

ASSESSMENT OF THE WORK of Bosnia and Herzegovina Institutions in Combating Discrimination



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Discrimination

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EXECUTIVE SUMMARY

The Law on Prohibition of Discrimination (LPD) was adopted by the BiH Parliamentary Assembly in 2009. It was subsequently amended in 2016, with the goal of strengthening BiH mechanisms designed to fight discrimination, particularly against persons of vulnerable social categories. This purpose is clearly stated in its first Article, which stipulates that the country's anti-discrimination mechanisms ought to provide a functioning "framework for the realization of equal rights and opportunities for all persons in BiH".

Ten years following the LPD's adoption, the OSCE Mission to Bosnia and Herzegovina (the Mission) is issuing this report in order to present its analysis of three key institutional actors with the mandate and competencies to combat discrimination in BiH: the judiciary, the Institution of Human Rights Ombudsman/Ombudsmen of BiH (the Ombudsman Institution) and the BiH Ministry for Human Rights and Refugees (MHRR). This report, titled *Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination* (the Report), provides an analysis of the work of these institutions from the LPD's adoption to date. In addition, the Report assesses the progress that has been achieved in applying anti-discrimination legislation over the past ten years, and offers recommendations for how to overcome challenges identified by the Mission in this area.

The Report builds on previous efforts by the Mission to strengthen domestic mechanisms in BiH that are meant to address discrimination cases, starting with the Mission's initial support for the adoption of the LPD in 2009. These efforts include the Mission's lobbying for the amendments to the LPD in 2016 as well as the training of more than 800 judges and judicial staff from all over BiH on international and European anti-discrimination standards and mechanisms, with a particular focus on the concepts and mechanisms contained within the LPD. This training module, implemented in co-operation with the Judicial and Prosecutorial Training Centres (JPTCs) in both the Federation of BiH (FBiH) and Republika Srpska (RS), was extended to include lawyers, free legal aid providers, and trade union representatives in 2018, given their important role in the initiation of anti-discrimination proceedings. In addition, the Mission has actively supported the Ombudsman Institution in exercising its mandate, including through capacity building and

relevant advocacy efforts, the provision of expert assistance and support to office days, and setting up the Institution's data management system.

As a result of the LPD's adoption and its subsequent amendments, a significant number of discrimination cases have been brought before domestic courts and the Ombudsman Institution, leading to considerable case-law for these institutions. This case-law relates to various societal spheres, such as systemic discrimination in education (i.e. so-called 'two schools under one roof'), the workplace (mobbing), employment opportunities (denial on the grounds of nationality or ethnicity), access to social and health services, etc.

Notwithstanding the positive steps made in anti-discrimination protections over the last ten years, the Report identifies the shortcomings which BiH has still to address in its anti-discrimination mechanisms. One of the greatest overarching challenges remains BiH's complex and fragmented political and legal framework, and the lack of political will necessary for adopting strategic and programmatic anti-discrimination policies, or even for meeting existing legal obligations. Added to this complexity is the lack of a unified data collection system, poor reporting and statistical collection of instances of discrimination, insufficient research on public needs, a lack of consistent legislative understanding among judges and legal professionals, and a lack of consultation and co-operation with civil society organizations (CSOs) by the legal community. Other problems arise due to the lack of harmonization of other relevant legislation with the LPD, as well as scarce public awareness of the social and legal protection mechanisms available for public benefit. These challenges are elaborated on in this Report in six chapters.

Chapter I describes the Report's methodology. It presents the sources used to collect the data used for the Report and describes the processes used to obtain information from relevant stakeholders.

Chapter II provides an overview of common discriminatory practices and instances in BiH. This chapter presents the main forms discrimination takes in BiH society, the areas of life where discrimination most frequently occurs, types of systemic discrimination, the most visible instances of discrimination as well as the social groups most susceptible to discrimination. The chapter largely relies on findings derived from the Mission's extensive work on discrimination issues, reports from credible domestic and international organizations, and domestic and international jurisprudence concerning discrimination in BiH.

Chapter III offers insight into the statistical trends among discrimination cases before domestic courts, especially as they relate to the application of newly introduced principles of the LPD. As the Report shows, the Mission considers the shift in the burden of proof to be one of the LPD's greatest novelties, yet this shift has also created numerous difficulties for judges in such cases. Courts often fail to deliberate and/or decide on the burden of proof, or they apply the burden of proof rule erroneously. The LPD was amended to ease the conditions for the participation of third parties and the Report examines their role

in practice. The chapter goes on to assess whether the LPD has been utilized to combat systematic discrimination, especially among BiH's most vulnerable social groups. While the Law is frequently used to combat discrimination in cases referring to employment opportunities, the possibility for CSOs and trade unions to take an active role in the proceedings as third-party interveners, through collective civil claims, or as the legal representatives of plaintiffs, is being underutilized. Additionally, many discrimination cases remain unreported due to a general lack of awareness of the LPD and relevant available mechanisms, a lack of confidence in institutions or fear among victims of the potentially negative consequences that could come with reporting a discrimination case. The chapter concludes with the need to further educate legal professionals and other stakeholders on anti-discrimination practices and ways to improve the application of relevant legislation.

Chapter IV of the Report analyses the work of the Ombudsman Institution as a central national institution tasked with combating discrimination by assisting citizens with potential discrimination claims. The chapter starts with an overview of relevant statistical data collected by the Institution, including the number of discrimination complaints brought to and resolved by the Institution, and examines the lack of implementation of some of its recommendations. In addition, the chapter analyses the Institution's capacities (technical, human and material) and offers recommendations aimed at strengthening these capacities to better fight discrimination. The Ombudsman Institution's report drafting, information flow and promotional activities are also analysed in this chapter. An emphasis is placed on the Ombudsman Institution's annual reports, special reports and treaty body reports, including recommendations for how to improve the Institution's overall reporting. Furthermore, particular attention is given to situational testing as a newly introduced experimental method for establishing discrimination. This entails that where discrimination is suspected, a person is deliberately put in a real-life situation to test whether discrimination occurs. As the Ombudsman Institution has been granted an important role in situational testing, the chapter proposes the most effective ways to apply this method, possible levels of engagement for the Institution, and includes notes on the role of CSOs.

Chapter V examines the role and work of the BiH Ministry for Human Rights and Refugees (MHRR), another key institutional actor for implementing the LPD. As presented in the Report, many of the obligations for the MHRR contained within the LPD have not yet been fulfilled by the MHRR. This is due to both internal and external factors, including a lack of political will to adopt strategic anti-discrimination documents, an insufficient level of co-ordination between the MHRR and other institutions, and a lack of internal capacity. The development of strategic and programmatic documents in particular, which is included in the mandate of the MHRR, remains necessary for enhancing the MHRR's effectiveness in the fight against discrimination in BiH.

Domestic courts, the Ombudsman Institution, the MHRR, legal aid providers and CSOs are all key actors for ensuring effective protection of BiH citizens against discrimination. Understanding the importance of each of these actors, the challenges to their work, and

most importantly the need for a strategic and systemic approach involving all of these institutions, chapter VI offers lessons learned and a set of recommendations for enhancing the capacities of existing mechanisms and for increasing the LPD's level of implementation, thereby further protecting all BiH's citizens from discrimination.

CHAPTER I

METHODOLOGY

In accordance with its mandate outlined in Article 13 of Annex VI to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), the Mission monitors the human rights situation in the country. As part of this mandate, the Mission places a particular emphasis on monitoring discrimination, and regularly collects quantitative and qualitative data and information on discrimination cases and trends from the judiciary, Ombudsman Institution, CSOs and other relevant actors.

The Report and its contents therefore fall under the Mission's mandate to monitor the human rights situation in Bosnia and Herzegovina as part of the Dayton Peace Agreement. The Report is based on a variety of sources.

In order to analyse statistical trends in anti-discrimination cases before BiH courts, the Mission relied on data from the BiH High Judicial and Prosecutorial Council (HJPC). Courts in BiH use an electronic database designed for cataloguing court cases known as the Case Management System (CMS). Immediately after the adoption of the LPD, the HJPC included a special designation in the CMS for cases falling under the LPD. Data contained in this database is therefore of paramount importance because it provides direct access to discrimination cases processed before all courts in BiH. The CMS provides data on the caseload, the courts in which LPD cases were processed, the duration and outcome of proceedings, legal effects, areas of public or private life in which discrimination occurred and, finally, the gender of plaintiffs and defendants.

As a result of its established co-operation with the Mission, the HJPC delivers data on discrimination cases to the Mission on a regular basis. Once the data is received, the Mission collects hard copies of the judgments from local courts through its network of field offices. This puts the Mission in the unique position to access all domestic jurisprudence on discrimination.

In addition, the Mission has significant insight into BiH courts' implementation of the LPD through regular trainings provided to the BiH legal community. Since 2012, the Mission, in collaboration with JPTCs, has trained more than 800 judges and judicial staff

members from all over BiH on international and European anti-discrimination standards and mechanisms, with a particular focus on the concepts and mechanisms of the LPD. In addition, the Mission regularly supports civil society organizations and strengthens their capacities to provide support to vulnerable groups in discrimination cases. The Mission has extended its trainings to BiH Bar Associations, and in 2018 delivered four trainings on discrimination to more than 70 lawyers.

Relying on its internal database, the Mission published an “Analysis of Judicial Response to Discrimination Challenges in Bosnia and Herzegovina” (hereinafter: the Analysis) in 2018. Intended for the further education of judges and the legal community in BiH, this document provided a detailed statistical and qualitative overview of 148 cases selected, covering the period between 1 December 2009 and 31 May 2017.¹

After the completion of the Analysis, and for the purposes of drafting this Report, the Mission requested updated statistics and data from the HJPC covering the period from 1 June 2017 to 30 June 2018. During this period, the CMS logged 185 entries as discrimination-related cases, of which 92 represented civil claims instigating new proceedings and 93 concerned judgments and other decisions in the proceedings. The hard-copy judgments were then collected by the Mission’s field offices and analysed in this Report. The Report compares the quantitative data from the 2017-2018 period with the data published in the Analysis, in order to establish statistical trends and deviations and to provide a complete picture of how the LPD has been applied by the BiH judiciary since its introduction into the BiH legal system.

The qualitative examination of case-law in this Report concentrates on the manner in which courts applied the most challenging aspects (i.e. the burden of proof and third-party interveners). This qualitative analysis is based on two sources: the findings of the above-mentioned Analysis covering the period 2009–2017, and the Mission’s conclusions from its direct contact with the BiH legal community, which was established by delivering trainings to judges and other legal professionals. In these interactions, the burden of proof and the role of third-party interveners regularly emerged as the greatest challenges for their work. Based on the statistical and qualitative assessment of the judiciary’s work, the Report offers a range of conclusions and recommendations for the judiciary and provides direction for future support by the Mission.

Chapter IV of this Report, which concerns the work of the Ombudsman Institution, is based on several sources. These include the Mission’s files and reports based on a decade of partnership and co-operation with the Ombudsman Institution, as well as three external reports, one published in 2015 by the United Nations in BiH, and two others recently published by the Council of Europe in BiH within its *Strengthening the Human Rights Ombudsman to fight discrimination* project. In addition, additional data and information was gathered through an interview conducted with two designated lawyers of the Ombudsman Institution who work on discrimination issues.

¹ Available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/400544>

Chapter V focuses on the MHRR. The work of the MHRR was analysed through documents adopted by the Ministry, such as the MHRR's Annual report on Instances of Discrimination, as well as the draft BiH Programme for Combating Discrimination and the draft second Annual Report on Instances of Discrimination. Given its active support to the MHRR in the adoption of these documents through the provision of expert advice, the Mission possesses unique insight into challenges the MHRR is facing in the development of these documents. In addition, for the purposes of this Report, the Mission held several meetings with the MHRR and interviewed its staff regarding their work on discrimination issues.

Finally, in order to get their perspective on discrimination-related issues, the Mission developed a questionnaire for several BiH human rights CSOs to map their views on the work of public institutions and more general efforts to combat discrimination in BiH (see Annex II).

CHAPTER II

AN OVERVIEW OF DISCRIMINATION CHALLENGES IN BiH

Largely relying on two key EU directives regarding anti-discrimination,² the LPD is broadly in compliance with relevant international standards and the EU *acquis communautaire*.

Bosnia and Herzegovina is a signatory to numerous international human rights documents, and as such is obliged to perform activities aimed at fulfilling obligations stemming from these commitments. Anti-discrimination clauses are an integral part of all international human rights documents (see Annex III). In addition, a number of international human rights treaties are directly incorporated into the BiH legal system through Annex VI of the Dayton Peace Agreement, which concerns human rights in BiH.

BiH is a signatory to the European Convention on Human Rights and Fundamental Freedoms (the European Convention) and other agreements of the Council of Europe – regional mechanisms for the protection of human rights and prohibition of discrimination. In accordance with its obligations undertaken from international and European human rights instruments, BiH must also consider the concluding observations of these Treaty Bodies (see Annex III). Many of these international bodies continuously emphasize the need for a systemic approach to anti-discrimination, not only in BiH, but worldwide. For example, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban issued a Declaration concerning discrimination worldwide, underscoring the need to design, promote and implement at the national, regional and international levels strategies, programmes and policies, as well as adequate legislation for combating discrimination.³

Finally, as Bosnia and Herzegovina intends to become a member of the European Union, it is important to note that this membership is conditioned on the adoption of

2 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin of 29 June 2000, OJ L 180 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, endorsed on 27 November 2000, published on 2 December 2000, OJ L 303

3 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration (2001), paras 18 and 107.

anti-discrimination legislation and its full harmonization with the *acquis*.⁴ In addition to the EU directives, in 2005 the European Commission adopted “A framework strategy for non-discrimination and equal opportunities for all”.⁵ The main objective of this strategy is to ensure effective legal protection against discrimination across the EU through the harmonization of national legislation with EU legislation. This document clearly identifies the lack of adequate harmonization of legislation among the EU Member States and requires that such harmonization takes place based on the EU strategic document. For BiH, this harmonization is also relevant to its accession process, particularly via Chapter 23: Judiciary and fundamental rights, and Chapter 24: Justice, freedom and security. This document also elaborates on the anti-discrimination activities of the EU in the process of enlargement, relations with third countries and international co-operation.⁶ The EU’s commitment to utilizing its pre-accession instruments to support the promotion of non-discrimination in countries such as BiH is to be commended and encouraged, especially given that this co-operation is to include both the international community and local counterparts.

In BiH’s unique and complex constitutional system, the provisions of the European Convention on Human Rights and Fundamental Freedoms and its Protocols have priority over all domestic laws. Furthermore, international standards have direct application in the BiH legal system. BiH has ratified Protocol No. 12 to the European Convention, thus expanding the State’s obligation to prohibit discrimination in the enjoyment of any right, including through domestic legislation. BiH subsequently became the first country which the European Court of Human Rights (ECtHR) found to be in violation of this Protocol, in the case of *Sejdić and Finci v. BiH*.⁷ In its ruling in favour of Sejdić and Finci, the ECtHR reproached the constitutional ineligibility of the applicants to stand for election to the BiH House of Peoples or the BiH Presidency because of their respective Roma and Jewish ethnicities.

Additionally, BiH authorities are legally obligated to respect human rights and non-discrimination arising from commitments contained within the BiH Constitution, the entity constitutions, the Statute of Brčko District BiH (Brčko District) and the constitutions of the Federation of BiH’s (FBiH) ten Cantons. Although the prohibition of discrimination was one of the key principles of the BiH legal system even before the adoption of the LPD, various forms of discrimination and the particularities of available protections against

4 The directives of the Council of the European Union for the full respect of the non-discrimination principle are: Racial Equality Directive (2000/43/EC), Directive on Gender Equality in the Labour Market (2006/54/EC) and Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC).

5 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 June 2005 – Non-Discrimination and Equal Opportunities for All - A Framework Strategy [COM (2005)224 – Official Journal C 236 of 24.9.2005].

6 “The Commission will ensure the promotion of non-discrimination and equal opportunities for all in the context of enlargement and in relations with third countries through:

- the use of pre-accession instruments to finance the promotion of non-discrimination;
- the defence of human rights, including respect for minorities, which forms an integral part of the political accession criteria;
- its European Neighbourhood Policy;
- a financial instrument for the promotion of democracy and human rights;
- co-operation on projects launched by CSOs and international organizations”.

7 *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, 22 December 2009.

discrimination were not defined, which contributed to a sense of legal uncertainty surrounding the issue.⁸ Indeed, before the LPD's adoption, the Constitutional Court of BiH established in several cases that regular courts had failed to ensure adequate protection against discrimination.⁹

However, despite the existence of this solid legislative framework and the efforts exerted by many relevant stakeholders (including the Mission) to enhance the capacities of these existing mechanisms, instances of discrimination persist in almost all spheres of life in BiH. While BiH is no exception to the general worldwide need to combat consistent discrimination, there are specific instances and types of discrimination which are unique to BiH and have been resistant to change.

Ten years after the ECtHR judged in its *Sejdić and Finci* case that the BiH Constitution is discriminatory, citizens who do not declare themselves as belonging to one of the three constituent peoples (Bosniaks, Croats and Serbs) are still excluded from running for office in the BiH House of Peoples or for the BiH Presidency. In practice, this discriminatory constitutional set-up affects all members of BiH's national minority groups, of which there are 17 officially recognized in the Law on National Minorities.¹⁰

In addition, BiH citizens who refuse to declare any ethnic affiliation, and who wish to run for these offices simply as citizens of Bosnia and Herzegovina, are equally ineligible to stand for office, a practice which the ECtHR also found to be discriminatory and in breach of the European Convention on Human Rights and Fundamental Freedoms in the *Zornić v. BiH* case.¹¹ It should be noted that the number of people who do not state an ethnic affiliation with one of the three constituent peoples is significant. According to the 2013 national census, they comprise 3.7 per cent of the BiH population (over 130.000 individuals)¹², though the actual figure is likely much higher.¹³

Finally, even those who do declare themselves as Bosniaks, Croats or Serbs are not equally eligible to run for all offices in the country. Serbs in the FBiH face discrimination as several cantons in the FBiH do not recognize Serbs as a constituent people in their cantonal constitutions, nor do they recognize the Serbian language and its Cyrillic script. In the *Pilav v. BiH* case, the ECtHR found BiH to be in violation of the European Convention as the applicant in the case was ineligible for election to the BiH Presidency as a resident of the RS, considering that he declared his ethnicity as Bosniak. Legally, presidential candidates

8 An exception is the Law on Gender Equality of BiH – consolidated version (Official Gazette of BiH, No. 32/10) which, in its initial version from 2003, defined different forms of discrimination for the first time.

9 See for example – Constitutional Court of Bosnia and Herzegovina, Case No. AP 1093/07

10 According to Article 3 of the Law - Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Rusyns, Slovaks, Slovenians, Turks, Ukrainians and other who meet requirements from the Law.

11 See *Zornić v. Bosnia and Herzegovina* (no. 3681/06, 15 July 2014).

12 According to the 2013 BiH Population Census

13 The number of Roma living in BiH, for example, is estimated to be several times higher than officially reported.

from the RS must be Serbs.¹⁴ In practice, this means that all BiH citizens are potential victims of discrimination as it relates to their right to run for the country's highest offices. Though contrary to the guarantees of the LPD, which prohibits discrimination in all areas of life, this political and legal discrimination is systemic, as it is rooted in BiH's highest legal act, its Constitution. And though BiH does have the legal possibility to amend its Constitution, no significant steps have been taken to eradicate these forms of structural and systemic discrimination, even ten years since the first ECtHR decision responding to this issue.

Many other instances of social discrimination apart from the systemic discrimination identified above are also of major concern in BiH. Segregation, also prohibited by the LPD, is one such example. Discrimination through ethnic segregation is especially visible in BiH's education system, where so-called 'two schools under one roof' continue to segregate children by ethnicity in 56 BiH schools. In these schools, children of different ethnicities are physically separated from each other and learn from different curricula. In many of these schools, children of different ethnicities have little or no opportunities to interact. This is a clear case of ethnic segregation and represents a long-term threat to BiH's security, and the Mission has for years called for political dialogue and the administrative and legal unification of these schools as vital first steps for ending this damaging practice.¹⁵

There have been attempts to use the LPD to combat this system. Two opposing decisions have been delivered by the Supreme Court of the Federation of Bosnia and Herzegovina in two separate cases concerning 'two schools under one roof', both of which were filed by a local human rights CSO. However, the final and binding judgment of the FBiH Supreme Court from 2014¹⁶, which ordered the end of the practice, has not yet been enforced.

