender equality is guaranteed in accordance with the generally accepted rules of international law, the recognized international treaties, the Constitution and laws.

The provisions of this law may not be interpreted in the manner that might cause abolishment or limitation of some existing right established by another regulation.

The state authorities, the authorities of the autonomous provinces, the authorities of self-government units, organizations entrusted with the exercise of public powers, as well as the legal entities established or financed in full, or mostly by the Republic of Serbia, the autonomous province and the self-government unit (hereinafter: public power bodies) are obliged to monitor the accomplishment of gender-based equality in all fields of social life, the application of international standards and the rights guaranteed by the Constitution in this field.

### **Article 3**

The public power bodies conduct an active policy of equal opportunities in all fields of social life. The policy of equal opportunities means the accomplishment of gender equality in all stages of planning, decision-making and implementation of decisions, which are of influence on the status of women and men.

### **Article 4**

Gender-based discrimination is any unjustified differentiation or unequal treatment or failure to treat (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying exercising or enjoyment of human rights and freedoms to a person or a group of persons in the area of politics, economy, social, cultural, civil, family life or any other area. It is also considered discrimination if a person is unjustifiably treated or might be treated in worse manner than another person, explicitly or mainly because such person is seeking or

intends to seek legal protection against discrimination or if a person offered or intends to offer evidence of discriminatory treatment.

Unjustified distinction, exclusion, limitation and treatment or other undertaken measures, within the meaning of this law, include in particular, if:

- 1) An undertaken measure is not justified by a lawful or legitimate aim;
- 2) There is no proportion between the actions undertaken and the aim to be achieved by such actions.

### **Article 5**

Direct discrimination is any unjustified distinction, exclusion or limitation by which, under the same or similar circumstances, by any act or action of the public power bodies, the employer or the provider of services, some person or a group of persons are placed or were placed in a subordinate position, namely, by which they might be placed in a gender-wise subordinate position.

### **Article 6**

Indirect discrimination is any unjustified distinction, exclusion or limitation by which, under the same or similar circumstances, a person or a group of persons are placed in a subordinate position gender-wise as the personal capacity, by adopting an act or performing an action that are apparently based on the principle of equality and non-discrimination.

### **Article 7**

It is not considered discrimination or violation of the principle of equal rights and obligations if some special measures are adopted in order to eliminate and prevent an unequal status of women and men and accomplish equal opportunities of both sexes.

### **Article 8**

No person may suffer harmful consequences because the person gave a testimony as a witness or a victim of gender-based discrimination before the competent body or warned the public of a case of discrimination.

## **Rehabilitation and Employment of Persons with Disabilities**

### **Article 3 (1)**

For the purposes of this law, a person with disabilities shall be the person suffering permanent consequences of bodily, sensory, mental and psychiatric impairment or sickness which cannot be eliminated by any treatment or medical rehabilitation and faced with social and other limitations affecting his/her working capacity and possibility to find or retain employment and who does not have the possibilities or has reduced possibilities to be included in the labour market or apply for employment on equal terms with other persons.

## **The Law on the Protection of National Minorities**

### **Article 3**

All forms of discrimination toward persons belonging to national minorities based on national, ethnic, linguistic or racial grounds are prohibited. Authorities of the federation, republic, autonomous province, town and municipality have no right to pass a law or some other legal normative act, or take measures which are not in accordance with the first paragraph of this Article.

#### **Article 4**

Authorities of the Federal Republic of Yugoslavia can, in accordance with the Constitution and the Law, pass legal rules, individual legal acts and take measures with the aim of securing full and effective equality for the persons belonging to national minorities and to the majority nation. Authorities will pass legal acts and take measures from the first paragraph of this Article with the aim of improving the position of persons belonging to Roma national minority. Legal rules, individual legal acts and measures from the first paragraph of this Article will not be regarded as acts of discrimination.

#### **Labor Code**

##### **Article 18**

Both direct and indirect discriminations are prohibited against persons seeking employment and employees in respect to their sex, origin, language, race, color of skin, age, pregnancy, health status or disability, nationality, religion, marital status, familial commitments, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions or any other personal quality.

##### **Article 19**

Direct discrimination, pursuant to this law, shall be any action caused by some of the grounds referred to in Article 18 of this law that puts a person seeking employment or employee in a less favorable situation than other persons in the same or similar situation.

Indirect discrimination, pursuant to this law, shall be recognized, in case an apparently neutral provision, criterion or practice puts or would put a person seeking employment or employee in a less favorable situation than other persons, due to a certain quality, status, belief or position of such person referred to in Article 18 of this law.