Discriminatory practices in the education sector are also evidenced through the situation surrounding Bosniak students in RS, who are not offered the right to call their language "Bosnian". The Mission considers it evident that the Bosniak people have the right to call their language "Bosnian", as confirmed by the BiH Constitutional Court.¹⁷

Social exclusion and discrimination against Roma, BiH's largest national minority, remains widespread, particularly in housing, employment, education, and health services.

14 See *Pilav v. Bosnia and Herzegovina* (no. 41939/07, 9 June 2016)

15 For a detailed analysis of this issue and the Mission's recommendations, consult the Mission's public report from December 2018: *"Two Schools Under One Roof" - The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina*

16 Supreme Court of the FBiH, case no: 58 0 Ps 085653 13 Rev, of 29 Aug 2014 in which the Court found that the defendants Herzegovina-Neretva Canton, Primary School in Stolac and Primary School in Čapljina committed discrimination through organizing the schools on ethnic principle, and separating schoolchildren based on their ethnicity. In the same judgment, the Court ordered the Canton to end such practice and establish unified, integrated and multicultural schools.

17 In particular in its decision U 7/15, of 26 May 2016, the BiH Constitutional Court found that the formulation "language of the Bosniak people" from the Constitution of RS is not discriminatory, as it does not impose the name of the language to Bosniak people. The Constitutional Court further explained that this cannot be used in such a manner to prohibit the Bosniak people to call their language "Bosnian" as it clearly allows the Bosniak people to call their language "Bosnian".

In terms of access to education, BiH has a low enrolment rate of Roma in secondary schools and universities, with a high dropout rate among Roma children beginning around the fifth grade of primary school. Roma women are often victims of multiple forms of discrimination, while many Roma are left outside of the health protection system, due to a lack of understanding of the necessary administrative procedures required for their inclusion. Local Roma Action Plans have been developed in only nine municipalities across BiH¹⁸, and the Mission is monitoring the implementation of these Action Plans.

Roma are frequent victims of discrimination-based or discrimination-related incidents involving hate crimes and hate speech, including via verbal or physical assaults, the use of derogatory terms and insults and the exhibition of negative stereotypes.¹⁹ According to the Mission's findings, some 45 per cent of Roma have been subjected to such discriminatory-based treatment, which generally goes unaddressed. Roma are often reluctant to report such incidents to the authorities due to a general lack of trust in institutions. In addition, as will be shown in this Report, the LPD is not sufficiently utilized to combat discrimination against Roma.

The returnee population in BiH still faces difficulties in reintegrating into society, particularly as it relates to obtaining official status and the subsequent rights endowed to returnees who are civilian victims of war. As a result, returnees often face difficulties in accessing the labour market, social benefits and health care.²⁰

The Mission has found that significant disparities exist across governments in BiH, as access to economic and social rights, and in particular access to social protection, social services and health care vary between RS, the FBiH and Brčko District, as well as between Cantons in the FBiH. Social assistance is often established on an *ad hoc* basis, resulting in wildly different types and levels of social protection, and leading to frequent cases of discrimination based on certain categories such as place of residence.

Women in BiH continue to face marginalization in all spheres of life. They are unequally-represented in politics for political, socio-economic and cultural reasons including gender stereotypes.²¹ They face difficulties in accessing the labour market, healthcare, and social protection, and are subject to violence and exploitation. Such disparities negatively impact

18 Prnjavor, Tuzla, Kakanj, Visoko, Sarajevo Centar, Gornji Vakuf -Uskoplje, Bijeljina, Brčko District and Travnik.

19 The Mission has recognized the impact of negative stereotypes in fueling discrimination and, in partnership with a local CSO "The Post-Conflict Research Centre" supported the campaign to combat the negative perceptions people have against Roma.

20 See "Concluding observations on the combined twelfth and thirteenth periodic reports of Bosnia and Herzegovina" adopted by the Committee on the Elimination of Racial Discrimination at its ninety-sixth session (6–30 August 2018). It should be noted, however, that it is often difficult if not impossible to differentiate the discrimination-based lack of access to healthcare for returnees from general lack of access due to poor quality of services for all persons.

21 For example, according to the Gender Analysis Report for Bosnia and Herzegovina: Extended Summary (USAID, 2016) "In BiH, gender stereotypes continue to play a significant role in political, economic, and private life, undermining the promotion of gender equality" and "One-third of men and one-fifth of women see men as better political leaders than women."

on the country's stability and economic development. The Mission is working with the country's gender equality institutions, political parties, civil society organizations and all other relevant actors to rectify this inequality.

BiH's legal provisions governing gender equality have advanced significantly, particularly through the BiH Gender Equality Law, which requires all institutions in BiH to comprise at least 40 per cent of the less represented sex. This requirement concerns all levels of government, including legislative, executive and judicial authorities, local self-government organizations, publicly owned bodies, and political parties. Under the said Law, gender-based discrimination exists whenever the 40 per cent target is not met, in which case authorities are required to design and implement measures to ensure equality. The BiH Election Law also requires a 40 per cent quota of candidates of the less represented sex on political parties' candidate lists. While this quota concerning political parties' lists is respected in practice, this has not translated into a similar percentage of seats in parliaments, where women remain underrepresented.²² In addition, women remain underrepresented in State, Entity, Cantonal and District governments on all levels. This represents a clear case of non-respect for the rule of law as well as systemic gender-based discrimination. Furthermore, despite the existence of relevant legislation, high rates of gender-based violence and relatively low rates of reporting remain significant social concerns across the country. Finally, as reported by several relevant CSOs, it is a serious challenge to record instances of gender-based discrimination in the workplace, and to record such cases as instances of discrimination before relevant courts.²³

In 2013 BiH ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, adopted in 2011). The Convention's primary goal is to eradicate domestic and gender based violence. However, it strongly recognizes that all forms of discrimination against women and girls need to be eradicated, and that Council of Europe member states must advance their efforts to promote gender equality. In 2015, BiH invested significant efforts to adopt the BiH Framework Strategy for Implementation of the Istanbul Convention, with clearly defined strategic goals, programs and activities for the period 2015-2018. BiH is due to present its report on Strategy implementation to the Convention monitoring body GREVIO²⁴ in November 2019, and women's nongovernmental organizations in BiH are also preparing an independent report. However, in the meantime, the Strategy as such has expired and it is unclear how BiH will continue its work on meeting the obligations stemming from the Convention, particularly as co-ordination, data collection and reporting between at least

22 For example, the percentage of women in the House of Representatives of BiH Parliamentary Assembly in the 2014-2018 term was 23.8 per cent, while the representation of women in the House of Peoples was 13.3 per cent. According to the publicly available data the percentage after the 2018 elections are as follows: 21.42 per cent in the House of Representatives of BiH Parliamentary Assembly, 23.46 per cent in the House of Representatives of FBiH Parliament and 19.27 per cent in the RS National Assembly.

23 Gender Analysis Report for Bosnia and Herzegovina: Extended Summary (USAID, 2016).

24 <https://www.coe.int/en/web/istanbul-convention/grevio>

11 relevant institutions²⁵ without a strategic framework is expected to pose practical and political challenges.

The principle of “equal pay for work of equal value” has been enshrined in domestic legislation. However, this principle is not consistently applied in practice. According to the UN Committee on Economic, Social and Cultural Rights, employers in BiH “fail to respect their legal obligations towards their employees, namely by arbitrarily dismissing employees or by failing to pay their salaries or social contributions on time” and “disregard their legal obligations towards pregnant women and women who are on maternity leave”.²⁶

LGBT persons in BiH face discrimination in numerous fields, including employment, education, housing and health care. As reported by relevant CSOs, discrimination on the grounds of sexual orientation/gender identity/sexual characteristics is most prevalent in the employment sector, as well as in accessing goods and services. Discrimination against LGBT persons within the educational system can lead to hate speech, violence and systemic discrimination. The prosecution of hate crimes as well as hate speech remains insufficient,²⁷ as reported violent attacks on LGBT persons have not been effectively investigated.²⁸

Persons with disabilities face discrimination in accessing education, employment, social protection and health care. The failure to implement relevant regulations contributes to the exclusion of children and young people with disabilities from the educational system. Most public buildings and institutions, as well as public transport infrastructure, have been reported by relevant CSOs as inaccessible to persons with disabilities.

According to the Mission’s findings, inadequate practical implementation of relevant anti-discrimination standards and legislation is what most contributes to the issues listed above. In addition, while the LPD requires the harmonization of all other relevant legislation with its principles and provisions, this process has not yet started in BiH. While many of the laws adopted before the LPD entered into force have not been harmonized with the LPD, laws adopted afterwards have also not been drafted with the LPD in mind.²⁹ BiH’s complex and multi-layered constitutional and political structure negatively affects further legal reforms and the adoption of amendments to human rights legislation. Despite efforts to

25 BiH Gender Equality Agency, FBiH Gender Centre, RS Gender Centre, RS Ministry of family, youth and sports, BiH Ministry of Justice, BiH Ministry of Human Rights and Refugees, BiH Ministry of Foreign Affairs, BiH Statistics Agency, BiH Ministry of Security, BiH HJCP, BiH Parliamentary Assembly.

26 See “Concluding observations on the second periodic report of Bosnia and Herzegovina”, adopted by the UN Committee on Economic, Social and Cultural Rights on 29 November 2013.

27 See the 2018 EU Progress Report for Bosnia and Herzegovina

28 For example, the BiH Constitutional Court in its decision AP 4319 of 19 December 2018 found that BiH has failed to effectively investigate the attacks against the participants in a *Queer Film Festival* in Sarajevo, thus violating the applicants’ rights from Article 3 (prohibition of torture) and Article 14 (non-discrimination) of the European Convention of Human Rights.

29 To name but a few, the labour laws of the Federation of Bosnia and Herzegovina, RS and Brčko District all prohibit discrimination in the workplace but the list of protected grounds does not match those in the LPD. Furthermore, the lists of protected grounds are not identical even across those laws, and the provisions regulating the burden of proof are not consistent and do not match those in the LPD.

develop and adopt a country-wide human rights and anti-discrimination strategy, BiH still lacks strategic and programmatic documents aimed at combating discrimination.

Finally, the lack of systematic awareness-raising campaigns is an additional obstacle to this legislative reform and implementation, as no major public campaign for the promotion of the LPD and its mechanisms has been carried out by relevant institutions.

Despite some progress, the improvement of the legal, institutional and strategic framework to combat discrimination remains a challenge for relevant institutions in BiH. The judiciary, the BiH Ombudsman Institution and the MHRR must adopt a systemic and co-ordinated approach to addressing widespread and diverse discrimination in BiH. In addition, CSOs, free legal aid providers, trade unions and other legal professionals who bring cases to courts should play an important role in this process by proactively utilizing the LPD's mechanisms.

CHAPTER III

JUDICIAL PROTECTION FROM DISCRIMINATION

Introduction

Judicial protection through civil proceedings holds the most prominent position within the overall anti-discrimination framework in BiH. This is because final court judgments have the power of being legally enforced, unlike either the Ombudsman Institution's recommendations, or the best practices outlined in strategic human rights documents. While court proceedings have their disadvantages, such as length, costs and problems with enforcement (as discussed below), they still are the strongest tool for protecting citizens from human rights violations. This holds particularly true for collective civil claims and for addressing strategic human rights issues.

It is precisely for that reason that the LPD introduced specific procedural rules by which the default civil procedure in discrimination cases was changed. These rules were meant to improve the procedural position of the alleged discrimination victim, i.e. the plaintiff in the proceedings, or the person(s)/organization who brought the case to court. However, as this Report determines, all too often these rules are not applied properly, if at all.

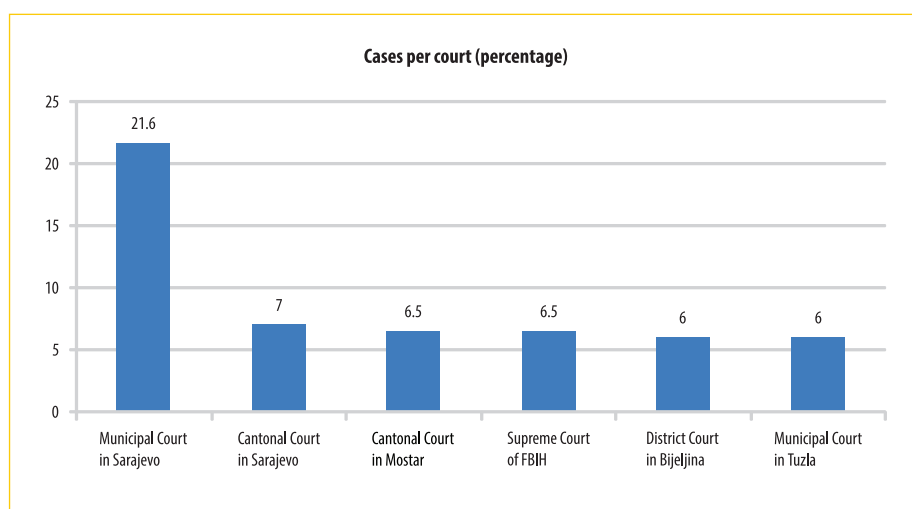
Accordingly, this chapter provides an analysis of trends in discrimination cases through statistical data, and offers insight into the implementation of the most contentious legal procedures introduced by the LPD. This analysis reveals how the LPD has been applied in practice and highlights the courts which had the most cases, the kinds of discrimination which occurred and the plaintiff and defendant structure (sex and legal or natural personhood), among other issues. The qualitative analysis focuses on two issues which proved to be very challenging in practice, namely the burden of proof and the role of third-party interveners.

The chapter ends with a concluding observations about the importance of educating legal professionals on anti-discrimination mechanisms, as well as ways to ensure greater impact.

Statistical trends in anti-discrimination cases

The statistical trends in the period covered by this Report largely correlate to the findings of the Mission's previous Analysis and concern the geographical distribution of cases, the areas of life where discrimination occurred, and plaintiff and defendant structure (sex and legal or natural personhood). These trends will be presented and explained below and compared with the previous Analysis.

The largest number of cases were processed by courts located in Sarajevo (the Municipal, Cantonal and Supreme Courts of FBiH) followed by courts in Mostar, Bijeljina and Tuzla.



Nearly two-thirds of all logged cases concerned discrimination related to labour rights (61 per cent or 113 cases). This presents a minimal deviation from the previously established trend in the Mission's last Analysis, where 64 per cent of cases from 2009-2017 concerned labour-related rights. This category is followed by another area with a significant number of discrimination cases marked as "Discrimination cases referring to equal access to public life for all citizens" (15 per cent or 28 cases), compared to 11 per cent in the previous period. The only two other areas with a significant number of cases are "justice and administration", with 8 per cent (15 cases) compared to 6 per cent registered previously, and "family life", with 6.5 per cent (12 cases) compared to 5.6 per cent in the Analysis.

This data shows that the LPD is consistently being used for combating discrimination in the labour market. However, this data does not give insight into the grounds for discrimination, nor does it necessarily prove that discrimination is most prevalent in the labour market (though it certainly is a strong indicator for this conclusion). Rather, the data shows that individuals suffering from discrimination-related injustices in the workplace are also those most likely to turn to legal recourse and the courts for protection.

Several reasons can be offered as an explanation for this trend. First, the importance of the right to work cannot be understated. Deprivation of the right to work, and in particular deprivation via discrimination or perceived discrimination, implies significant negative social and economic consequences for the victim. In addition to the deprivation of the right to income, financial independence and subsistence, discrimination in labour relations affects other interconnected rights, such as the right to private life and various economic-social rights closely related to the right to work.³⁰

Further, while litigating discrimination cases was not part of legal tradition in BiH before the introduction of the LPD, and prior discrimination-related cases have been rather scarce and largely undocumented in relevant databases, the use of legal proceedings to protect rights deriving from employment, including through specialized labour courts, has had a long tradition in all countries of the former Yugoslavia.³¹ For all these reasons it is not surprising that legal procedures in this area are the most frequent. Finally, according to information from the Ombudsman Institution (a comprehensive analysis is found in Chapter IV of this Report), most of the cases registered with the Ombudsman's Department for Elimination of all Forms of Discrimination pertain to labour rights, with mobbing being a particular issue.

Nothing in the available data suggests that this trend is likely to change in the near future. Therefore, the data on the prevalence of labour-related discrimination should be taken into account when drafting public policies, developing awareness-raising activities and providing training for legal professionals. Some attempts by relevant institutions to tackle labour-related discrimination in relevant policies have already taken place. These, however, have mostly been unsystematic and have not produced their intended results.

For example, upon a proposal by the BiH Council of Ministers, the BiH Parliamentary Assembly in August 2016 adopted a report on Instances of Discrimination in Bosnia and Herzegovina and an accompanying Action Plan for the Realization of Proposed Measures for Prevention of Instances of Discrimination in Bosnia and Herzegovina (see Chapter V of this Report for a detailed analysis of the MHRR's annual reporting on discrimination). These two documents proposed 32 concrete measures and interventions for addressing discrimination, three of which concerned labour-related discrimination. Those are worth presenting verbatim:

- "1. Consider the possibility for adopting a separate law for protection from mobbing in BiH institutions;

30 This method of interpretation, which came to be known as the "integrated" approach to human rights, was applied in the ECtHR judgment *Sidabras and Dziautas v Lithuania*. For an analysis of the judgment see "Work and Private Life: *Sidabras and Dziautas v Lithuania*" (2005) 30 European Law Review 573.

31 For further reading on the topic, consult "Labor courts and workers' rights in Yugoslavia: A case study of the contradictions of socialist legal theory and practice", Robert M. Hayden, *Studies in Comparative Communism*, Volume 18, Issue 4, 1985, Pages 247-260.

2. Include a separate module on mobbing and other manifestations of discrimination (ensure the participation of a larger number of executive structures and other state administration employees) in the curriculums for trainings delivered by the Agencies for State Administration;
3. Draft a separate report on instances of mobbing in BiH with the proposal for extensive measures.”

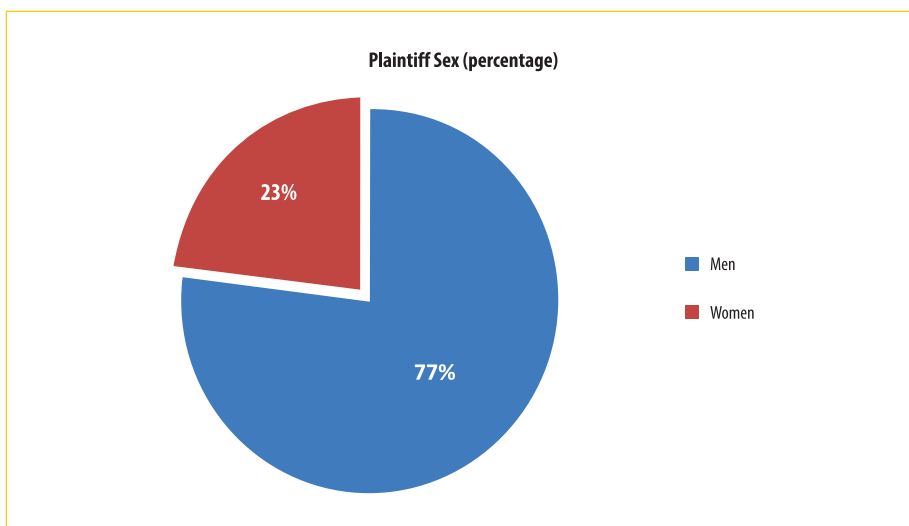
While some of the proposed measures warrant further discussion, such as whether the LPD is the most appropriate piece of legislation to deal with mobbing, whether mobbing is rightly defined as a form of discrimination, and whether it should instead be a subject for a separate piece (or pieces, given the constitutional setup of the State) of legislation, other proposed measures are commendable, such as the drafting of a special report on mobbing and education on mobbing. However, out of the proposed measures, only the second has been partially implemented, while the rest appear to have been ignored altogether.

It is therefore important for both the MHRR and the Council of Ministers to properly analyse the data on discrimination in the labour market, including the data from this Report, and to propose concrete measures to address issues and ensure the effective implementation of the measures adopted. The drafting process of the second MHRR Report on Instances of Discrimination in Bosnia and Herzegovina and the accompanying Action Plan, which is scheduled to be completed and adopted in 2019, and which is dealt with in a separate chapter of this Report, present suitable opportunities for this analysis.

Given the significant number of labour-related cases before courts, the role of trade unions in these proceedings also needs to be addressed. The LPD allows for trade unions to take an active role in the proceedings as third-party interveners, through collective civil claims and by legally representing plaintiffs. Trade unions play a significant role in these proceedings, especially through their network of free legal aid representatives, who also need to be supported and included in training programs.

Another important statistical indicator from the CMS is the data on the plaintiffs' sex. Namely, in the Mission's previous Analysis, it was established that 77 per cent (71 cases) of civil claims in discrimination proceedings were filed by men, vs. 23 per cent (21 cases) by women. These statistics remained the same for this Report.

Plaintiff sex



Rather than being more likely to be victims of discrimination, this data demonstrates that men are far more likely to turn to the courts for protection against discrimination. Contrary to the available statistics from courts on case numbers, and according to available data from other sources, women in BiH actually form a larger percentage of victims of discrimination, including in employment, where they are twice as likely as men to fall victim to instances of discrimination.³²

The reasons for more men using available legal mechanisms is better explained by other circumstances. Indeed, according to data from the European Institute for Gender Equality, discrimination itself actually results in women having less access to courts, which is particularly evident with elderly women, women with disabilities or those who live far away from courts. Also, women from marginalized communities who experience a compounded exposure to discrimination (such as Roma women) are as a rule not sufficiently informed of their rights and options for accessing legal remedies, especially as these groups are often exposed to multiple layers of social discrimination. For example, according to data from the 2013 Census in BiH, half of the persons with a disability are older than 65, and about 65 per cent of those are women. Over 50 per cent of the Roma population have not finished primary school and every fourth Roma woman over 70 years of age is illiterate.³³

Finally, the sex breakdown of plaintiffs largely corresponds with the statistical data on employment in BiH, according to which some 60 per cent of employed persons are men

³² For more information, consult the Gender Country Profile for Bosnia and Herzegovina (2014), Discrimination in the area of work in Bosnia and Herzegovina (Association of Democratic Initiatives, 2015) and U. S. Department of State BiH Country report on Human Rights Practices for 2017

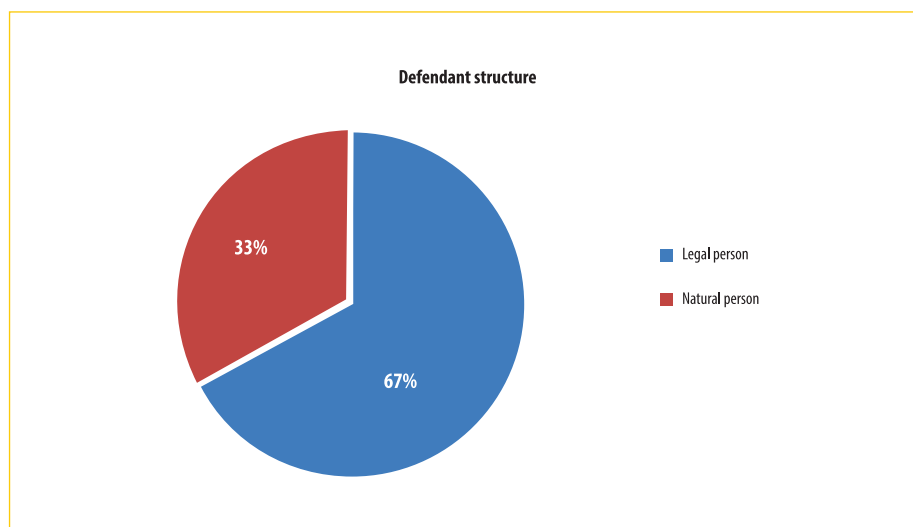
³³ Women and men in Bosnia and Herzegovina (Agency for Statistics of Bosnia and Herzegovina, 2018)

and 40 per cent are women,³⁴ with the unemployment rate of women being much higher than that of men.³⁵ Therefore, a significant difference in the percentage of the plaintiffs' sex can be principally attributed to a significant difference in employment numbers, which could also indicate the existence of gender-based discrimination in the labour market.

It is evident that this statistical data is insufficient to establish precise conclusions regarding the amount of gender-based discrimination in employment, and additional research into political, socio-economic and cultural factors is necessary. It is, in this sense, essential to conduct research on citizens' own perceived levels of discrimination in BiH society, which would include a gender component. The collection of such data would serve the purpose of planning future policies which would ensure equal access to justice in discrimination cases for both sexes. The future Programme for Combating Discrimination and the Action Plan for Combating Discrimination developed by the MHRR should therefore have a prominent gender component.

The data on the legal personality of defendants shows minimal differences from that contained in the Mission's Analysis, with 67 per cent (62 cases) of defendants being legal persons and 33 per cent (30 cases) natural persons.

Defendant structure



Seen in combination with data on areas of life where discrimination cases are most likely to occur, it would appear that in 2/3 of anti-discrimination cases, it is natural persons (candidates for a certain job, employees or former employees, and predominantly men) who use the LPD to take legal action against their (former) employers on the grounds of

34 Agency for Statistics of Bosnia and Herzegovina, Demography and Social Statistics, May 2018

35 Agency for Statistics of Bosnia and Herzegovina, Women and Men in Bosnia and Herzegovina, 2018

discrimination and mobbing in the workplace. It seems that the LPD is regularly used as a means of reinforcing already existing labour-related claims. This is in line with the findings of a similar analysis conducted by the Sarajevo-based CSO “Analitika”, in which all the judgments selected for qualitative analysis concerned labour-related disputes.³⁶

The length of anti-discrimination proceedings

While the LPD requires speedy processing of anti-discrimination cases, the available data suggests that the length of the civil proceedings under the LPD is not shorter than regular proceedings.³⁷ The average duration of court consideration varies depending on the outcome: 413 days for accepted claims, 404 for rejected cases and 467 days for dismissed cases. This is relevant for establishing the degree to which courts consider discrimination cases in urgent procedure. According to the Constitutional Court of BiH, assessing whether the right to trial within a reasonable time has been violated depends on the actions of a court in each specific case.³⁸ Nevertheless, having in mind that the average time needed for completed cases by BiH first-instance courts totaled 400 days³⁹ in the past three years, it is questionable to what degree cases in urgent procedure are considered by courts in a timely manner. This is particularly alarming given the negative consequences that lengthy proceedings can have on victims of discrimination. As a rule, the length of a court proceeding is directly proportional to its cost. In civil proceedings it is the plaintiff who bears the costs of the proceedings such as lawyer’s fees, expert witnesses’ fees, fees related to witnesses’ participation in the proceedings and examination of evidence. These costs are reimbursed by the defendant only if the plaintiff succeeds in their claim and only at the end of the civil proceedings. The length and costs of these proceedings can therefore discourage the potential plaintiff (discrimination victim). Thus it is imperative that courts ensure that cases under the LPD are dealt with speedily, as a means of ensuring the right to proceedings within a reasonable time.⁴⁰ It should be added that the inappropriate length of proceedings before the courts, as well as the ineffective enforcement of court decisions, are among the most frequent reasons for citizens to address the Ombudsman Institution,⁴¹

36 Kvadratura antidiskriminacijskog trougla u BiH: zakonski okvir, politike i prakse 2016–2018 (Analitika, BiH)

37 See Analysis for detailed breakdown of statistics

38 Constitutional Court of BiH considers the trial reasonable time in light of the circumstances surrounding individual cases, taking into account the criteria established by the ECtHR’s case law, in particular, in reference to the case complexity, conduct of both parties and the competent court, as well as in reference to the significance of the legal matter to the plaintiff. See Decision on Admissibility and Merit, Case No. AP 1859/11 of 13 June 2012

39 The average is based on the data contained in the 2016 Annual report/High Judicial and Prosecutorial Council of BiH

40 In requiring cases to be heard within a “reasonable time”, the ECHR underlines the importance of administering justice without delays which might jeopardize its effectiveness and credibility (*H. v. France*, § 58; *Katte Klitsche de la Grange v. Italy*, § 61). Article 6 § 1 obliges the Contracting States to organize their legal systems so as to enable the courts to comply with its various requirements. The ECtHR has repeatedly stressed the importance of administering justice without delays which might jeopardize its effectiveness and credibility (*Scordino v. Italy* (no. 1) [GC], § 224).

41 MConsult Ombudsman Institution Annual Reports

the BiH Constitutional Court⁴² and the European Court of Human Rights under Article 6 of the European Convention for Human Rights.⁴³ This points to a systemic problem in dealing with court cases in a timely manner, which constitutes an obligation under the LPD.

This statistical data does not reveal how the new concepts introduced into the BiH legal system by the LPD are applied, so the next Chapter offers insight into this matter.

Challenges in applying certain procedural aspects of the LPD

Discrimination can be either direct or indirect. Direct discrimination is an act or omission leading to an unfavourable position compared to a person or group who are in similar circumstances, while indirect discrimination refers to an apparently neutral provision, criteria or practice leading to the same result. Discrimination is usually not manifested overtly and is difficult to prove in most cases. That applies to all forms of discrimination, especially indirect discrimination, in which different treatment based on prohibited grounds is not immediately discernible. Thus, the LPD defines special procedural rules such as a reversed burden of proof, use of statistical data, situational testing and relaxed rules for third-party interveners on the discrimination victim side to be applied in discrimination cases and under specific conditions defined in the LPD. Chapter V of the LPD defines a number of procedural rules which enable efficient examination of all claims pertaining to discrimination. They are based on the case law of the ECtHR and EU directives which focus on the need to establish efficient protection from discrimination. To that end, according to the LPD, protection from discrimination may be sought through regular civil or administrative proceedings or through special anti-discrimination claims instigated on the basis of the LPD, and conducted in accordance with the rules set forth therein.

Consistent implementation of these rules in discrimination proceedings represents a key aspect to ensuring efficient protection from discrimination. However, it is precisely these rules, being new and different from the standard rules of civil procedure, which have proven to be difficult to implement in practice. This section will therefore look into actions undertaken by courts in discrimination proceedings with reference to the implementation of the burden of proof and the role of third-party interveners.

42 See, for example the press release from the 55th Session of the Constitutional Court's Grand Chamber of 10 May 2017 in which the Court points to "systemic deficiencies in organization of the judiciary" which result in a large number of cases in which the violation of the right to proceedings within a reasonable time has been found.

43 Out of 172 judgments delivered against BiH before the ECtHR, 91 concerned the violation of the civil limb of Article 6 of the Convention (the right to fair trial in civil proceedings, which include the length of proceedings, access to court and non-enforcement of judgments), see www.hudoc.echr.coe.int

Burden of proof

The LPD provisions which regulate the burden of proof in discrimination proceedings represent one of the most beneficial novelties of this Law, as they prescribe rules which are considerably different from those contained in general rules for civil proceedings. Consequently, and according to the Mission's findings, those provisions present the greatest challenge for BiH judges, who are frequently applying them for the first time and are, as a rule, not sufficiently aware of their peculiarities.⁴⁴

While an ordinary rule in civil proceedings is that the burden of proof (*onus probandi*) always rests on the plaintiff - the claimant in a dispute - in discrimination proceedings this rule is reversed. Under the LPD, rather than proving their case with the degree of probability required for the merits of the case, the plaintiff needs only to make a *prima facie* case, after which the burden of proof switches to the respondent (defendant). In other words, the plaintiff needs to make a claim of discrimination and demonstrate that there are facts which, in the absence of an explanation from the defendant, could establish that discrimination has indeed occurred. These facts can be demonstrated by different forms of evidence such as witness statements, documents, common knowledge, questionnaires, forensic and expert opinions, etc. The LPD specifically allows the use of statistical evidence, databases, situational testing and the Ombudsman Institution's recommendations in order to prove the *prima facie* existence of discrimination (see Chapter IV of this Report for a detailed analysis of situational testing and the use of OI recommendations).

The level of probability required for deciding on the merits of the case does not lend itself to a precise theoretical definition and it frequently depends on the specific circumstances of each case and the legal system concerned. In some jurisdictions the standard required in criminal cases is defined as "beyond a reasonable doubt", the highest possible level of certainty, while civil cases are decided by applying a "preponderance of evidence," meaning that something is more likely than not. The LPD does not define the probability necessary for deciding on the merits of the case and therefore the general rules of civil procedure apply in discrimination cases.

Similarly, the LPD does not precisely define the required level of probability for a *prima facie* case which would lead to a shifting of the burden of proof, but requires that the plaintiff makes it "probable" that discrimination occurred. It is therefore the domestic courts that should develop a practice to provide guidance on this level of probability. It is, however, logical that the level of probability for having a *prima facie* case ought to be lower than the level of probability required for accepting the merits of the case. This is, indeed, the standard applied in EU law and ECtHR jurisprudence.

44 This transpired clearly during the trainings the Mission provided on the LPD to more than 800 judges since 2012, where the issue of reversed burden of proof proved to be the most challenging concept to adopt. In addition, in the Analysis published by the Mission in 2018, erroneous application of burden of proof has been described in detail.

Legislators decided to introduce this rule into the BiH legal system for multiple reasons, but were guided primarily by human rights concerns. The first stems from a presumption that victims of discrimination are the weaker party in the proceedings, and thus the application of general principles of civil proceedings in terms of the burden of proof would present an obstacle to efficient protection from discrimination. Another reason is that victims of discrimination, as a rule, face more difficulties in accessing information and evidence which is often held by the defendant, so the reversed burden of proof is viewed as a way to ensure procedural equality between the parties. For example, in a case that concerns labour related discrimination, most of the relevant documents are by rule in possession of the defendant (the employer). Finally, regulating the shift of the burden of proof is an obligation of BiH in harmonizing its domestic legislation with EU anti-discrimination directives, as well as with obligations stemming from the European Convention on Human Rights. The ECtHR applied the rule of the shifted burden of proof in a number of discrimination cases, regarding claims which were either “supported by evidence”, or ones from which one could “infer” that discrimination had occurred. The Constitutional Court of BiH took a similar stance when it discussed court decisions regarding discrimination prior to the adoption of the LPD. In cases where lower-level courts failed to shift the burden of proof, the Constitutional Court of BiH established that there had been a violation of the right to a fair trial, prescribed in Art. 2 (3) e) of the Constitution of Bosnia and Herzegovina and Art. 6 (1) of the European Convention on Human Rights.⁴⁵

The general rule regarding the burden of proof, stipulated in Art. 15 (1) of the LPD, envisages that the plaintiff is obliged to prove the probability of the discrimination claims, while the defendant is obliged to propose evidence to prove objective treatment, rather than discriminatory treatment.

Therefore, when deciding on which burden of proof rule to apply (the one from the LPD or the one from the Civil Procedure Code), courts must start with the LPD provisions as *lex specialis* and assess whether a difference in treatment was probable, and whether the plaintiff made a prima facie case of discrimination. If evidence is presented during the proceedings which would indicate that discrimination was probable, the courts must apply the provisions from the LPD and switch the burden of proof to the defendant. If the plaintiff fails to make a plausible prima facie claim, courts will apply the rules from the Civil Procedure Code (CPC), regardless of the indicated legal basis of the lawsuit and its corresponding claims.

In practice, the burden of proof rule has created difficulties for BiH courts. In a large proportion of cases, courts have simply failed to decide and discuss the burden of proof and in a significant number of cases the rule was applied erroneously, both leading to a weakened position of the plaintiff.⁴⁶

45 See e.g. Constitutional Court of Bosnia and Herzegovina, Case No AP 1093/07

46 See the relevant chapter in “An Analysis of Judicial Response to Discrimination Challenges in BiH” (OSCE Mission to BiH, 2018) for further discussion and citation of relevant case-law.

For example, in a case concerning the practice of ‘two schools under one roof’ filed by the CSO “Vaša prava BiH” against Central Bosnia Canton (CBC) on the basis of ethnic segregation of children in CBC schools, the Travnik Municipal Court, Novi Travnik Cantonal Court and the Supreme Court of the Federation of BiH found that the plaintiff did not meet the criteria for a prima facie case. In other words, those courts found that even the low level of probability required for a prima facie case had not been met. This was in spite of the fact that the ‘two schools’ practice is well-known and can be said to form common knowledge, is well-documented by a number of institutions and international organizations, and was documented through an abundance of evidence proposed by the plaintiff. This evidence included reports from various international human rights organizations calling for an end to the practice⁴⁷ while clearly labelling the system as ethnic segregation and a form of discrimination, in addition to a final judgment by the very same Supreme Court of the Federation of BiH which found neighbouring Herzegovina-Neretva Canton responsible for ethnic segregation in a virtually identical factual and legal situation.

The role of third-party interveners

The second important procedural novelty is the role of third-party interveners in anti-discrimination proceedings. Similar to the rules concerning the burden of proof, when third-party interveners appear in discrimination proceedings the courts must apply provisions of the LPD rather than those of the CPC.

The third-party intervener role under the LPD is reserved for *“a body, organization, association or a different party dealing, within its scope of work, with protection from discrimination of individuals or groups whose rights are the subject of the proceedings”*.⁴⁸ The LPD explicitly states that the intervener is meant to appear on the *“side of the person or group of persons claiming to be victims of discrimination”*.⁴⁹ The procedural requirements for the interveners are relaxed compared to the CPC and favour the alleged discrimination victim. Unlike in the CPC, where each party can oppose the participation of a third-party intervener, in anti-discrimination cases, it is only the plaintiff who is required to give consent. In addition, the intervener does not have to prove that it has a legal interest in the proceedings and their outcome. This is contrary to the rules of the CPC, which demand interveners to justify their legal interest in the success of one party to the proceedings, and for the court to affirmatively decide on whether to allow such intervention.

The reasons behind such relaxed conditions for third-party interveners on the side of the plaintiff are clear. In discrimination proceedings, the plaintiff is often a person or a group that finds itself in a situation of vulnerability, either due to being a member of a

⁴⁷ Among many authorities, the practice has been condemned by the UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Council Special Rapporteur, the UN Committee on the Rights of the Child, the Council of Europe, the European Parliament, the Steering Board of the Peace Implementation Council and the OSCE Mission to Bosnia and Herzegovina.

⁴⁸ Article 16 of LPD

⁴⁹ Ibid.

minority group (ethnic minorities, persons with disabilities, LGBT people, etc.) or due to the defendant possessing a much greater amount of social or economic power. The defendant in discrimination cases can often be an organization possessing vastly greater resources than those of the plaintiff.⁵⁰ Interveners therefore, who are, as a rule, human rights CSOs, are given space to support the discrimination victim as a sort of *amicus curiae*.

The actual practice in BiH, however, stands in stark contrast to the prescribed rules. While human rights CSOs rarely appear on the side of plaintiffs in court proceedings, third-party interveners often appear in support of the defendant. For example, in a case before the Basic Court in Srebrenica, as a first instance court, where a number of parents brought civil claims against an elementary school for alleged discrimination against Bosniak children in their right to receive education in the Bosnian language, an intervener (the RS Ministry of Education and Culture) appeared on the side of the defendant.

In addition, in the previously cited ‘two schools under one roof’ case, the courts allowed for the local Parents’ Council to come to the aid of the respondent (Central Bosnia Canton) as a third-party intervener. While the plaintiff CSO “Vaša prava BiH” insisted that the role of third-party interveners under the LPD is reserved for human rights organizations supporting the plaintiff only, the courts allowed the Parents’ Council to intervene in the proceedings. The courts accordingly found that the Parents’ Council had a legal interest in proving that the Canton did not commit discrimination by allowing ethnically segregated schools to function in its jurisdiction.⁵¹ This decision has been the source of much criticism for its lack of proper reasoning⁵² and apparent twisting of the spirit of the LPD.⁵³

Finally, even though discrimination cases overwhelmingly concern labour-related issues, it is particularly striking that trade unions have not intervened in proceedings, even though they are considered an “organization that [...] deal(s) with protection from discrimination of persons or group of persons whose rights are being decided upon in the proceedings” under Article 16 of the LPD.