##### **Article 20**

Discrimination referred to in Article 18 of this law shall be prohibited in relation to:

- 1) employment conditions and selection of candidates for a certain job;
- 2) working conditions and all rights resulting from the labor relationship;
- 3) education, training and advanced training;
- 4) promotion at work;
- 5) termination of the labor contract.

Provisions of the labor contract establishing discrimination pursuant to some of the grounds referred to in Article 18 of this law shall be null and void.

##### **Article 21**

Harassment and sexual harassment are prohibited.

Harassment, pursuant to this law, is any unwanted behavior resulting from some of the grounds referred to in Article 18 of this law aimed at or representing violation of dignity of a person seeking employment or employee, causing fear or breeding adverse, humiliating or insulting environment.

Sexual harassment, pursuant to this law, is any verbal, non-verbal or physical behavior aimed at or representing violation of dignity of a person seeking employment or employee in the area of sexual life, causing fear or breeding adverse, humiliating or insulting environment.

##### **Article 22**

Differentiation, exclusion or prioritization for a certain job shall not be considered discriminating when the nature of the work is such or the work is done under such

circumstances that qualities relating to some of the grounds referred to in Article 18 of this law represent the true and decisive requirement for performance of such job, and that the purpose aimed at is justified.

Provisions of this law, general document and the labor contract relating to special protection and assistance to certain categories of employees, particularly those relating to protection of disabled persons, women on maternity leave and absence from work for childcare, special childcare and provisions relating to special rights of parents, adoptive parents, guardians and foster parents – shall not be interpreted as discrimination.

### **Article 23**

In cases of discrimination pursuant to provisions of Articles 18 - 21 of this law person seeking employment or employee may file for compensation of damages before the competent court, pursuant to the law.

## **Law on Preschool Education**

### **Article 3 (4)**

In discharging the activity of preschool education and other activities in preschool institution, all forms of violence, abuse and neglect shall be forbidden, as well as all other activities that may jeopardize, discriminate against or single out a child or a group of children on any grounds, in line with the Law.

## **Law on Fundamentals of Education System**

### **Article 3 (1) items (1) and (5)**

The education and pedagogy system must provide all children, students and adults with:

- 1) Equality and accessibility of education and pedagogy without discrimination and segregation based on gender, social, cultural, ethnic, religious or other background, place of residence or domicile, financial or health status, developmental difficulties and impairments and disabilities, as well as other grounds;

- 5) Equal opportunities for education and pedagogy at all levels and types of education, in keeping with the needs and interests of children, students and adults, without any obstacles to change, continuation and completion of education and lifelong education.

### **Article 6**

The citizens of the Republic of Serbia shall be equal in exercising their right to education and pedagogy, regardless of their gender, race, national, religious and language background, social and cultural background, financial status, age, physical and psychological constitution, developmental impairments or disabilities, political opinion or another personal trait.

Persons with developmental impairments and disabilities shall be entitled to education and pedagogy which takes into consideration their educational needs within the regular education and pedagogy system, within the regular system with individual or group additional assistance or in a special preschool group or school, in accordance with this and the pertaining law.

Persons with exceptional abilities shall be entitled to education which takes into consideration their special educational needs, within the regular system, within special classes or within a special school, in accordance with this and the pertaining law.

Foreign citizens and persons without citizenship shall be entitled to education under same conditions and in the same manner as envisaged for the citizens of the Republic of Serbia.

#### **Article 44**

Activities aimed at threatening, belittling, discriminating or singling out groups or individuals on the basis of their racial, national, ethnic, linguistic, religious background or gender, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views as well as encouraging or not preventing such activities, and other types of activities stipulated by the law prescribing the prohibition of discrimination, shall be prohibited in an institution.

Discrimination of a group or an individual shall imply each and every direct or indirect, covert or overt exclusion or limitation of rights and freedoms, unequal treatment or failure to act or unjustified differentiation through lax discipline or giving precedence.

Special measures introduced for the purpose of achieving full equality, protection and progress of disadvantaged persons or groups shall not be considered as discrimination.

More detailed criteria enabling an employee, student or another person in an institution to detect different forms of discrimination shall jointly be prescribed by the minister and the minister in charge of human rights.

### **Law on Churches and Religious Communities**

#### **Article 2**

No one shall be subject to coercion which could impair freedom of religion, or be compelled to declare their religious belief and religious conviction or absence thereof.

No one shall be harassed, discriminated or privileged for her religious convictions, belonging or not belonging to a religious community, participating or not participating in religious services and religious ceremonies and exercising or not exercising guaranteed religious freedoms and rights.

There shall be no state religion.