It remains important, therefore, to raise the awareness, encourage and support human rights CSOs and trade unions to assume their roles as *amicus curiae* interveners in discrimination cases.

50 It is often a corporation/employer or the state/public authority that is accused of discrimination

51 It is also questionable whether the said Parents’ Council even satisfied the requirements under the CPC to intervene in the case, as they did not appear to have legal personhood and consequently no legal capacity either. In addition, the courts failed to elaborate why the Parent’s Council had a legal interest in defending the Canton from allegations of discrimination.

52 See the OSCE Mission to BiH’s public report from December 2018: ‘Two Schools Under One Roof’ - The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina.

53 Kvadratura antidiskriminacijskog trougla u BiH: zakonski okvir, politike i prakse 2012–2016 and Kvadratura antidiskriminacijskog trougla u BiH: zakonski okvir, politike i prakse 2016–2018 (Analitika, BiH)

Anti-discrimination education of legal professionals

In addition to the positions taken by CSO's and trade unions, the identified deficiencies in applying the LPD are to a certain extent also the result of insufficient continuous legal education of professionals on human rights standards. The training of judges and expert associates provided by the entity Judicial and Prosecutorial Training Centres is not sufficiently streamlined and lacks a uniform approach.⁵⁴

In order to enhance the quality of the trainings even further, several steps need to be taken. The JPTCs should, under the guidance of the HJPC, conduct a Training Needs Assessment of judges in BiH. This assessment should take note of the difference in needs among newly appointed and more experienced judges and develop specific curricula for both categories. The curricula should combine theoretical lectures with practical case study analysis of identified case-law in BiH courts and the ECtHR. Education on discrimination should also be integrated into BiH universities as a separate module or as part of broader legal/human rights studies.⁵⁵

Concluding observations

Ten years since its adoption, the LPD is being applied by BiH courts in an effort to tackle discrimination in numerous areas of life, especially in labour and employment. This indicates that, among the general population, labour and employment rights represent an issue of exceptional importance. As a result, persons affected by discriminatory treatment in this sector decide relatively frequently to instigate anti-discrimination court proceedings. This also points to a need for strengthening the role of labour unions and free legal aid providers within labour unions.

It is, however, also evident that the LPD remains underutilised when it comes to its primary purpose – combating the systemic, most serious forms of discrimination, and discrimination against individuals and vulnerable groups. Although reports by international and domestic human rights organizations indicate members of certain groups as particularly exposed to discrimination (women, Roma, persons with disabilities), these groups appear to be the least present in cases instituted under the LPD. The reason for this presumably lies in the fact that these groups are victims not only of discrimination but also of other discrimination-related human rights violations, such as social exclusion and under-education. Discrimination cases that end up before the courts represent only a small percentage of the overall instances of discrimination in BiH society.

Despite the LPD's explicit call for urgency in case proceedings, procedures for the protection against discrimination have, as a rule, not taken less time than the average

⁵⁴ Trainings on anti-discrimination are primarily conducted by the international community in BiH, the foremost provider being the Mission.

⁵⁵ The Mission has already supported education on discrimination in BiH universities through several lectures, moot court competitions and debates on discrimination. These activities will continue and increase in the future.

duration of ordinary civil proceedings in BiH. The excessive duration of such proceedings is problematic from the standpoint of upholding the rights of discrimination victims, including the right to a legal remedy within a reasonable deadline. As already mentioned, lengthy proceedings also increase costs, which further discourages potential plaintiffs.⁵⁶

The application of the reversed burden of proof still represents the greatest challenge for judges in BiH. This requirement is too often applied erroneously and there does not appear to be a common understanding in the judiciary of the requirements for the shifting of the burden of proof. A similar situation presents itself in the role of third-party interveners in anti-discrimination cases. The development of a unified approach to these issues by the BiH judiciary is therefore recommended. This could be done, for example, through discussion panels on the harmonization of court practices, organized under the auspices of the HJPC.

In this regard it is also necessary to continue training for all actors involved in discrimination cases, including judges, attorneys and free legal aid providers. Particular attention should be paid to associations and organizations that could institute collective civil claims under the LPD in the future, aiming to resolve strategically targeted systemic problems experienced by those social groups that are the most frequent victims of discrimination. These activities are particularly important bearing the LPD's newest mechanisms in mind, which have not yet found adequate application in court proceedings (e.g. the burden of proof, collective civil claims, third-party interveners, situational testing and the use of statistical data).

⁵⁶ It should be noted that these issues in implementing the LPD were corroborated by the responses received from BiH CSOs to the Mission's questionnaire. Topics which regularly emerged as problematic included a lack of understanding and proper application of the burden of proof by the judiciary, the excessive length of court proceedings, and an insufficient education of legal professionals on anti-discrimination standards.

CHAPTER IV

INSTITUTION OF HUMAN RIGHTS OMBUDSMAN/ OMBUDSMEN OF BiH

Introduction

Following the 2006 amendments to the Law on the Human Rights Ombudsman of BiH, a single BiH Ombudsman Institution was established through the unification of two entity-level and one state-level Ombudsman Institutions. BiH's single Ombudsman Institution now has a broad mandate when compared to similar institutions in the region, as it is "set up to promote good governance and the rule of law and to protect the rights and liberties of natural and legal persons ... monitoring to this end the activity of the institutions of Bosnia and Herzegovina, its entities, and the Brčko District."⁵⁷

In practice, the Ombudsman Institution has the dual role of responding to individual complaints and addressing human rights violations at the societal level. Individual complaints are submitted by natural and legal persons, while the Institution can also initiate investigations without the submission of a complaint. The Institution works on complaints of maladministration within public institutions and various rights violations committed by authorities at different levels of governance across the country. These cases result in the Ombudsman Institution's issuing of individual and/or general recommendations and thematic/Annual reports. The Ombudsman Institution also holds an A Status from the Subcommittee on the Accreditation of National Human Rights Instruments.⁵⁸ This status represents full compliance with the Paris Principles⁵⁹ and gives the Institution the right to participate and address human rights treaty bodies and other UN organs, mainly the UN Human Rights Council.

57 Article 1, paragraph 1 of the Law on the Human Rights Ombudsman of BiH.

58 The Ombudsman Institution was awarded reaccreditation with Status A in February 2018 at the General Assembly of the Global Alliance on National Human Rights Institutions (GANHRI).

59 A legislative or constitutional basis; A broad mandate to promote and protect human rights; Independence from government and other actors; Pluralism, including through membership, staff and/or effective co-operation; Transparent appointment, dismissal and security of tenure for members; Adequate resources, human and financial; Adequate powers of investigation; Co-operation with national and international actors, including civil society and Accountability, in particular through annual reporting.

Apart from the range of roles which the Ombudsman Institution has assumed pursuant to the Law on the Human Rights Ombudsman of BiH, the Institution also holds special competencies deriving from separate pieces of legislation. One such example, and the most relevant one for this Report, relates to the Institution's central role in the protection against discrimination. The LPD provides for these competencies and lays the ground for the establishment of a special Department within the Institution, tasked with specifically addressing discrimination against any legal or natural person in any area of life. The LPD also enables the Ombudsman Institution to initiate or intervene in court proceedings and to have its recommendations explicitly recognized as evidence in anti-discrimination proceedings.

Under the LPD, the Institution has a wide scope of competencies, ranging from awareness-raising activities, situational testing, issuing recommendations which can be used in court proceedings, conducting research in the field of discrimination, drafting annual and thematic reports, initiating mediation procedures, advancing anti-discrimination public policies and most importantly, acting upon the complaints of individuals claiming to be victims of discrimination and taking an active role in the proceedings addressing potential victims of discrimination. In this sense, the legal jurisdiction of the Ombudsman Institution in anti-discrimination protection largely follows international standards. However, as will be presented in this Report, most of the competencies provided for by the LPD are underutilized at best, while some have not been used at all.

While the main form of anti-discrimination engagement by the Ombudsman Institution stems from issuing recommendations on individual cases of discrimination⁶⁰, the annual and special reports addressing instances of discrimination which the Institution drafts are also an important aspect of the Institution's anti-discrimination engagement in BiH. A separate chapter of this Report will elaborate more on the scope of the Institution's reporting, including the main challenges the Institution faces in its reporting processes. Reporting on discrimination-related topics by relevant institutions in BiH, including the Ombudsman Institution and MHRR, remains a generally weak aspect of the country's countering and prohibiting discrimination. With the support of the Mission, the Ombudsman Institution in 2018 prepared communications and shadow reports to international treaty bodies, including the Committee for the Elimination of Racial Discrimination and the Committee for the Elimination of Discrimination against Women.⁶¹

60 The Institution, with the support of the Mission, has developed and issued a Manual for the Processing of Discrimination Cases, available at http://ombudsmen.gov.ba/documents/obmudsmen_doc2016101419280006eng.pdf

61 The Mission organized a training on UN Treaty Bodies reporting, which served as preparation for the drafting of the reports.

The 62 current employees of the Institution work in several thematic departments, in financial and general affairs, in the Cabinet, and across four regional/field offices. The thematic departments include:

- Children's Rights;
- Rights of Persons with Disabilities;
- Rights of National, Religious, and Other Minorities;
- Economic, Social and Cultural Rights;
- Political and Civil Rights;
- Elimination of All Forms of Discrimination;
- The Rights of Prisoners and Detainees, and
- The Human Rights in the Judiciary Department (recently formed).

The Head Office of the Institution is located in Banja Luka, while three regional offices operate in Sarajevo, Brčko, and Mostar, with one field office in Livno. The Department for the Elimination of all Forms of Discrimination was established in January 2009 with the main objective of ensuring a harmonized and standardized approach in exercising and protecting citizens' rights throughout BiH and taking effective measures to prevent all forms of discrimination.

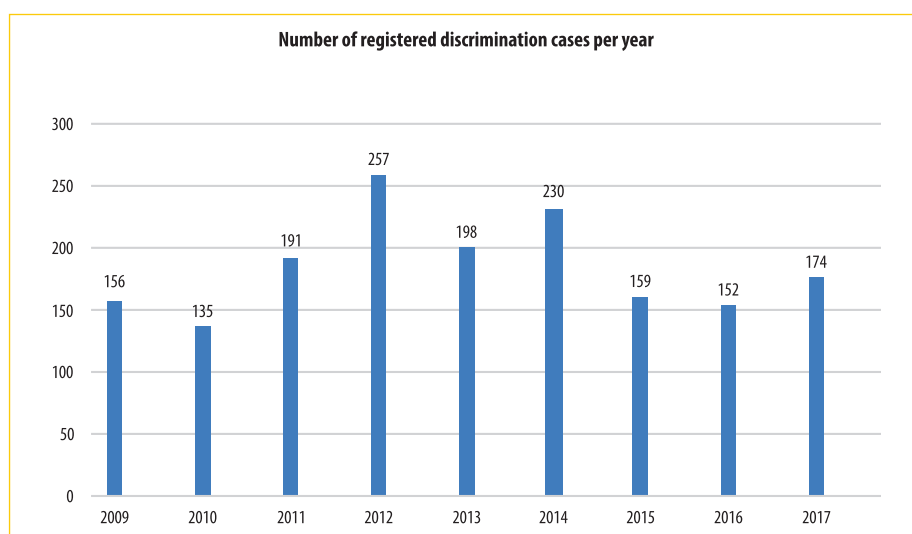
However, though the Ombudsman Institution is legally mandated as a central institution for the prohibition of discrimination and possesses a dedicated anti-discrimination Department, legal provisions and its existing structure alone are not sufficient for effective discrimination prevention work. The Institution requires additional human resources, a more effective organizational structure and a better internal process for distributing workload. Moreover, the general public as well as potential complainants need to be better informed about the mandate of the Institution⁶², including the assistance it can provide. The role of the Ombudsman Institution in situational testing exercises needs to be made clearer, and most importantly, the judiciary needs to consider the Institution's recommendations during anti-discrimination court proceedings.

⁶² Based on data collected by the Ombudsman Institution, there are a low number of appeals from certain groups or locations/Cantons. When it comes to discrimination appeals, the Institution has not received a single appeal on discrimination from Bijeljina, Doboј and Bihać, indicating that people are not familiar with the Institution's mandate or process of submitting appeals.

Statistical data and analysis of discrimination cases

This section offers insight into the statistical data which the Institution gathers on discrimination cases. It looks at the number of such cases from 2017 and earlier, the areas of life concerned, the lack of implementation of recommendations, the regional distribution of discrimination cases and the sex of appellants.

Based on available data, in 2017, a total of 174 discrimination cases were registered with the Ombudsman Institution, representing an increase of 17 per cent compared to 2016. Below is a graph showing the trend in filing individual appeals on discrimination in the period from 2009 to 2017.



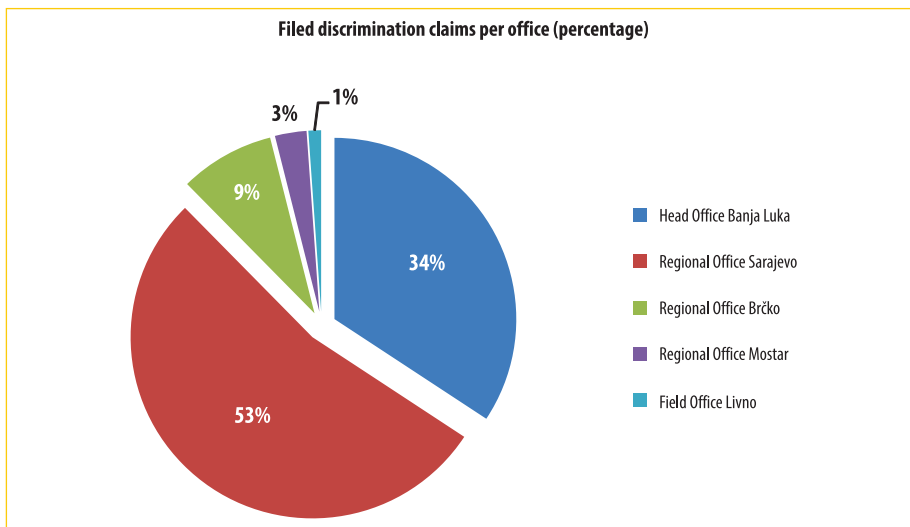
This data signals a few notable positive developments. Not only was there a significant increase in the number of discrimination complaints submitted to the Institution in 2012 and 2014, but the Institution has also noted that in recent years, these complaints included better justifications. Furthermore, applicants increasingly address the Ombudsman Institution through an intermediary, and the Ombudsman Institution's recommendations are being increasingly used as evidence during court proceedings.⁶³ However, out of the total number of complaints received by the Ombudsman Institution, only 5.7 per cent were discrimination-related cases.⁶⁴

63 According to the report of Bosnia and Herzegovina on the Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, available at http://www.ombudsmen.gov.ba/documents/obudsmen_doc2018072014053046eng.pdf

64 The largest number of cases concern courts (length of proceedings), administration, access to information, police, etc. For more detailed overview kindly consult the Ombudsman Institution's Annual Report for 2017 available at https://ombudsmen.gov.ba/documents/obudsmen_doc2018030810344228eng.pdf.

In addition to the number of complaints filed in 2017, the Institution also had to process 141 discrimination appeals which remained backlogged from previous years. The case backlog problem is present in other departments as well, not only in the Department for the Elimination of all Forms of Discrimination. The overall number of processed appeals and issued recommendations in anti-discrimination cases in 2017 remains low. Out of 315 received and transferred anti-discrimination cases in 2017, 28 recommendations were issued. Out of these 28 issued recommendations, six have been implemented.

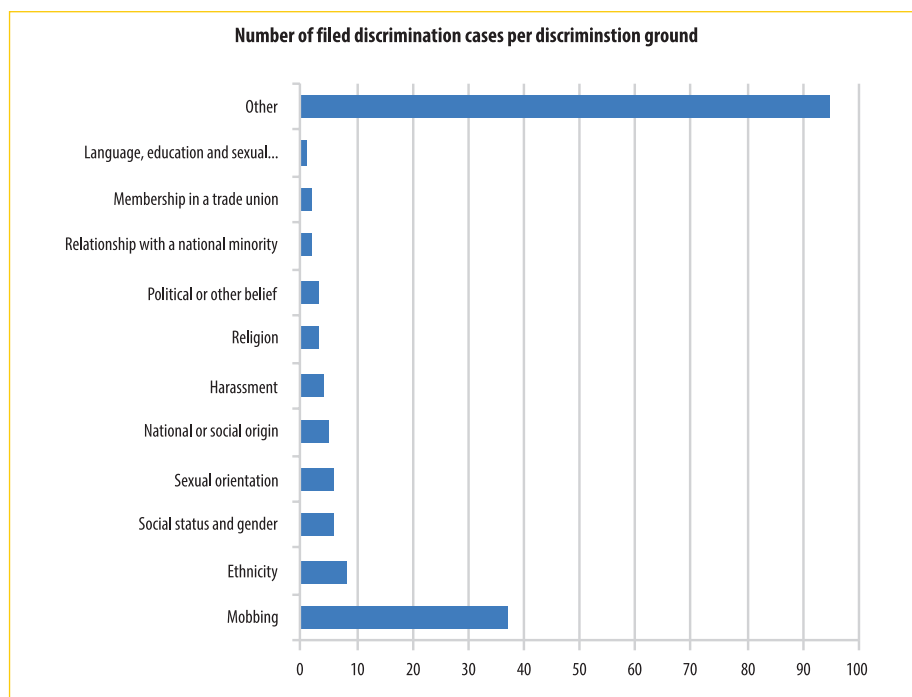
The largest number of registered discrimination cases was documented by the Sarajevo Regional Office, followed by the Head Office in Banja Luka. In 2017, no complaints resulted from the Mission's initiative to hold office days in areas without an official Ombudsman Institution presence, namely in Bijeljina, Dobož and Bihać. In addition, the number of appeals filed in the regional offices is relatively low, except for Sarajevo. Knowing the realities that exist throughout BiH, the Mission concludes that this is due to a combination of low awareness in these communities on the concept of discrimination and the legal and non-legal avenues which potential appellants can use to protect themselves from discrimination, as well as low trust in public institutions.



Out of 174 discrimination cases filed in 2017, the largest number (95) are registered as "discrimination - other", which means that the areas of life in which discrimination occurred were not identified and documented. A similar trend was identified by the Mission in court cases, with 45 per cent of discrimination decisions not specifying the exact grounds. While the lack of proper identification of areas of life in court cases can be partially attributed to the limitations of the judicial database (CMS), the Ombudsman Institution's database provides the opportunity for entries concerning areas of life in accordance with the LPD amendments. It is therefore both the appellants themselves and the Institution's staff who

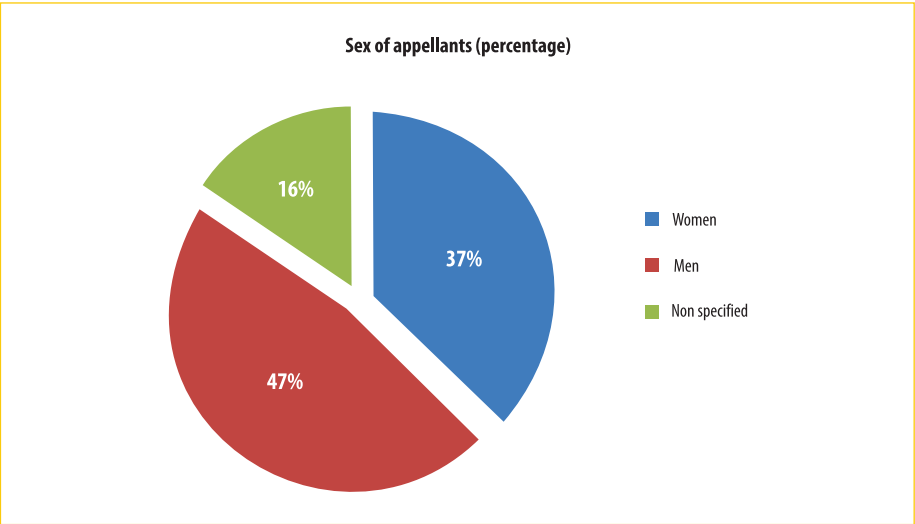
failed to identify the areas of life where discrimination occurred when registering cases in the database. While it can hardly be expected of a layperson submitting a complaint to properly identify the area of life in which discrimination occurred, the lawyers at the Institution who register a case as discrimination should be able to adequately record such data. Nonetheless, in over half the cases registered with the Ombudsman Institution, the area of life where discrimination occurred was not identified. Obviously the Institution's lawyers need to structurally record this information when registering cases in the database. Adequate data is critically important to guide and inform policymaking, legislative analysis and advocacy.

Of those cases which do identify the areas of life where discrimination occurred, most cases concern mobbing as a special form of discrimination in the workplace, followed by complaints of discrimination based on ethnic origin, sexual expression or sexual orientation, national or social origin, social status and gender, religion, language, connections to a national minority, political or other opinions, and finally property and education. In the past two years, the Institution has witnessed a decreasing trend in the number of complaints based on ethnic origin, whereas complaints of mobbing have increased.

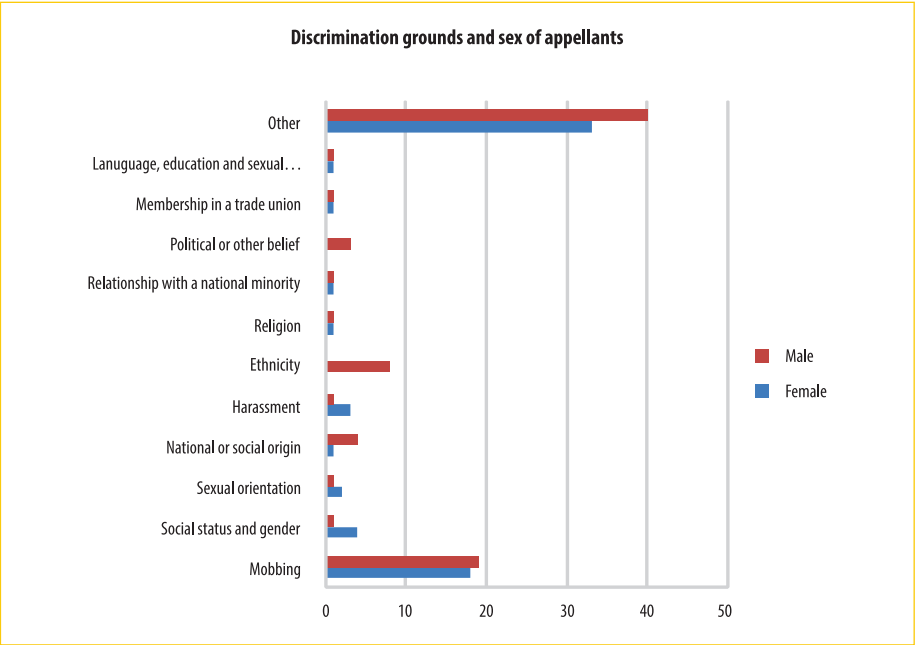


It is commendable that the Institution disaggregates data by sex of appellants. According to their 2017 data, 47 per cent of appeals were filed by males, while 37 per cent were filed by female appellants. In the rest of the cases, the appellants have requested to remain anonymous, while a number of complaints are collective, making the recording of

sex not applicable. The Mission recommends the Ombudsman Institution to elaborate on this data in its Annual Report.



Below is a graph demonstrating the discrimination grounds claimed by male and female appellants.



The data shows that both male and female complainants have most frequently addressed the Institution regarding instances of mobbing. Female complainants are more

represented in appeals based on harassment, social status and gender, as well as sexual orientation, but have not filed a single claim on the grounds of ethnicity or political or other beliefs. Further analysis of this data and complementary research could be very beneficial in demonstrating the existence of structural problems which affect both genders in a different manner. Such analysis should also form an important part of the Annual Report of the Ombudsman Institution.

Capacities of the Ombudsman Institution in combating discrimination

In order to provide an overview of the Ombudsman Institution's relevant capacities to deal with discrimination complaints, as well as its wider work on combating discrimination, the Mission has reviewed the Ombudsman Institution's human and financial resources, implementation and publishing of recommendations, case management system, annual and special reports, promotional activities and regional cooperation.

Human and financial resources

The Ombudsman Institution is not at its envisaged human resource capacity level. Its initial document on post allocation and organization envisages 93 employees (including the three Ombudspersons), but at the time of writing the Ombudsman Institution currently has 62 employees. Of these 62, 30 are lawyers who work on cases, while the rest are administrative staff. This ratio is disproportional, which clearly affects the efficiency of the Institution in performing its key role – working on individual complaints. More importantly, the Institution has been given additional roles through legislation such as the LPD and BiH Law on Ministerial, Council of Ministers and other Appointments, but has not been granted adequate corresponding budget increases to effectively assume these roles.

Through working on individual complaints or investigations on its own initiative, the Department for the Elimination of all Forms of Discrimination seeks to outline the importance of fully implementing standards on the prohibition of discrimination contained in international conventions and domestic law, as well as the importance of harmonizing national legislation with international human rights standards. Through recommendations and other decisions, relevant institutions and services are warned of factors hampering the equal treatment of all BiH citizens and are provided with recommendations for appropriate measures aimed at protecting these citizens' rights.

This department is foreseen to have four positions (one Head of Department, two expert advisors and one expert associate). At the moment, three persons are employed in the department, while the post of expert associate remains vacant. This department is clearly not the only one within the Institution that is understaffed; at least two other departments within the Institution have the same number of staff and a significantly higher number of appeals to process.

Though discrimination cases are often complex and can contain multiple grounds of discrimination within a single claim, it has been noted in a report issued by the UN⁶⁵ and confirmed in other reports that lawyers operating in this department regularly take on cases from other departments. This is a general practice of the Institution, whereby although the principle rule is to assign cases to lawyers from the department where the appeal belongs thematically, an additional rule calls for lawyers to work on appeals from other departments. As a result, the existence of the different departments as it stands now is merely formal, and does not ensure that lawyers within the Department for the Elimination of all Forms of Discrimination work on discrimination cases only. In the same UN report⁶⁶ it was stated that the “Head of one of the Departments reported that the work on cases thematically falling within the domain of this department constitutes approximately 40 per cent of all cases the interlocutor deals with”. This situation demands lawyers to be versed and knowledgeable in many different areas of law and human rights in order to manage the processing of appeals filed on different grounds. The problem of staff working on appeals which do not fall under their department is a result of different factors. One is the provision from Article 1(4) of the Law on the Human Rights Ombudsman, which requires the establishment of three departments (Departments on the Rights of the Child, the Rights of Persons with Disabilities and the Rights of National, Religious and Other Minorities). Unless this Law is amended, these three departments are therefore required to exist, and the Institution would have to take this into account in the event of a change in its organizational structure.

On a positive note, in the month of September of 2018, the Institution engaged an additional seven lawyers based on its first budget increase since 2010. This increase in staffing should ease the burden on existing staff and lower the backlog of pending complaints. However, this boost in the number of lawyers will not have positive effects if the structure of the Institution remains as it is, including the division of departments and the way that cases are assigned. Moreover, the assignment of cases and workload by the Ombudspersons themselves hampers efficiency should be delegated. The Mission therefore recommends that the Institution conducts an organizational review, looking at both structures and processes.

As stated in a report by the Council of Europe⁶⁷, the Institution has not conducted a needs assessment for the training and professional development of its staff, and especially of lawyers, even though this was a part of their Strategy for the period 2016 to 2021.⁶⁸ Trainings and professional development are offered on an *ad hoc* basis. This approach should be changed, and the Institution should critically assess the needs of staff and offer training based on an adopted staff development programme.

65 United Nations, Analysis of Status, Independence and Functioning of the Institution of Human Rights Ombudsman of BiH, Sarajevo, May 2015.

66 United Nations, Analysis of Status, Independence and Functioning of the Institution of Human Rights Ombudsman of BiH, Sarajevo, May 2015.

67 Available at <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>.

68 Available at https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2016041509303547eng.pdf.

Implementation and publishing of recommendations

Unimplemented recommendations and a lack of capacity to follow-up on issued recommendations remain the key challenges for the Institution. In general, only one-third of the overall number of issued recommendations is being implemented by respondent parties. Indeed, the follow-up system seems to predominantly end with the Ombudsman Institution demanding feedback from the respondent party about the status of implementation. No further action is undertaken in cases of no reply from the respondent party, or in any case of an unimplemented recommendation. In situations with multiple complaints filed against a certain institution, the Ombudsman Institution does organize meetings with this institution and follows up on the complaints received. However, according to information received from the Institution's lawyers, this is predominantly done in the investigation phase and only on rare occasions in cases after recommendations have been issued or in cases of unimplemented recommendations. The legally prescribed possibility of the Institution initiating misdemeanour proceedings to enforce implementation of recommendations has not been fully explored, with only two misdemeanour actions initiated in 2013.⁶⁹

The Institution has no system in place to track whether its recommendations in discrimination cases are being used in court proceedings and to what extent this practice is on the rise. One option to acquire this information is for the appellants to notify the Ombudsman Institution that they rely on the Institution's recommendation as evidence in court proceedings. For a number of reasons, it is highly unlikely that complainants will notify the Institution of steps which they will be taking after the recommendation is issued.

On the other hand, there are no requirements for the courts to notify the Institution that their recommendation has been relied upon during the court proceedings. Such a practice would offer the most structured provision and would be complementary to information already recorded in the CMS. The Mission recommends that this practice be introduced by the HJPC.

Finally, a significant number of finalized cases in which the Ombudsman Institution has issued recommendations are not accessible to the public through the Institution's website. While there are some cases in which the Institution is obliged to protect the personal data of appellants, a large number of cases with no such obligation remain unpublished. It appears that only two discrimination cases processed in 2017 have been made public on the Institution's website. Even in cases involving protected personal data, the recommendations and subsequent replies from respondent parties could be published in a redacted form, as is the practice in other national human rights institutions.

69 During an expert conference held in Sarajevo in February 2018 on the role of national human rights mechanisms in administrative and judicial proceedings, NGOs urged for a more prominent and proactive role for the Ombudsman Institution in issuing recommendations and participating in proceedings, as the NGOs consider this Institution their natural partner in protecting human rights. According to them, potential victims of discrimination consider the presence of the Ombudsman in their case as an encouragement.

Publishing recommendations and the subsequent replies of the respondent parties would increase public trust in the Institution, improve its transparency, enable other actors to consult the way in which the Institution processes discrimination appeals, and provide data for research into discrimination in BiH. Furthermore, the only way to currently ascertain which published appeals concern discrimination is to read through all published recommendations. We therefore advise the Institution to consider changing its naming system for published recommendations, so that any interested party could easily identify the recommendations he/she wishes to consult.

Case management and information flow

The Ombudsman Institution uses an online case management system for managing submitted appeals and storing the corresponding files for each of the appeals they process – the Orka Workflow Information System (OWIS). However, this system is not used to assign cases to lawyers. This is instead done manually by the Ombudspersons, and the information concerning assigned cases is written down in a hard copy document. Once assigned, the documents for each claim are stored in the OWIS and further tracked through the system.

There are a number of problems with the process of assigning cases which could hamper effective work on the processing of appeals. First, Ombudspersons themselves are required to assign the cases, rather than cases being assigned in a more automated way. In addition, the Institution has never done an assessment of the average number of working hours spent on processing cases from various departments, in order to establish whether some cases are more complex than others and require more time to process. Such an assessment would allow for more efficient distribution of cases among lawyers, so that workload is more evenly distributed.

The OWIS also does not provide an opportunity for lawyers to search across data and documents by topic, organization or grounds for discrimination. While the system provides the Ombudspersons access to each individual claim that has been processed or is being processed, lawyers can only access case files they are currently or have previously worked on and are excluded from access to other case files. While this helps to protect complainants' privacy, it makes it more challenging for lawyers to follow the practices of other colleagues or to consult prior findings and recommendations in their work. This puts the burden of standardization and harmonization on the Ombudspersons themselves. On a positive note, the online system has been updated to reflect amendments to the LPD, and is now fully aligned with these amendments.

Reports

Based on a number of factors, the Ombudsman Institution can decide to issue special reports, some of which address discrimination or instances of unequal treatment.

The number of received complaints from citizens is one such factor, especially if complaints seem to indicate a recurring trend rather than isolated incidents. The Institution can also be invited by the BiH Parliamentary Assembly to draft a special report on a topic considered acute in any given context and time. Reports may recommend the amendment of legislation and policies, or the enactment of sanctions or other enforcement mechanisms.

The Mission observes that some special reports offer vague and general recommendations which lack the specificity required for effective advocacy. For example, some reports call for undertaking “all relevant measures” without specifying which Institution would need to work on what tasks, or even what these “relevant measures” actually are. Other reports however, such as the 2018 Report on the Rights of Persons with Mental and Intellectual Disabilities, put forward detailed recommendations for a variety of relevant actors.

Similar to recommendations in individual complaints, the Institution does not have a clear strategy or dedicated staff to follow up on the recommendations contained in special reports, or to ensure that relevant authorities adopt the conclusions and requests put forth by the Ombudsman Institution. One notable exception is the Ombudsman Institution’s 2013 Special Report on the Status of Roma in BiH, which was followed up by a Report on the Implementation of the Ombudsman Institution’s Recommendations in 2014.⁷⁰ However, this is not a regular practice, and there seems to be no system in place to make sure that the recommendations from special reports are implemented. Options such as dedicated meetings with relevant authorities or continuous media outreach and advocacy regarding the violations identified in the reports have yet to be fully explored by the Institution.

In addition to the challenge of non-implementation of recommendations derived from special reports, the manner in which these reports are drafted is inconsistent. Reports do not follow the same format, focus, methodologies, depth of recommendations or frankly quality. Again relating to the lack of a programme for staff development, it is important to state that not all the Institution’s lawyers are equally skilled in developing reports through use of varying methodologies, and many have to work on the reports while already facing a backlog of cases. Despite the fact that these reports constitute important advocacy tools in the fight against discrimination, they would be more effective were they to contain a consistent quality of data analysis and depth of recommendations, while being complemented with targeted follow-up activities.

70 Both reports were prepared within ODIHR’s project *Best Practices for Roma Integration*, and with the support of the OSCE Mission to BiH.

The LPD also foresees the drafting of annual reports on discrimination occurrences in BiH society, which the Institution issued in 2011, 2012, 2013 and 2014. In 2015, the Institution abandoned the practice of issuing Annual reports solely on discrimination, while that data became an integral part of the Annual Report.

Nonetheless, the Annual Report on the Institution's work neglects important aspects with regards to the occurrences of discrimination in today's BiH. The Annual Report lacks significant data on individual appeals and recommendations as well as on indicators of discrimination, and could be more reader-friendly. It does not offer the sex of the complainants or any analysis based on the Institution's sex-disaggregated data. Furthermore, the Institution does not address the small number of discrimination appeals filed in regional offices or through office days, or interpret what the reasons and possible solutions for this problem could be. Most importantly, it does not discuss discrimination occurrences in BiH, regardless of whether these occurrences have been the subject of submitted complaints. The Annual Report therefore fails to offer significant data on discrimination in BiH, and does not serve as a way of alerting the public or holding relevant authorities accountable for ending discrimination practices.

As mentioned, the Ombudsman Institution did file two reports on discrimination to UN treaty bodies in 2018. These reports, addressed to CERD and CEDAW, follow identical methodologies, offering data derived from complaints submitted by applicants as well as an analysis of general discrimination occurrences and practices in BiH. There seems to be a good balance between data from complaints and information stemming from other sources. However, there are differences between the two reports, particularly with the report for CEDAW containing recommendations to authorities, something the CERD report neglects.

Promotional activities

The introductory provision of the Law on the Human Rights Ombudsman of BiH defines the Ombudsman Institution as "an independent institution established for the purpose of promoting good governance and the rule of law...", thus giving an opportunity to the Institution to undertake a certain level of promotional activities. 2018's proposed, though not yet adopted, amendments to the Law provide for a more explicit role for the Ombudsman in promotion and prevention. However, even if these amendments are not adopted, the current text of the law provides room for the Institution to have an active role in the promotion of human rights. In addition, the LPD mandates the Institution to "promote this Law, inform the public, raise awareness, implement campaigns and otherwise actively promote the fight against discrimination with the view of prevention of discrimination".⁷¹

In practice, however, the Ombudsman Institution is not exercising its promotional role, especially with regard to discrimination and pursuant to the provisions of the LPD.

71 Article 7(l) of LPD

According to a CoE report⁷², the Institution does not tap into public awareness efforts aimed at educating the public on the principles and best practices of anti-discrimination, and has not specifically assigned this work to any staff members within its Department for the Elimination of all Forms of Discrimination or to any other department.

Increased promotion of the Ombudsman Institution's findings as well as the concept of discrimination, including the forms discrimination can take and the areas of life where it occurs, could serve several important purposes, not the least of which is increasing the number of discrimination complaints received by the Institution. A more targeted and localized awareness-raising campaign on the mandate of the Institution could also lead to an increase in the number of discrimination complaints from locations where few discrimination appeals have been filed. It could also make appeals more justified and well elaborated. The promotion of the work and results of the Ombudsman Institution would contribute to increased leverage of the Institution and more trust among potential appellants. Finally, outreach concerning instances of discrimination, backed by statistical data and analysis, can serve as an important advocacy tool for decision-makers and other relevant institutions. In fact, the CoE⁷³ found that advocacy and promotion often have greater impact and influence in practice than an institution's work on individual complaints.

The promotional role of the Institution is to an extent exercised through the organization of office days. During these office days, two lawyers of the Institution travel to locations where the Institution has no field presence, offering to receive complaints and being at the disposal of citizens for advice and referral. With the support of the Mission, office days have been established in six locations: Glamoč, Drvar, Grahovo, Bihać, Doboj and Bijeljina.

In the absence of any Ombudsman Institution premises in these locations, these lawyers normally use municipal premises in co-operation with the local municipal administration. The frequency of office days depends on the location in question, but they usually occur twice a month. The Ombudsman Institution has since taken ownership of the office days, while transportation is still being provided by the Mission. These office days not only record individual complaints, but they also inform locally developed strategies for the Institution concerning human rights.

A brief internal analysis done by the Mission of the impact of office days held throughout 2017 in Bihać, Doboj and Bijeljina demonstrated that appellants do use the opportunity to speak to the Institution's staff, and that some do this multiple times through different complaints. Less clear are the outcomes from these office days, specifically the subsequent steps that are undertaken by the Institution in response to its communications with citizens (e.g. initiating of complaint procedures, issuing recommendations, holding follow-up meetings with relevant actors, etc.).

72 Available at <https://rm.coe.int/comparative-study-on-advocacy-capacities-of-the-ombudsperson/16808f13c0>.

73 Ibid

As a result, a more structured and uniform manner of reporting on office days held around BiH is required in order to track and assess their impact. Such data could also serve different actors in developing policies and strategies in the locations where office days are held. The Institution could utilise announcements on radio and TV stations in the local community to promote office days, and increased use of social media should also be explored for this purpose. Close co-operation could be established with existing civil society organizations, which could refer cases and beneficiaries to the Ombudsman Institution during office days. In addition, the Institution, through its local offices, could conduct quarterly needs assessments on the need for office days in certain communities, and develop office day schedules accordingly.

Regional co-operation

Another important initiative of the Ombudsman Institution concerns its participation in a network of equality bodies from Southeast Europe, which is the result of a Statement of Co-operation formalized between the Ombudsman Institutions of the region in 2010.⁷⁴ In November of 2016, equality bodies and Ombudsman Institutions from Republic of Albania, Republic of Croatia, Bosnia and Herzegovina, Republic of North Macedonia, Republic of Montenegro and Republic of Serbia signed a statement of co-operation. This statement gives the opportunity for national mechanisms for fighting discrimination to co-operate regionally in promoting “equality principles, prohibiting discrimination, achieving the principles of equal opportunities and tolerance”.⁷⁵ The network’s focus is on promoting the visibility of bodies fighting discrimination, while also strengthening their capacities, exchanging experiences and good practices, and developing innovative approaches in the field. In addition to the signing of the statement in 2016, two additional regional meetings have been held in Zagreb and Tirana. The Ombudsman Institution of BiH was actively involved in all events.