### **Law on Youth**

#### **Article 5**

All young people shall be equal.

It shall be prohibited to differentiate or unequally treat young people, whether directly or indirectly, on the grounds of race, gender, nationality, religion, language, social origin, property, membership in political parties and other organizations, mental or physical disability, health status, physical appearance, sexual orientation, gender identity and other real or assumed personal characteristic.

#### **Article 6**

Young people shall have the right on equal opportunities and participation in all spheres of social life in line with their own choices and capacities.

### **Law on Sports**

#### **Article 10**

It is forbidden to directly or indirectly discriminate against athletes in their performance of sports activities, on the grounds of their personal characteristics, gender, status, orientation or belief. This includes discrimination against professional athletes and those who want to

become professionals, with regard to employment, wages or conditions of work, except in a situation when the act of differentiating between athletes, i.e. of putting an athlete in a less favorable position in comparison to other athletes in an identical or similar situation, is based on the very nature of a particular sports activity or on real and decisive conditions for performance of such activity, with the aim to achieve justified results.

Provisions of a contract made between an athlete and a sports association that set forth discrimination against the athlete shall be null and void, while the provisions of sports directives and general acts of associations in the sphere of sports that set forth discrimination against athletes shall not be applied.

An athlete who doesn't have a valid contract signed with one sports association may not be denied the right, by sports rules, to conclude a contract with another sports association or to transfer to another sports association and represent it in sports competitions as an athlete, when the sports association to which the athlete transfers pays the appropriate remuneration to the sports association that the athlete leaves.

In case of a consensual termination of contract between an athlete and a sports association, a dispute that may arise between the sports association to which the athlete transfers and the sports association that the athlete leaves on the subject of amount and manner of payment of the agreed transfer remuneration may not influence the athlete's sports activities, and his or her right to represent the sports association to which he or she transferred.

An athlete has the right on reparation of damage that he or she may suffer on the account of discrimination acts committed by sports associations from paragraphs 1 to 4 of this Article.

#### **Article 26 (11)**

The provisions on prohibition of discrimination from Article 10 of this Law shall be accordingly applicable to sports experts and experts in the field of sports as well.

#### **Article 145 (3)**

Sports venues must be accessible to persons with special needs (children, elderly, persons with disabilities, etc.).



## **PART THREE**

### **Conclusions and Recommendations**





## Conclusions and Recommendations

The regional project „Legal Protection Against Discrimination in South East Europe“ was implemented with a support from Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe-Legal reform in the period October 2015-August 2016. The project gathered as key partners the twelve public law faculties represented through the South East European Law School Network (SEELS), the state anti-discrimination authorities from South East European (SEE) countries and the Ludwig Boltzmann Institute of Human Rights (BIM) from Vienna. The overall objective of the project was to improve the methodological capacities of the relevant stakeholders to act against discrimination in SEE.

Aiming to present the results of the regional project and to agree on recommendations for further priorities and needs of the SEE countries to improve the implementation of the anti-discrimination policy, a Regional Conference was organised on the 28<sup>th</sup> and 29<sup>th</sup> of June 2016 in Budva, Montenegro. The Conference gathered representatives from the line ministries, Law Faculties members of the SEELS Network, Ombudsman, Ombudswoman, judicial training institutions, judges, state anti-discrimination bodies, NGOs and representatives from international organisations and donors.

The Regional Conference was structured into two panels and two working groups. At the Conference, the benefits of the regional cooperation to improve and strengthen the legal protection and enforcement against discrimination and the advancement of the legal education and training in anti-discrimination between the SEE countries, were discussed. Modes of effective legal protection mechanisms, appropriate educational and training modules and relevant target groups were discussed and conceptualized during the working group sessions.

The first panel was devoted to presentation of the key findings and recommendations by the authors of the national reports followed by presentation of the regional comparative overview prepared by an international expert. The national reports were presented by respective representatives, most of them being authors or co-authors of the reports: Ms. Aida Sadiku, attorney at law, Assistant Professor Midhat Izmirlija, Associate Professor Mario Vinković, Mr. Naim Osmani, Ms. Milena Krsmanović and Dina Knežević, Ombudsman advisors, Judge Margarita Caca Nikolovska and attorney at law Atanas Georgievski and Associate Professor Ivana Krstić Davinić.

On the basis of the recommendations identified by the authors in their national reports, the following regional recommendations for improvement of the implementation of anti-discrimination policies in SEE countries were agreed:

1. Further alignment of the existing anti-discrimination legal framework.
2. Anti-discrimination policy to be implemented hand in hand with other rule of law and social policies.
3. To consider the specific needs and the situation of the marginalized social groups (such as people with disabilities, women, national minorities, asylum seekers, LGBT community, youth and elderly and others) in policy making process.
4. Social services must counter discrimination against marginalized social groups in the planning and delivery of their services.
5. Strengthening professional capacities among the stakeholders.
6. Organizing training for prosecutors and police officers.