Role of the Ombudsman Institution in situational testing

Situational testing was introduced into BiH legislation following the adoption of the 2016 amendments to the LPD. The recognition of situational testing by BiH law is a great advantage and no further effort is necessary to (re)claim its social and legal validity and credibility, which historically has been a major obstacle in other countries.⁷⁶ Often, human rights organizations lack facts and evidence to support their claims in discrimination cases. Testing helps to establish facts and collect evidence in proving discrimination. Moreover, testing translates subjective insights into observable and measurable data that can be

74 The Mission supported in 2010 the first meeting of the Ombudsman Institutions of the region (Bosnia and Herzegovina, Republic of Croatia, Republic of North Macedonia, Republic of Montenegro, Republic of Serbia and Republic of Slovenia), which ended with a formal Statement on Co-operation which was the basis for the future expansion of the network.

75 Statement on Co-operation between South East Europe Equality Bodies signed in Belgrade on 16 November 2016.

76 See the mentioned cases of *Akapulko* and *Krsmanovača*

used to corroborate discrimination claims, and can also be used in advocacy and public campaigns.

Article 15 (para. 4) of the LPD stipulates that a person (referred to as a tester) who deliberately exposes him/herself to discriminatory behaviour aiming to test the implementation of the anti-discrimination regulations could take the role of either witness or plaintiff during court proceedings. The article also specifies the role of the Ombudsman Institution (para. 5) and details the rights and obligations of testers (paras. 5 and 7). The tester has to inform the Ombudsman Institution of an intention to conduct the situational testing, unless the circumstances do not allow for this notification (it should be noted that the LPD does not specify the circumstances which relieve the tester from this obligation).

In 2016, a manual for practitioners was published in the local language⁷⁷, providing a general overview of testing but specifically focusing on the methodology and practical application of testing. However, despite its clear advantages and the guidance provided, not a single case using situational testing was brought before the Ombudsman Institution or BiH courts.

There is a general lack of localized knowledge of situational testing among most relevant actors. This localized knowledge is generally developed through a trial and error approach.⁷⁸ Another identified weakness is the difficulty in BiH of mobilizing testers from those minority groups who are also most often victims of discrimination. These groups may be reluctant to put themselves in a legal spotlight or to draw negative attention from more powerful interest groups or authority figures.

In almost all European countries, CSOs have been crucial to developing and applying situational testing, with the knowledge and skills developed through these testing exercises subsequently transferred to numerous European institutional contexts. However, in light of the lack of cases, it is safe to conclude that BiH CSOs neither possess the capacities or willingness to implement situational testing alone and to adjust it to the specific context of BiH. Even though the LPD prescribes the role of the Ombudsman Institution in a minimalist manner (hands-off approach), the experiences of other equality bodies in Europe may be used to build the capacities of the Institution to promote situational testing and providing related support to CSOs.⁷⁹ In this regard, the Mission submits that in light of its overall mandate, the Ombudsman Institution can play a key role in promoting the application of situational testing in BiH, including through partnering with CSOs. Considering the

77 Situaciono testiranje diskriminacije – priručnik za aktiviste/kinje, Asocijacija za demokratske inicijative, Sarajevo, 2016

78 In practice, this entails an ability to develop a solid testing plan suitable to test discrimination of various groups and individuals in different areas of life, while ensuring that the situation “created” also closely resembles the reality being tested.

79 In that regard it would be wise to learn from practices exhibited by equality bodies based in Eastern Europe, considering the similar treatment of specific minority groups as well as the models of co-operation between CSOs and independent bodies. The Public Defender of Rights (Czech Republic) should come as a first-choice, having in mind that around 90 per cent of the Czech anti-discrimination case law is based on evidence obtained through situational testing.

limited number of discrimination court cases, testing can contribute tremendously to the development of anti-discrimination case law.

Co-operation between the Ombudsman Institution and CSOs in situational testing

With greater institutional encouragement and adequate support, both in terms of knowledge and resources, CSOs can make situational testing an irreplaceable tool for combating discrimination. Being the stakeholder with the most direct contact with members of BiH's most discriminated against social groups, CSOs possess unique insight into the problems these groups and individuals are facing. CSOs are the first to understand the trends relating to discrimination in practice, they are familiar with typical discriminatory situations and the prevalence of discrimination throughout the country, and they ought to be able to identify typical cases of discrimination that are suitable for testing and encourage testers from relevant social groups.

In this effort, after strengthening its own capacities, the Ombudsman Institution should take the lead in developing a methodology and an implementation strategy based on information obtained from CSOs. This can be done with the support of the Mission⁸⁰ and other independent experts, and could take the form of tailored trainings for OI lawyers, especially from the Department for the Elimination of Discrimination, and further trainings for CSOs to identify the strengths and weaknesses of the existing legislative framework and to strengthen their capacities in utilizing it. This should include capacity training to identify cases of discrimination suitable for testing, based on a broad understanding of methodological principles, as well as methods to widen the pool of qualified testers in target social groups. Moreover, CSOs could utilize a trial-and-error approach in several testing simulations to accumulate practical experience. In this process, CSOs could rely on the support of the Ombudsman Institution and/or independent experts. CSOs could also choose to organize trainings for inspectorates in charge of labour, the market (access to goods and services) and education.

In conclusion, situational testing in BiH has so far been worryingly underutilized. Its successful and effective application must be the result of co-operation and mutual support between the Ombudsman Institution and CSOs. The Ombudsman Institution is expected to take the lead in this effort, and should consider co-operation with CSOs as a starting point.

Concluding observations

The Ombudsman Institution is one of the most important institutions in BiH for protecting citizens against discrimination. It has a role in processing individual complaints

⁸⁰ The Mission has already held two trainings for the Ombudsman Institution in 2017 and 2018 on this topic and encouraged the Institution to develop internal rules governing its role in situational testing.

from natural and legal entities, as well as in initiating investigations on its own behalf. The Institution submits reports on discrimination occurrences, and uses its Annual report to highlight trends and statistics. Finally, the Institution plays an active role in the regional co-operation of south-east European quality bodies. Given its importance, the Ombudsman Institution should be given the full support, political independence and necessary funding to conduct its work uninterrupted. It is recommended that the BiH Parliamentary Assembly therefore adopts the amendments to the Law on the Ombudsman, and ensure additional steps towards the Institution's financial independence. With the adoption of these amendments and the Institution's new role of National Preventive Mechanism, authorities are also recommended to provide an adequate increase in the Ombudsman Institution's budget, since existing capacities within the Institution are insufficient.

Though the legal framework on the prohibition of discrimination does follow international standards and enables interventions by the Ombudsman Institution, many aspects of the fight against discrimination could be improved. This includes building the capacities of the Ombudsman Institution staff, particularly the Department for the Elimination of Discrimination. In its current organizational set-up, the Ombudsman Institution lacks the human resources needed to effectively work on both individual complaints and promotional activities in anti-discrimination. It is recommended that the organizational structure and processes be reviewed. It is also recommended that the institution improve public communication and advocacy by regularly updating the website and publishing decisions and recommendations in accordance with the BiH Law on the Protection of Personal Data.

As noted above, it is recommended that the methodology used to draft annual reports be improved, especially in those chapters which concern discrimination practices in BiH society. Though generally positive, some small improvements may also be made in reporting to international human rights bodies.

The efforts of the Institution in organizing office days throughout the country help increase the accessibility of the Institution's lawyers in locations where there is no formal office of the Ombudsman Institution. However, it is recommended that these office days be better organized to increase impact, through practices such as quarterly planning and media outreach.

The Ombudsman Institution has assumed a role in situational testing under the LPD. Even though this method has thus far been underutilized, the Mission sees great potential for the Institution to exercise a greater role in promoting the application of situational testing. It is recommended that the Ombudsman Institution become the prime driver of the testing process by ensuring capacity building for CSOs and providing methodological guidance. Testing results should be used by the Ombudsman Institution to develop studies and surveys that could have a prominent role in the Institution's reports and their broader advocacy efforts.

CHAPTER V

BiH MINISTRY FOR HUMAN RIGHTS AND REFUGEES

Introduction

The BiH Ministry for Human Rights and Refugees (MHRR) is one of the most important institutions in BiH working to protect citizens from discrimination. The LPD tasks the MHRR with several important roles which, if fulfilled, contribute greatly to the overall system for prevention of discrimination in the country. The role of the MHRR is specific because, unlike the Ombudsman Institution or the judiciary, it does not deal with individual cases of discrimination, instead focusing entirely on overall national policies and trends. At the same time, a certain amount of overlap exists between its work and the work of other relevant institutions, particularly in terms of data collection (the Ombudsman Institution and judiciary) and annual reporting (the Ombudsman Institution). In this regard, the MHRR's most important roles are:

- › collecting data on discrimination cases,
- › annual reporting on instances of discrimination in BiH,
- › drafting of strategic documents and policies for combating discrimination,
- › overall monitoring of the implementation of the LPD; and
- › reporting on the LPD's implementation and the general situation surrounding discrimination to the BiH Parliamentary Assembly.

This Chapter gives an overview of the MHRR's work in the aforementioned areas, and assesses relations and co-operation with other institutions as well as deficiencies in the MHRR's exercise of its mandate, while also providing recommendations for improvement.

Data collection on discrimination cases

The importance of thorough, reliable and systematic data collection on discrimination cases can hardly be overstated. Such data collection provides both authorities and the general public with reliable statistics for monitoring discrimination, identifying and

removing systemic barriers, addressing social disadvantages and promoting equal access to rights. Without this data, institutions are unable to adequately design laws and policies addressing relevant human rights concerns. That is precisely why the LPD places a strong focus on discrimination case data collection. Nonetheless, discrimination case data collection in BiH is currently far from satisfactory, due to a lack of institutional capacities, frequent overlap of competencies, unsatisfactory co-operation between institutions and technical limitations such as the incompatibility of databases.

At the moment, there are three databases for discrimination cases in BiH: the judicial database (CMS – Case Management System⁸¹), the Ombudsman Institution's database (OWIS - Orka Workflow Information System) and the database developed by the MHRR.

The judicial database contains a significant amount of data, as it stores all relevant cases from all BiH courts. This database is also the primary source for the Mission's reporting on anti-discrimination cases. However, as the Mission has also already reported⁸², this database has several important deficiencies. Primarily, the CMS does not offer the possibility to log data on the grounds for discrimination in a given case. Consequently, it is impossible to conclude from the database whether any given court case concerns discrimination based on sex, age, ethnicity, etc. The database does enter the area of life where discrimination occurred, for example in the labour market, employment sector, education sector, etc, but the CMS does not provide data on whether an act of alleged discrimination was direct or indirect, or what type of discrimination it was (mobbing, harassment, sexual harassment, victimisation etc.). Finally, an entire set of discrimination cases in which protection from discrimination is being sought in existing proceedings remains⁸³ unrecorded in the CMS. Moreover, many cases marked as discrimination cases in the CMS do not actually concern discrimination, while a number of discrimination cases identified during the Mission's monitoring efforts were not properly marked in the CMS as such by the competent courts.

The Ombudsman Institution database also has a large number of recorded cases. This database recognizes discrimination grounds, unlike the CMS, but it does not recognize the area of life where discrimination occurred. This makes it impossible to calculate the number of people who have turned to the Ombudsman Institution to claim discrimination in employment, education, public life, etc.

According to the LPD, the MHRR database is envisaged to be a central database for all discrimination cases in BiH. Article 8 of the Law requires the "institutions in BiH [...] to regularly keep records of all reported cases of discrimination and to present the data collected to the Ministry for Human Rights and Refugees of Bosnia and Herzegovina". In addition, and in line with the same Article, "special records shall be established in legislative,

81 It is important to note that CMS is used by BiH courts to store data on all court cases in BiH, not only discrimination related ones.

82 See relevant chapters in the Analysis of Judicial Response to Discrimination Challenges in BiH.

83 Article 11 of LPD.

executive and judicial bodies for the purpose of registration of cases of discrimination as determined in criminal, civil, non-contentious and enforcement proceedings”.

In line with this mandate and with the Mission’s support, the MHRR developed a Rulebook on the Method of Data Collection on Discrimination Cases in Bosnia and Herzegovina.⁸⁴ This Rulebook serves as a solid basis for the design of a central database, but has yet to be updated to reflect the 2016 amendments to the LPD. On the basis of this Rulebook, in 2018 the MHRR developed a software solution for a database in the form of a central server and a web-based user interface.

This MHRR database is, in theory, the most encompassing database, because it has all the required entries mentioned in the LPD, including grounds of discrimination, areas of life where discrimination occurred, forms of discrimination (direct or indirect), etc. However, the main challenge currently facing this database is the storing of cases delivered to the MHRR by other institutions, as the MHRR does not have any cases of its own, and unlike the courts or the Ombudsman Institution, it does not work on individual cases. In order to arrange the smooth delivery of data, the MHRR has requested all relevant institutions (as defined in Article 8 of LPD) to nominate a person who would submit data on discrimination cases to the MHRR.

The mutual incompatibility of these three databases remains a problem that needs to be addressed. As the databases of the courts and Ombudsman Institution both lack important categories, as explained above, compiling them into a single MHRR database would produce unreliable and skewed statistics. In addition, importing data from several sources could lead to a duplication of cases, i.e. a single case being recorded multiple times. This could happen, for example, if a person initiated administrative proceedings before an administrative body, filed a complaint before the Ombudsman Institution and initiated a civil claim before a court, with each of these cases then being separately imported into a central database.

One possible solution to this problem would be to improve the exchange protocols of different databases in order to make them mutually compatible with the central MHRR database so that the data can be easily imported and to identify procedures to detect duplicates while keeping in mind the necessity to protect personal data. In particular, the Ombudsman Institution has raised questions regarding data protection, and has been reluctant to provide all of the data concerning its complainants to the MHRR. The MHRR and Ombudsman Institution have discussed overcoming this issue by encrypting the Ombudsman Institution’s data.

84 BiH Official Gazette, no: 27/13.

MHRR Annual reports on instances of discrimination in BiH

Pursuant to Article 8 of the LPD, the MHRR is obliged to prepare a report on instances of discrimination in BiH and to submit this report to the BiH Parliamentary Assembly through the BiH Council of Ministers at least once a year. The MHRR is also tasked with drafting special reports proposing measures aiming to combat and prevent discrimination when the issuance of such a report is considered necessary by the MHRR. However, since the adoption of the LPD through 2015, only one report containing an action plan regarding instances of discrimination was prepared and submitted by the MHRR. This report was considered and adopted by the BiH Council of Ministers during its session on 26 April 2016, and subsequently forwarded to the BiH Parliamentary Assembly, which adopted the report in the BiH House of Representatives on 2 August 2016 and in the BiH House of Peoples on 31 August 2018.

The lack of a functioning database has been identified as an obstacle to the MHRR's reporting on discrimination in BiH. The report mainly relies on data from the Ombudsman Institution's Annual reports, as well as data collected by relevant institutions and international treaty bodies. It is apparent that the MHRR analysed this data through desk research. The MHRR report contains an Action Plan of 32 proposed measures, though not all of these measures focus on the elimination of discrimination, instead making vague proposals for drafting of further strategies, action plans and programs and focus on issues such as attacks on journalists, restitution of property to returnees, providing support to various associations etc. In addition, it is not clear who is tasked with the implementation of these measures.

Three years since the adoption of this first report, the MHRR is currently finishing a second draft report, intended to follow-up on its previously proposed measures and to propose new ones. Due to a shortage of human resources, the Mission has provided significant support to the MHRR in drafting this report, including through its own expertise, by hiring an external expert and by facilitating consultative meetings with CSOs in June 2018. Covering the period from 2016 – 2018, this report maintains the same structure as the MHRR's first report.

The drafting of this second report has presented several challenges to the MHRR. One issue is that the database of discrimination cases is not yet fully functional. In addition, the reporting relationship and level of co-operation on discrimination issues and discrimination reporting between the Ombudsman Institution and the MHRR are not clear, despite both institutions being required to prepare and submit reports on this topic. As previously stated, the Ombudsman Institution has abandoned publishing Annual reports specifically concerning discrimination, and the MHRR has had difficulties in producing them, especially on a yearly basis. There appears to be little co-operation and co-ordination between the two concerning annual reporting on discrimination. An increase in such co-operation would be greatly beneficial to both institutions.

Drafting of strategic documents and policies for combating discrimination

According to the LPD, the MHRR is also mandated to draft strategic documents and policies for combating discrimination. Based on this mandate, the MHRR has attempted to draft a national Anti-Discrimination Programme in BiH. The drafting of such a document requires co-ordination across government levels and relevant agencies and stakeholders, in order to produce the necessary public policies for fighting discrimination and protecting human rights in BiH.

While the existing normative framework on discrimination in BiH is comprehensive⁸⁵ and in line with relevant international human rights documents, institutional practice often paints a different picture, as highlighted in reports from credible international and domestic human rights bodies/institutions.⁸⁶ It would therefore appear, as one author put it, that in BiH “declaratory constitutional and legislative guarantees are not supported by an efficient enforcement mechanism”.⁸⁷ Unfortunately this is not an uncommon perspective. A well-drafted piece of legislation such as the LPD, and the incorporation of international human rights standards into constitutional and legal frameworks, is only one part of an effective anti-discrimination framework. One can of course utilize these mechanisms when instigating proceedings before the courts, the Ombudsman Institution and/or international tribunals. However, they are ultimately reactive rather than proactive mechanisms.⁸⁸ A unified national programme involving multiple stakeholders and all governmental levels is therefore a necessary step for strengthening anti-discrimination and human rights policy in BiH. The development of such a programme falls under the responsibility of the MHRR.

A functional protection system against discrimination and effective anti-discrimination mechanisms can only come as the result of a co-ordinated approach from different actors at different levels of authority. For example, the Republic of Croatia, the Republic of Serbia and the Republic of North Macedonia all adopted policy documents providing for a co-ordinated governmental approach in these countries’ overall work in combating discrimination. Such systemic approaches to the implementation of anti-

85 The Constitution of Bosnia and Herzegovina, the Constitution of RS, the Constitution of the Federation of Bosnia and Herzegovina and the Constitution of Brčko District all contain a non-discrimination provision. Furthermore, Bosnia and Herzegovina recognized that discrimination represents a societal problem through its adoption of the LPD, also explicitly recognizing the existence of various protected categories such as sexual and national minorities, sexual orientation, gender identity and sexual characteristics, which in many societies is still not the case.

86 For instance, in its report on the State of the World’s Human Rights 2017/2018, Amnesty International found that “Social exclusion and discrimination – in particular of Roma; lesbian, gay, bisexual, transgender and intersex (LGBTI) people; and of people with disabilities – remained widespread, despite the adoption of a progressive Law on Prevention of Discrimination in 2016” while, according to the Human Rights Watch World report 2018 “There was little visible progress on human rights during 2017. Authorities failed yet again to end structural and political discrimination against Jews, Roma, and other minorities”.

87 Vesna Pirija “Kako do adekvatne strategije za prevenciju i borbu protiv diskriminacije?: Moguće lekcije za Bosnu i Hercegovinu”, Analitika, Sarajevo 2017.

88 Though the LPD does clearly stipulate a proactive role, especially for the Ombudsman Institution and MHRR, this role is often neglected and underutilized, as further elaborated in this report, and in any case would be insufficient on its own.

discrimination legislation allow for more capacity building in the judiciary and Ombudsmen Institution, the establishment of adequate database for tracking discrimination trends, etc.

This co-ordinated approach can only be delivered through harmonized public policies defined through a programmatic document identifying problems, areas of responsibilities, necessary actions and deadlines for delivery. The process of adopting such a document is also almost as important as the results it aims to achieve. For the programme to be implemented properly, all actors involved in its eventual implementation will need to also be involved in the programme's drafting and consultation processes. Key actors in this process are as follows:

- The BiH Ministry for Human Rights and Refugees – as monitor of the implementation of the LPD;
- Relevant authorities from all levels of government in BiH (State, Entity, Brčko District and Cantons);⁸⁹
- The BiH Ombudsman Institution – as the central institution for protection from discrimination;
- Courts in BiH – as providers of protection through civil cases and administrative disputes;
- The BiH Agency for Gender Equality – as the institution which monitors the implementation of the BiH Gender Equality Law;
- Legal aid providers (both free legal aid and other legal professionals) – as providers of access to justice;
- CSOs – as participants in activities aimed at the prevention of discrimination;
- Trade unions – as instigators of proceedings in cases concerning labour-related discrimination.

All the above actors are essential to achieving the anti-discrimination protective aims of the LPD, making their co-ordinated engagement in the development of a national anti-discrimination policy of critical necessity. Considering the fact that each actor faces their own unique challenges in anti-discrimination work, it will be necessary to continue analysing existing challenges and defining ways to improve the capacities of all the actors identified. Apart from these key actors, it is necessary to ensure that other competent administrative bodies play an active role in this issue, especially to harmonize relevant legislation with the LPD, and to establish priorities in this area.

The general public ought to have opportunities to be involved and be informed of this process through public consultations, debates, the accessibility of materials online and the opportunity to comment, etc.

The positive steps already taken in this process, the obstacles encountered, and possible ways forward are further discussed below.

⁸⁹ In particular, the State/Entity/District Ministries of Justice, Social Services, Labour and Education.

BiH International commitments in protection from discrimination

In its Progress Reports (now called country reports) for Bosnia and Herzegovina covering 2014-2018, the European Commission called on BiH to draft a public policy on human rights. In these Progress Reports, the European Commission noted that the strategic, legal, institutional and policy frameworks for the observance of human rights remain in need of substantial improvement. Shortcomings in the human rights protection system can be seen in the uneven application of anti-discrimination provisions and the non-existence of a country-wide programmatic document on anti-discrimination. The 2018 Report for Bosnia and Herzegovina explicitly notes that in the coming year, Bosnia and Herzegovina should in particular:

“Adopt a countrywide strategy for human rights and take additional measures to combat all forms of discrimination, notably by adopting an anti-discrimination programme and advancing implementation of anti-discrimination measures stipulated by law.”

Additionally, in its latest report on BiH from February 2017, the Council of Europe's Commission against Racism and Intolerance (ECRI) analysed discrimination issues in the country in detail, and recommended authorities to undertake a number of measures aimed at the prevention of and protection from discrimination.⁹⁰

All of the above indicates a necessity for BiH to draft a programmatic document which would define concrete steps towards the fulfilment of international obligations and the implementation of relevant domestic legislation in the area of anti-discrimination. Such a programmatic document would enable BiH authorities to do everything in their power, and within their constitutional competencies⁹¹, to ensure effective protection from discrimination in BiH.

Activities undertaken to date

The MHRR initiated the process of drafting a strategic anti-discrimination document in 2016, but to date it has not been finalised. The reasons for the lack of such a document can be summarized by a lack of political will and a lack of internal MHRR capacities.

In its work plan for 2016, the MHRR envisaged the drafting of a Strategy for Prevention of and Combating Discrimination.

90 See ECRI report on Bosnia and Herzegovina (fifth monitoring cycle), published on 28 February 2018

91 Most of the specific areas of life that would be subject to interventions of the Programme for Combatting Discrimination, such as labour and employment, education (with the exception of Zepce and Maglaj), social protection etc, are within constitutional competencies of the entities, cantons and Brčko District. It is, therefore, necessary to involve all the relevant levels of authority in the drafting process as they will, ultimately, be responsible for the Programme's application.

The necessity to adopt a strategic document for combating discrimination in BiH has also on several occasions been a matter of discussion by the Joint Commission for Human Rights of the BiH Parliamentary Assembly (JCHR), and this Commission has repeatedly expressed its unequivocal support for the adoption of such a document.⁹²

Based on this work plan, the MHRR invited institutional representatives from the State, Entity and Brčko District levels, the Ombudsman Institution and CSOs to nominate members to the working group for the development of the strategy. All of these actors nominated representatives to the working group with the exception of the RS Government, which informed the MHRR that it would not accept the adoption of such a strategy in BiH.⁹³

Against the backdrop of RS opposition, the BiH Council of Ministers tasked the MHRR on 21 September 2017 to develop a “Mid-term Programme for Combating Discrimination 2017-2022” (the Programme). The Programme was to be based primarily on the recommendations of international treaty bodies and the LPD, while the implementation of measures would be divided according to constitutional competencies, i.e. primarily between the entities. The MHRR anticipated better prospects for the political acceptance of the Programme, given that it was based on international treaties and that it would foresee entity/district authorities implementing most of its activities.⁹⁴

However, as the MHRR invited relevant entity authorities to nominate participants to thematic panels to discuss the draft Programme and the procedure for its adoption, the initiative was once again rejected by the RS Government in July 2018. The process has effectively stalled since then.⁹⁵ Unfortunately, there has been no follow-up by the JCHR on its repeated calls for the adoption of a strategic document. This appears to be a reflection of the overall ineffectiveness of the BiH Parliamentary Assembly, whose legislative activity in the 2014-2018 term was at an all-time low.

92 Specifically, at their second annual conference on the situation of human rights and freedoms in BiH in Mostar on 22-23 March 2016, the JCHR invited the MHRR to prepare the draft of the Strategy for Human Rights and the Anti-discrimination Strategy, and to inform the Joint Commission on the progress. At their third conference held in Neum on 26-27 April 2017, the JCHR repeated this request

93 According to the conclusion no. 04/1-012-2-1300/16 adopted by the Government of RS in its 76th session held on 02.06.2016, “the Government of RS did not accept the adoption of the said strategy in BiH”. In addition, on 5 May 2016, the Ministry for Economic Relations and Regional Co-operation of RS informed the MHRR that the RS Government did not consider it necessary to nominate a representative to the working group for development of a Strategy for Human Rights in BiH, as it did not see a necessity to adopt such strategic documents at the state level.

94 The Mission recognized the importance of developing such a Programme and provided support to the MHRR throughout the process. In 2017 and 2018 the Mission organized several workshops for MHRR staff and the Mission’s human rights experts in order to develop a draft Programme. In addition, the Mission hired an external human rights professional, who jointly drafted an Operating Plan for the development of the Programme.

95 On 4 July 2018, the RS Ministry for Economic Relations and Regional Co-operation of informed the MHRR of the joint position of RS institutions that it is not necessary to develop a Programme for Combating Discrimination and that the proposed Programme is unacceptable, as it would contain elements of the Strategy for Combating Discrimination in BiH which had already been refused by the RS Government.

Prospects for the future development of the Programme/Strategy for Combatting Discrimination in BiH

The future of the Programme/Strategy for Combating Discrimination in BiH is uncertain at present. While there exists strong support among international human rights mechanisms and BiH civil society and nominal support from the BiH Parliamentary Assembly and Council of Ministers, the RS Government continues to refuse to participate in the process.

The Mission regrets the refusal of the RS Government to participate in the drafting of strategic human rights documents at the BiH level, including the proposed Programme, and reiterates that the protection of human rights, including the freedom from discrimination, is an obligation stemming from both international and national human rights legislation. Adopting such documents is also an obligation towards the citizens of BiH, whose human rights should not be subject to political bargaining. The Mission, therefore, invites the RS Government to reconsider its position and to find a way to proactively contribute to the development and implementation of all strategic human rights documents in BiH.

Regardless of the above political barriers, the MHRR currently lacks the capacity to produce such a strategic document, which is evidenced by the fact that after three years of drafting, a first version has yet to be completed. This situation is further challenged by the approach of the JCHR and Council of Ministers which, apart from periodical nominal support, have failed to consistently monitor the drafting process or provide technical and political support. It is recommended that the new convocation of the JCHR closely monitors the drafting progress, provide support when necessary.

In addition, without proper data on the prevalence of discrimination in BiH, it is more than difficult to develop appropriate policies on combating discrimination. This again highlights the need for the creation and maintenance of a database of discrimination cases in BiH. Similarly, it is challenging to develop a *public policy* document without systematic and periodic research on *public attitudes* towards discrimination. This research should document the view of BiH citizens on the extent to which discrimination exists and when and where it is most prevalent. The MHRR Annual Report on Instances of Discrimination and the Annual Report of the Ombudsman Institution's section on discrimination could offer a suitable framework for this endeavour.

Concluding observations

The MHRR represents one of three institutional pillars (together with the Ombudsman Institution and the judiciary) supporting the structure of the BiH anti-discrimination system, and as such needs to fulfil its anti-discrimination mandate to the fullest extent possible.

However, as detailed in this chapter, there have been serious shortcomings in the exercise of the MHRR's mandate due to both external and internal factors. The MHRR has so far produced only one Annual Report on Instances of Discrimination in BiH (in 2015) and

many of the proposed measures to tackle discriminatory policies from the accompanying Action Plan have subsequently been abandoned. The drafting of public policy documents (the Human Rights Strategy and Programme for Combating Discrimination) has been stymied by the political situation in the country, which is the primary reason these documents have not been produced. In addition, it is clear that regardless of the political barriers, the MHRR has also struggled to produce well-drafted documents due to insufficient internal capacities. The MHRR should produce draft strategic documents without prejudging their political feasibility.

Finally, the creation and maintenance of a comprehensive database of discrimination cases in support of analysis and policy-making - an objectively challenging task - has been made even more difficult by the lack of uniformity among existing databases, their mutual incompatibility, the insufficiency of CMS and OWIS and the lack of communication and information sharing between the courts, the MHRR and the Ombudsman Institution.

CHAPTER VI

RECOMMENDATIONS

In the foregoing chapters, the Mission made several recommendations. The primary purpose of this Report is to assess the work of BiH institutions in their application of the LPD. It is abundantly clear that the implementation of ECtHR judgments is a requirement to end discrimination in BiH and that there has been no progress on this front. However, the Mission recommendations aim to address practical issues identified to enhance the day-to-day functioning of anti-discrimination bodies in BiH. The Mission will therefore not address the way forward on these overarching issues, which have been covered extensively before. The recommendations are listed below, organized by the responsible sector or institution:

Recommendations to state and entity legislative authorities

- › Ensure that new legislation is reviewed for compliance with the LPD, including by relying on the MHRR assessment in this regard;
- › In order to advance gender equality in BiH and ensure minimum of 40% representation of “less represented gender” at all levels of government and in public institutions, the Mission recommends that the Gender Equality Agency and other gender equality mechanisms advise authorities at their respective levels which legislation needs to be further harmonized with the BiH Gender Equality Law.
- › The BiH Parliamentary Assembly should adopt amendments to the Law on the Ombudsman, including to ensure additional steps towards the Institution’s financial independence. An increase to the OI budget is also recommended, since existing capacities within the Institution are insufficient, especially in light of newly assigned roles.
- › The new convocation of the BiH PA Joint Committee on Human Rights should monitor the drafting progress and provide necessary support in relation to the National Anti-Discrimination Programme.

Recommendations to the judiciary

- Courts should ensure that specific officeholders are responsible for enforcement of their decisions in accordance with a specific timeline;
- Courts should also alert relevant prosecutor's officers of non-enforcement, for which the latter should seek criminal sanctions in instances of non-compliance, such as the non-implementation of the FBiH Supreme Court judgment ordering an end to the practice of 'two schools under one roof' in Herzegovina-Neretva Canton;
- Apply the burden of proof rule consistently as a means of ensuring the right to fair trial;
- Process discrimination cases speedily as a means of ensuring the right to fair trial and the right to a trial within a reasonable time by setting clear incremental targets. Court Presidents have the primary role of ensuring speedy proceedings.

Recommendations to the HJPC

- Expand the database (CMS) used by courts to make it compatible with the central MHRR database by adding new indicators such as "grounds for discrimination";
- Train judges and judicial support staff to apply provisions of international human rights treaties and the practices of the ECtHR in cases of discrimination;
- Continuously monitor the developments in ECtHR case-law and provide updates through case information sheets and translations of the most important ECtHR judgements for judges to consult;
- Provide clear guidance to judges on how to consider recommendations of the Ombudsman Institution when relied upon as evidence in procedures under the LPD. In the event that the findings and recommendations of the Ombudsman Institution are not accepted, justify the decision not to accept;
- Provide further information on and promote the role of third-party interveners in accordance with the letter and the spirit of the LPD;
- Consider contested issues in the application of the LPD (burden of proof, third-party interveners etc.) at the Panels for Harmonization of Court Practice with the view of adopting their uniform interpretation;
- The HJPC should ensure that, at the systematic/state level, discrimination cases are being processed speedily by the courts.
- The JPTCs should, under the guidance of the HJPC, conduct a Needs Assessment for training judges in BiH in relation to the LPD;
- The JPTCs should continue training all actors involved in discrimination cases, in particular judges, attorneys and free legal aid providers.

Recommendations to labour unions

- Labour unions, and free legal aid providers within labour unions in particular, should utilize the LPD in order to combat discrimination in the workplace, especially through initiating collective civil claims and third-party interventions.

Recommendations to the Ombudsman Institution

- Organize a twinning programme for the Ombudsman Institution, whereby support would be provided in assessing their current structure, with a view toward a possible reorganization, based on the experiences of Ombudsman Institutions in other countries, or by conducting a substantive organizational review with the assistance of a management consultancy firm, as suggested by the Council of Europe⁹⁶;
- Develop a programme for the professional development of staff and enable all case-processing lawyers within the Institution access to data from the OWIS;
- Use methodologies for the drafting of the Annual report and reports on discrimination for UN treaty bodies which target human rights violations and discrimination occurrences, and which can be used as advocacy tools by other actors;
- Increase the impact of office days by conducting quarterly or bi-annual planning and assessment of results, including outreach activities, and ensuring unified and effective reporting from office days;
- Initiate a campaign to raise public awareness about discrimination and available judicial and non-legal remedies, with a specific focus on local communities;
- Develop and adopt internal procedures for the participation of the Institution in situational testing, build capacity among NGOs on situational testing and adopt a methodology for testing based on trial and error;
- Conduct research into workplace-related discrimination with a particular focus on gender-based discrimination, including mobbing and sexual harassment;
- Conduct research and opinion polls into public attitudes towards discrimination in accordance with its mandate contained in Article 7 of the LPD;
- Regularly update the Ombudsman Institution website and publish all decisions and recommendations (redacting the personal identity data in accordance with the BiH Law on the Protection of Personal Data).

⁹⁶ Available at <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>, page 6.

Recommendations to the MHRR

- Draft Annual reports on instances of discrimination and special reports on discrimination issues;
- Finalize the drafting process of the National Anti-Discrimination Programme;
- Allocate adequate human and financial resources within the MHRR to work on the above-mentioned documents;
- Ensure that the central database of discrimination cases is fully operational and regularly updated, including by considering appropriate exchange protocols with the HJPC and Ombudsman Institution.
- Monitor the drafting process of all new legislation relating to human rights in order to ensure compatibility with the LPD;
- Update the Rulebook on the Method of Data Collection on Discrimination Cases in Bosnia and Herzegovina to incorporate the 2016 Amendments to the LPD;
- Conduct an analysis of existing legislation in order to propose harmonization with the LPD where appropriate.
- Initiate periodic research on public attitudes towards discrimination to better inform policy-making

Recommendations to entity governments

- The Mission urges the RS Government to reconsider its position in relation to the National Programme for Combating Discrimination and to proactively contribute to the development and implementation of all strategic human rights documents in BiH.

Recommendations to the International Community/Donor organizations in BiH

- Provide expert, logistical and financial support to associations working on the protection of human rights to increase capacities to institute procedures through collective civil claims, including by bringing claims before the ECtHR if national remedies are exhausted;
- Provide expert, logistical and financial support to the Ombudsman Institution and CSOs to increase capacities for situational testing for combating discrimination;
- Considering the cross-cutting importance of discrimination, the EU should ensure that the adoption of the National Anti-Discrimination Programme receives adequate attention in the EU accession process.

ANNEX I

THE LAW ON PROHIBITION OF DISCRIMINATION⁹⁷

CHAPTER I: GENERAL PROVISIONS

Article 1

(Subject of the Law)

(1) This Law shall provide a framework for realisation of equal rights and opportunities to all persons in BiH and shall define a system of protection from discrimination.

(2) In compliance with the BiH Constitution and international standards related to human rights and fundamental freedoms, this Law defines responsibilities and obligations of legislative, judicial and executive authorities in BiH and legal persons and individuals with public authorities in BiH, (hereinafter “competent authorities in BiH”) to act to ensure protection, promotion and creation of conditions for equal treatment.

Article 2

(Discrimination)

(1) Discrimination, in terms of this Law, shall be any different treatment including any exclusion, limitation or preference based on real or perceived grounds towards any person or group of persons, their relatives, or persons otherwise associated with them, on the grounds of their race, skin colour, language, religion, ethnic affiliation, disability, age, national or social background, connection to a national minority, political or other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics, as well as any other circumstance serving the purpose of or resulting in prevention or restriction of any individual from enjoyment or realization, on equal footing, of rights and freedoms in all areas of life.

⁹⁷ This is the unofficial revised version of the Law on Prohibition of Discrimination, which includes the provisions of the Law on Prohibition of Discrimination (Official Gazette of BiH No 59/09) and the provisions of the Law on Amendments to the Law on Prohibition of Discrimination (Official Gazette of BiH No 66/16).

(2) Prohibition of discrimination shall apply to all public bodies, all natural and legal persons, in public and private sector, in all spheres, especially: employment, membership in professional organizations, education, training, housing, healthcare, social protection, goods and services designated for the public and public places, and conducting of economic activities and public services.

CHAPTER II: FORMS OF DISCRIMINATION

Article 3

(Forms of Discrimination)

(1) Direct discrimination is any different treatment on the grounds defined in Article 2 of this Law, specifically, any action or failure to act when a person or a group of persons is put, has been or could be put into less favourable position in comparison to any other person or group of persons facing similar situation.

(2) Indirect discrimination occurs in any situation, in which, an apparently neutral provision, criteria or practice has had or could have the effect of putting a person or group of persons, in the context of grounds specified under the provisions of Article 2, Paragraph (1) of this Law, into unfavourable or less favourable position comparing to other persons.

Article 4

(Other Forms of Discrimination)

(1) Harassment shall be considered to be any unwelcome behaviour motivated by some of the grounds specified in Article 2, Paragraph (1) of this Law, which aims at, or represents violation of person's dignity and creation of intimidating, hostile, degrading, demeaning or offensive environment.

(2) Sexual harassment shall be considered to be any form of unwelcome verbal, non-verbal or physical behaviour of sexual nature which aims at or results in violation of person's dignity, especially when it creates intimidating, hostile, degrading, humiliating or offensive environment.

(3) Mobbing shall be considered to be any form of non-physical harassment at a workplace, manifested in repetitive actions that have humiliating effect on the victim and aim at or result in degradation of employee's working conditions or professional status.

(4) Segregation shall be considered to be an act by which a (natural or legal) person separates other persons on the basis of one of the grounds specified in Article 2 of this Law, in line with the definition of discrimination, as provided under Article 2 of this Law.

(5) Instructing others to discriminate, assisting others in discrimination, as well as incitement to discrimination shall also be considered forms of discrimination.

(6) Any discrimination against certain individual based on multiple grounds specified under the provisions of Article 2, Paragraph (1) of this Law (multiple discrimination), discrimination occurring multiple times (repeated discrimination) and discrimination

occurring over an extended period of time (extended discrimination) shall be considered to represent aggravated form of discrimination.