7. Introducing new university courses and examining discrimination contents in textbooks.
8. Provision of a continuous intensive trainings for judges and public prosecutors.
9. Developing specialized trainings for the officials of the judicial system.
10. Introducing ECtHR case-law at the judicial system.
11. Organizing training for the media representatives.
12. Developing the public awareness on anti-discrimination protection mechanisms.
13. Publishing informative materials (handbooks etc.).
14. Monitoring and advocacy.

This was followed by the presentation of the regional comparative overview of anti-discrimination in South East Europe prepared by Ms. Barbara Liegl, key international project expert from the Ludwig Boltzmann Institute of Human Rights from Vienna. The following regional recommendations were summarized at the end of her presentation:

1. Legal provisions shall promote the victims of discrimination as the beneficiaries of the free legal aid. The criteria for access to the free legal aid shall be reviewed also with regard to the necessary documents.
2. The equality bodies should cooperate with the NGOs for awareness raising and filing complaints. The cooperation shall be formalized through MoUs, joint projects and other joint activities.
3. Strategic way of cooperation should be developed between the equality bodies, state authorities and NGOs (e.g. advisory groups for systematic solutions for overcoming issues).
4. Analyses on the implementation issued by the equality bodies should be carried out.
5. Follow up mechanisms with regards to the issued recommendations within the equality bodies should be established.
6. To maintain the increasing number of ex officio investigations of equality bodies.
7. Equality bodies shall make more use of the EQUINET.
8. All legal professions need more training to be specialized in anti-discrimination.
9. Police and the Ministries of Justice need to implement the recommendations issued by the equality bodies.
10. Data collection should be improved. There is intention in some countries to establish a central database.
11. To increase the willingness to take cases to the courts. Currently there is insufficient access to justice, and the risk to cover the costs if losing the case, threaten of further victimization and low confidence in the system.
12. To shorten the duration of the court proceedings (shifting of the burden of proof).
13. To create comprehensive databases to access judgments of other judges (international and domestic). Trainings are needed – case law from EU and other countries is a valuable instrument.
14. To do surveys on the regional level with the same methodology in order to be able to compare the countries for i.e. public administration and police, because they are role models in combating discrimination in equal treatment of citizens.

Afterwards the participants were divided into two working groups (WG).

The WG1 was focused on „Legal Education and Training on Anti-discrimination in SEE“. The participants of the WG1 recommend increasing the higher legal education in anti-discrimination in SEE through different education models. The primary recommendation was to introduce specialized anti-discrimination courses at the SEE Law Faculties, where such thing is possible. The aim of this course should be to develop a specific knowledge, skills and understanding on the protection against discrimination and should be delivered in various forms.

The issue of the anti-discrimination should also be incorporated in the human rights courses delivered at the Law Faculties. The issue could also be considered within the specialized summer schools for master and doctoral students. The Law Faculties should also consider introduction of specialized master programmes, targeting different groups involved in protection against discrimination.

In regard to the development of the specific knowledge and skills of the legal practitioners it is recommended that further activities are undertaken for introduction of specific training modules for the professionals. The primary focus should be the development of the knowledge, skills and understanding of the judges and prosecutors. The trainings should also include the lawyers and the free legal aid providers. Such capacity development activities should be undertaken in regard to the institutions responsible for the protection against discrimination such as the equality bodies and the Ombudsperson.

The implementation of these activities should be supported when addressing the specific needs of the higher legal education institutions and the professional organizations and state institutions, in particular in providing of the relevant literature and development of the expertise.

The activities for the development of the **legal education and training on anti-discrimination** in SEE, having in mind the common needs in the region, should be carried out on a regional level in cooperation between the theory and the practice. Such cooperation should be conducted both in the development and the delivery of the courses and in the exchange of the expertise. An interdisciplinary approach should be established and maintained in the education and training of the law students and legal professionals.

All of the education and training activities should aim to support the development of the culture of rights, high integrity of the legal professionals and respecting of diversity. This will provide for effective and efficient legal protection against discrimination.

The participants of the WG2 on „Anti-discrimination Enforcement and Capacities in SEE“ discussed the deficiencies and agreed on the regional recommendations for the legal framework, the system of anti-discrimination, the equality bodies, the role of the courts and the culture of rights for the region of South East Europe.

Related to the **legal framework** the discussion addressed the following topics: how to ensure involvement of the practitioners in the law amending process; how to cope with the large number of grounds and areas for discrimination; how to overcome conflicting legal provisions especially in regard to the different levels of protection; and how to improve the free legal aid in practice to ensure access to justice for victims of discrimination. The following recommendations are agreed:

1. To identify the relevant practitioners that should be included in the amendments of the laws.
2. To establish a group of stakeholders for law making process (NGOs, law professors, lawyers, judges and other).
3. To prescribe how the stakeholders will be involved (preliminary procedure).
4. To develop an official consultation process when amending the laws.
5. To develop commentaries on the laws and more actors to be involved in the process (e.g. legal practitioners).
6. The law in favour of the victim should prevail (*Lex specialis derogates lex generalis*).
7. To include alleged victims of anti-discrimination in the Law on Free Legal Aid.

With regards to the **system of anti-discrimination**, the participants addressed the following topics during their discussion: what is the role of the different institutions and/or organizations; what is the actual cooperation between the stakeholders; and how can a more systematic approach be achieved and in which areas. The following recommendations were agreed:

1. To establish legal provisions on the cooperation of the relevant stakeholders,
2. To strengthen the role/authority of the equality bodies within the system,
3. To establish a regular coordination meetings with the aim of discussing the trends, cases of discrimination and challenging issues, etc.,
4. To establish a monitoring system to which all stakeholders contribute,
5. To implement an awareness raising trainings to include more stakeholders in the system (e.g. public officials, educators, social welfare/health workers, inspectors, etc.).

Referring to the **equality bodies**, the participants discussed on: which elements of the mandate of the equality bodies are regularly used, which are not used and what are the reasons behind this; what role the equality bodies play in supporting the victims of discrimination in finding their way to their right to non-discrimination; how the equality bodies make a use of the data; and how effective are their recommendations especially in regard to supporting the establishment of structures and the development of policies capable of preventing discrimination. The following recommendations were agreed:

1. To strengthen the capacities of the equality bodies to deliver their services to the citizens. To be close to the citizens in geographical terms and in making tangible what services are offered and what can be achieved.
2. To strengthen the powers of the equality bodies to prevent future discrimination. To further develop the quality of recommendations of the equality bodies and including recommendations on how institutions and/or organizations can develop policies and mechanisms for preventing discrimination.
3. To strengthen the capacities of the equality bodies to support victims of discrimination.

Considering the **role of the courts**, discussion was led on the following topics: what skills of the judges and/or lawyers need to be further improved and how; how to improve the harmonization of the judgments on discrimination; how to strengthen the role of the equality bodies in court proceedings; and how to achieve accommodation to diversity during the court proceedings. The following recommendations were agreed:

1. To establish a data base, in which judgments related to discrimination are easily accessible for judges, lawyers, equality bodies, non-governmental organisations and citizens.
2. To develop a handbook on the case law from the region.
4. To strengthen the capacities of the equality bodies to develop an effective role in the court proceedings.
5. To develop adequate tools to inform legal practitioners about European and national case law, relevant publications, comments on final judgments, etc.

With regards to the **culture of rights**, the participants discussed on the following topics: whether the awareness raising activities match the needs of the target groups; how can the state institutions become more active in the raising awareness and/or overcoming prejudices and stereotypes; whether and how the equality bodies can make better use of some of their powers (e.g. public shaming, strategic litigation, public info on occurrences of discrimination); and which activities and by which institutions and/or organizations can

effectively contribute to preventing future discrimination. The following recommendations were agreed:

1. To oblige the state institutions to implement awareness raising campaigns targeting rural and urban areas as well as vulnerable groups.
2. To develop strategies on how to effectively protect the victims against discrimination.
3. To provide for equality bodies to share the results of their proceedings (e.g. mediation, decisions/opinions) with the public.
4. To support concrete measures to raise the awareness and combat prejudices/stereotypes (e.g. living libraries, moot courts, etc.).
5. To provide for structures so that the most important stakeholders (e.g. the Ministry of Justice, the Ministry of Education, the Ministry of Social Affairs and Labor, the equality bodies, the civil society) can develop measures contributing to the development of a culture of rights.

At the second plenary of the Regional Conference the work group results and recommendations were presented.

The general and WGs' recommendations agreed at the Regional Conference shall serve as a basis for improvement of the implementation of the anti-discrimination policies in the SEE countries and for developing additional measures to strengthen the capacity for both (1) the employees of the judiciary, public bodies and authorities as well as for (2) the judicial training institutions and law faculties dealing with anti-discrimination issues.

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