Article 5

(Exceptions from Principle of Equal Treatment)

Legal measures and actions shall not be considered discriminatory when reduced to unfavourable distinction or different treatment, if based on objective and reasonable justification. Following measures shall not be considered discriminatory if they realize a legitimate goal and if there is a reasonable proportionality between means used and goals to be achieved and when:

a) They result from implementation or adoption of temporary special measures designed to prevent or compensate for damages that persons suffer on the grounds specified in Article 2 of this Law, which particularly applies to members of vulnerable groups, such as persons with disabilities, members of national minorities, women, pregnant women, children, youth, elders and other socially excluded persons, civilian victims of war, victims in criminal proceedings, displaced persons, refugees and asylum seekers; to enable their full participation in all spheres of life;

b) They are based on features related to grounds specified in Article 2 of this Law, when under limited circumstances, due to the nature of concrete professional activities or context in which these are implemented, such feature represents real and defining condition in terms of choice of occupation. This exception shall be a subject to occasional review;

c) They are based on distinction, exclusion or advantage in relation to employment as a staff member of an institution that is done in compliance with doctrines, basic presumptions, dogmas, beliefs or learning of actual confession or religion, having in mind that every distinction, exclusion or advantage is done consciously, in order not to hurt religious feelings of members of that confession or religion;

d) They define maximum age as the most appropriate for termination of employment and determine age as a condition for retirement;

e) They are based on citizenship requirements, as mandated under the law;

f) They are based on realization of reasonable accommodation aiming to ensure the principle of equal treatment in relation to persons with disabilities. Employers shall, based on needs in a concrete case, take appropriate measures, in order to enable a person with disabilities to access workplace, participate in work, make career advancement and participate in training, provided that such measures do not represent disproportionate burden to the employer;

g) They put a person into less favourable position in defining family-specific rights and responsibilities, when defined so under the law, in particular with the view of protecting rights and interests of children, which has to be justified by a legitimate aim, protection of public morality, as well as favouring marriage, in line with the provisions of the family law.

h) They imply inclusion into membership upon commencement of employment, and taking actions that are in compliance with preaching and operating of registered churches and religious communities in BiH, and other public or private organizations working in accordance with the Constitution and laws, if so required by religious doctrines, beliefs or goals.

CHAPTER III: PROTECTED RIGHTS

Article 6

(Scope of Application)

This Law shall apply to actions of all public bodies at the level of the state, entity, canton and Brčko District, municipal institutions and bodies, and legal persons with public authorities, as well as to actions of all legal and natural persons, in all spheres of life, but especially in the following fields:

a) Employment, work and working conditions, including access to employment, occupation and self-employment, working conditions, remuneration, promotions and dismissals;

b) Education, science and sports. Access to education should not depend on immigration status of children or their parents;

c) Social protection, including social insurance, social benefits, social assistance (housing allowances, allowances for youth, etc.) and ways of treating social protection beneficiaries;

d) Health protection including access to care and treatment, in terms of ways of providing care and treatment to patients;

e) Training, including orientation and ongoing professional development, all types and levels of professional orientation, advanced professional training and development, additional qualifications and requalification, including gaining practical working experience;

f) Judiciary and administration, including activities of police and other law enforcement officers, border control officers, military and prison staff, with the view of ensuring that all persons are equal before courts and tribunals;

g) Housing, including access to housing, housing conditions and termination of lease agreements;

h) Public information and the media;

i) Membership in professional organizations, including membership in organizations of employers or employees or any other organization whose members are engaged in a certain profession; involvement in such organizations and benefits provided by these organizations;

j) Goods and services designated to public and public places, including, e.g. when purchasing goods in a shop, submitting an application for a loan in a bank and in relation to access to discotheques, coffee shops and restaurants;

k) Performance of commercial activities, including competitive market law, relations between companies and relations between companies and the state;

l) Participation in creative activities in the area of culture and art;

m) Equal participation of all citizens in public life;

n) Families, where marital partners shall enjoy full equality in terms of their rights and responsibilities in relation to marital community, for the duration of marital community and during and after divorce proceedings, including rights and responsibilities in raising children, in accordance with the provisions of the family law;

o) Rights of children, including measures of protection needed resulting from their status of minors, to be undertaken on the part of their families, society and the state.

CHAPTER IV: COMPETENT INSTITUTIONS FOR PROTECTION FROM DISCRIMINATION

Article 7

(Central Institution for Protection from Discrimination)

(1) Central institution competent for protection from discrimination is the Institution of Human Rights Ombudsman of Bosnia and Herzegovina (hereinafter: BiH Ombudsman Institution).

(2) BiH Ombudsman Institution shall act in accordance with this Law and the Law on Human Rights Ombudsman for BiH, by undertaking the following activities within the scope of its competence:

a) Receive individual and group complaints related to discrimination;

b) Provide needed information to natural and legal persons who filed a complaint for discrimination, about their rights and obligations and possibilities of judicial and other forms of protection;

c) The BiH Ombudsman Institution may decide not to accept a complaint or to initiate an investigative procedure, in line with special regulations;

d) Propose initiation of process of mediation in compliance with provisions of the Law on Mediation;

e) Collect and analyse statistical data on discrimination cases;

f) Deliver annual and if necessary extraordinary reports on instances of discrimination to the Parliamentary Assembly of BiH, FBiH Parliament, RS National Assembly and Brčko District BiH Assembly;

g) Inform the public of instances of discrimination;

h) Conduct surveys in the field of discrimination at its own initiative;

i) Issue opinions and recommendations aiming to prevent and combat discrimination, and suggest appropriate legal and other solutions to the competent Institutions in BiH;

j) Have the right to initiate and participate in proceedings for protection from discrimination, for misdemeanours specified under this Law;

k) Monitor legislation and provide guidance to legislative and executive bodies;

l) Work to promote this Law, inform the public, raise awareness, implement campaigns and otherwise actively promote fight against discrimination with the view of prevention of discrimination;

m) Improve policies and practices aimed at ensuring equal treatment.

(3) When developing regular reports, opinions and recommendations on instances of discrimination, the BiH Ombudsman Institution shall co-operate with civil society organizations dealing with protection and promotion of human rights and organizations dealing with protection of groups at high risk of discrimination.

(4) The BiH Ombudsman Institution shall provide assistance to persons or groups of persons addressing international bodies for protection from discrimination, providing them with guidelines, advice, and consultations during the course of the procedure, in addition to making proposals and recommendations.

(5) In order to exercise its competences, the BiH Ombudsman Institution shall establish a special department that would solely focus on the cases of alleged discrimination resulting from actions of public bodies at the level of the state, its entities, cantons and Brčko District, municipal institutions and bodies, and legal persons with public authorities, as well as actions of all legal and natural persons, in all spheres of life.

The budget of the BiH Ombudsman Institution shall include a special budget line designated for functioning of special department(s) for combating discrimination.

(6) All state, entity, cantonal, and Brčko District institutions and bodies, municipal institutions and legal persons with public authorities and all other legal and natural persons, shall be required to submit, upon the request from the BiH Ombudsman Institution, any data and documents requested, within 30 days of the date of receipt of such request.

(7) Competent institutions in BiH shall be required to co-operate with the BiH Ombudsman Institution and present their responses and notifications in writing, within the deadline set forth by the BiH Ombudsman Institution, as well as report on the effect of recommendations made with the view of eliminating discrimination.

Article 8

(Recordkeeping and Coordination among Competent Institutions)

(1) Competent institutions in BiH shall be required to regularly keep records of all reported cases of discrimination and to present the data collected to the Ministry for Human Rights and Refugees of Bosnia and Herzegovina.

(2) In line with its competences defined under the law, the Ministry for Human Rights and Refugees of Bosnia and Herzegovina shall be required to present reports on the subject of discrimination to the Council of Ministers of BiH, based on collected data on instances and magnitude of discrimination, at least once a year, in addition to presenting special

reports, as and when needed, with suggested measures for prevention and suppression of discrimination in Bosnia and Herzegovina.

(3) The Ministry for Human Rights and Refugees of Bosnia and Herzegovina shall be required to report on the subject of discrimination to the BiH Parliamentary Assembly, through the Council of Ministers, and propose specific legislative or other measures.

(4) In line with the provisions of this Article, special records shall be established in legislative, executive and judicial bodies for the purpose of registration of cases of discrimination as determined in criminal, civil, non-contentious and enforcement proceedings.

(5) The central database of acts of discrimination shall be established within the Ministry for Human Rights and Refugees of Bosnia and Herzegovina.

(6) The Ministry for Human Rights and Refugees of Bosnia and Herzegovina shall issue a Rulebook on the method of collection of data on cases of discrimination in Bosnia and Herzegovina, within 90 days of entry of this Law into force. The Rulebook shall define the content and the layout of the questionnaire for collection of data on discrimination cases as well as regulate other issues of relevance to the procedure of data collection.

Article 9

(Monitoring of Implementation of the Law)

The Ministry for Human Rights and Refugees of Bosnia and Herzegovina shall monitor implementation of this Law.

Article 10

(Co-operation with Civil Society Organizations)

In the process of development of reports, laws, strategies and other plans related to situation in the area of human rights and discrimination, all competent authorities shall be required to co-operate with civil society organizations dealing with protection and promotion of human rights, and protection of rights of persons and groups of persons exposed to high risk of discrimination.

CHAPTER V: PROCEEDINGS FOR PROTECTION FROM DISCRIMINATION

Article 11

(Protection in Existing Proceedings)

(1) Any person or group of persons who consider to have been discriminated against shall be able to seek protection of their rights through existing judicial and administrative proceedings.

(2) In cases in which violation of right to equal treatment resulted from an administrative decision, appeal in administration proceedings and possible initiation of an administrative dispute with the view of protection from discrimination requesting

annulment of such administrative decision shall not preclude a person referred to in Paragraph 1 of this Article from initiating judicial proceedings for protection from discrimination.

(3) All concrete claims as laid out in Article 12 of this Law, individual or collective, may be required in order to submit a lawsuit in civil proceedings.

(4) Court and other bodies shall apply the principle of urgency in all proceedings which concern examination of claims of discrimination.

(5) In line with general rules of procedure, courts and other bodies shall be required to take necessary action to ensure that proceedings which concern examination of claims of discrimination are conducted as a matter of urgency and completed within the shortest time possible.

Article 12

(Special Lawsuits for Protection from Discrimination)

(1) In line with the provisions of this Law, a person or a group of persons exposed to any form of discrimination shall have the right to initiate a lawsuit and claim the following:

a) Determining that the respondent violated the plaintiff's right to equal treatment i.e. that the action s/he took or failed to take could directly result in violation of the right to equal treatment (lawsuit for determining discrimination);

b) Prohibition from undertaking actions that violate or could violate the plaintiff's right to equal treatment, or performance of actions to eliminate discrimination or its consequences (lawsuit for prohibiting or ending discrimination);

c) Compensation of pecuniary and non-pecuniary damages caused by violation of rights protected under this Law (lawsuit for compensation);

d) Publication of the decision which found violation of the right to equal treatment in the media, at the expense of the respondent.

(2) Claims listed in Paragraph (1) of this Article could be added to claims for protection of other rights which are subject to civil proceedings, under the condition the correlation exists between them, regardless of whether those claims are to be addressed in regular or special civil proceedings, with exception of trespassing related disputes. In those cases, relevant rules applicable to the particular dispute shall apply, unless stipulated otherwise under the provisions of this Law.

(3) Claims listed in Paragraph (1) of this Article shall be decided upon by the relevant court, in line with the provisions of the law on civil procedure in effect in Bosnia and Herzegovina, unless stipulated otherwise under the provisions of this Law.

(4) Claim for publication of decision referred to in Paragraph (1) Item d) of this Article shall be accepted by the court if the court finds the following:

(a) That the violation of right to equal treatment occurred via the media, or

(b) That the information on action that resulted in violation of the right to equal

treatment was published in the media and publication of the decision is needed for the purpose of full reparation of damage sustained or protection from unequal treatment in the future.

(5) If claim for publication of decision is approved by the court, the court shall issue the instruction that the full text of the decision be published. As an exception, the court may stipulate that the decision be published partially, or that certain personal information be redacted from the text of the decision, if required for the purpose of protection of privacy of parties to the proceedings and other individuals, without undermining the purpose of legal protection provided.

(6) The decision issued by the court instructing publication in the media shall be legally binding for the publisher of the media in which the decision is to be published, regardless of whether the publisher was party to the proceedings.

Article 13

(Competence, Deadlines and Execution)

(1) Unless stipulated otherwise under the provisions of this Law, and in compliance with the provisions of laws on courts in effect in both entities and Brčko District, disputes in first and second instance proceedings referred to under the provisions of Article 12 of this Law shall be handled by a court having general territorial jurisdiction, a court located in the place where the plaintiff has temporary or permanent residence, or a court with the seat at the location where damage was sustained or discriminatory action was taken.

(2) Revision shall be always allowed in the proceedings referred to under the provisions of Article 12 of this Law.

(3) In dealing with claims referred to under the provisions of Article 12, paragraphs b) and d) of this Law, the competent court may decide that appeal shall not delay the enforcement or determine shorter deadline for taking action ordered to the respondent.

(4) Deadline for submission of the lawsuit referred to in Article 12 of this Law is three years after the discovering of the violation of the right and no more than five years of the day violation was committed. In the event of continued discrimination, the applicable deadline applies to the latest action that resulted in violation. Deadlines do not apply to cases of systemic discrimination. Deadline for submission of request for revision is 3 months of receipt of second-instance judgment.

Article 14

(Security Measures)

(1) Prior to commencement or during the course of the proceedings on the basis of claim referred to in Article 12, Paragraph (1), the court may, upon the proposal of the proponent, instruct security measures or temporary security measures to be taken, as mandated under the laws on civil proceedings in effect in Bosnia and Herzegovina.

(2) Security measures may be directed by the court if:

a) The proponent makes it probable that right to equal treatment has been violated,

b) Security measures are necessary to eliminate the risk of grave violation to equal treatment, irreparable damage or to prevent violence.

Article 15

(Burden of Proof)

(1) In cases when a person or group of persons provide facts in all proceedings specified under this Law, based on the evidence available to them, making it probable that discrimination has occurred, the burden of proof that discrimination has not occurred shall lie with the opposing side.

(2) In cases when a person considers that s/he suffered consequences of discrimination, it shall be allowed to use statistical data or databases as an evidence for realization of the right from Paragraph (1) of this Article.

(3) In cases when a person considers that s/he suffered consequences of discrimination due to failure of reasonable accommodation, burden of proof shall lie with the opposing side.

(4) The person who intentionally exposed him/herself to discrimination with the intent of direct assessment of application of the rules on prohibition of discrimination, may appear as witness in the proceedings for protection from discrimination.

(5) The person referred to in Paragraph (4) of this Article shall be required to notify the BiH Ombudsman Institution of his/her intent, unless the circumstances restrict him/her from doing so, in addition to informing the BiH Ombudsman Institution in writing of any action taken.

(6) The person referred to in Paragraph (4) of this Article may testify in Court as a witness.

(7) The person referred to in Paragraph (4) may file a claim referred to in Article 12, Paragraph (1) items a), b) and d) of this Law in a concrete case.

(8) The provisions of Paragraph (1) of this Article shall not apply to misdemeanor and criminal proceedings.

(9) In cases when court reviews the case in which the BiH Ombudsman Institution already issued a recommendation, which is used by a party to the proceedings as evidence, the court shall be required to look into the recommendation made by the BiH Ombudsman Institution, in accordance with the rules of procedure.

Article 16

(Participation of Third Parties)

(1) In the proceedings initiated in line with Article 12 of this Law, in accordance with the rules of procedure, on the side of a person or group of persons claiming to have been

discriminated against an intervener may be introduced, including body, organization, association or a different party dealing, within its scope of work, with protection from discrimination of individuals or groups whose rights are the subject of the proceedings.

(2) The court shall allow participation of an intervener only upon agreement of the plaintiff.

(3) The intervener shall participate in and take action in the proceedings, until the plaintiff expressly recalls the agreement previously given.

(4) Regardless of the outcome of the proceedings, the intervener shall bear the cost of its participation in the proceedings.

Article 17

(1) Associations or other organizations established in accordance with the law, dealing with protection of human rights or rights of a specific group of individuals, may file a lawsuit against the person who violated the right to equal treatment of large group of individuals who predominantly belong to a group whose right the plaintiff is protecting.

(2) The lawsuit referred to in Paragraph (1) of this Article may include the claim:

a) To determine that the respondent violated the right to equal treatment of members of a group whose rights the plaintiff is protecting,

b) To prohibit any action that violates or that may violate the right to equal treatment, or to take action to eliminate discrimination or its consequences suffered by members of the group,

c) To publish the decision that found violation of the right to equal treatment in the media, at the expense of the respondent.

(3) Procedural provisions of this Law shall appropriately apply to the lawsuit referred to in Paragraph (1) of this Article.

Article 18

(Protection of Persons reporting Discrimination or Participating in Proceedings)

Victimization as a form of discrimination is prohibited. It represents any form of unfavourable treatment of persons who reported or who intend to report discrimination in good faith, who were present or who witnessed discrimination, who refused the instruction to discriminate or otherwise took part in the proceedings for protection from discrimination, provided or intend to provide information or documents needed in the proceedings of protection from discrimination or informed the public of discrimination.

CHAPTER VI: PENAL (MISDEMEANOR) PROVISIONS

Article 19

(Violation of Article 2, Paragraph (2) of this Law)

(1) The legal person that puts a person or a group of persons into less favourable position on the grounds given in Article 2 (Discrimination), Paragraph (1), in a way described in Article 3 (Forms of Discrimination) and Article 4 (Other Forms of Discrimination) of this Law, shall be fined for misdemeanor with 1,500 to 5,000 KM.

(2) Responsible person in state, entity and cantonal institution, Brčko District body, municipal institution, legal person with public authorities and other legal person shall be also fined for misdemeanor from Paragraph (1) of this Article in the amount of 700 to 1,500 KM.

(3) Natural person shall be fined with 550 to 1,500 KM for a misdemeanor specified under Paragraph (1) of this Article.

(4) If misdemeanor from Paragraph (1) of this Article resulted from failure to act upon recommendation of the BiH Ombudsman Institution, legal person shall be fined for such offence with 2,500 to 6,500 KM, and responsible person in the legal person or a natural person shall be fined with 1,000 to 3,000 KM for such offence.

(5) If misdemeanor from Paragraph (1) of this Article resulted from failure to act upon a instruction by a court, legal person shall be fined with 3,500 to 10,000 KM and responsible person in the legal person or natural person shall be fined with 2,000 to 5,000 KM for such offence.

Article 20

(Violation of Article 7, Paragraph (6) and (7) of this Law)

(1) Legal person shall be fined with 1,000 to 5, 000 KM for misdemeanor, resulting from:

a) failure to deliver data or documents upon the request of the BiH Ombudsman Institution, specifically, failure to deliver them within the prescribed deadline, or failure to allow access, in violation of Article 7 (Central Body for Protection from Discrimination), Paragraph (6) of this Law;

b) failure to co-operate with the BiH Ombudsman Institution and failure to provide response or notifications in writing, or failure to provide information on the effect of recommendations given in order to end discrimination, in violation of Article 7, Paragraph (7) of this Law.

(2) Responsible person in state, entity and cantonal institution, Brčko District body, municipal institution, legal person with public authorities and in another legal person, shall be fined with 500 to 1,500 KM for misdemeanor from Paragraph (1) of this Article.

(3) Natural person shall also be fined with 450 to 1,000 KM for misdemeanor from Paragraph (1) of this Article

Article 21

(Violation of Article 18 of this Law)

(1) The legal person that puts into less favourable position the person who has reported discrimination in good faith or the person who has participated in the proceedings for protection from discrimination in any capacity, for the reason of reporting discrimination or participation in the proceedings, in violation of Article 18 (Protection of persons who report discrimination or participate in the proceedings) of this Law, shall be fined for misdemeanor with 1,000 to 10,000 KM.

(2) Responsible person in state, entity and cantonal institution, Brčko District body, municipal institution, legal person with public authority and other legal person, shall be fined for misdemeanor from Paragraph (1) of this Article with 1,000 to 3,500 KM.

(3) Natural person shall also be fined for misdemeanor from Paragraph (1) of this Article with 700 to 2,000 KM.

(4) The responsible person in legal person who intentionally commits misdemeanor from Paragraph (1) of this Article shall be fined with 2,000 to 7,000 KM, and if natural person intentionally commits the same misdemeanor, such natural person shall be fined with 1,500 to 4,000 KM.

Article 22

(Measures of Protection)

(1) For misdemeanor specified under this Law, measures of protection may be taken resulting in seizure of goods and prohibition of a certain professional activity, business activity or duty.

(2) Protective measures of seizure of goods shall be mandatory if misdemeanor is committed through the use of these goods, specifically when the goods were used with the intent to commit minor offence or created as a result of the misdemeanor committed.

Article 23

(Publication of Decision on Misdemeanor)

Decision in misdemeanor proceedings specified under this Law shall be published in public media available on the entire territory of Bosnia and Herzegovina.

CHAPTER VII: TRANSITIONAL AND FINAL PROVISIONS

Article 24

(Harmonization of Other Regulations with this Law)

(1) The provisions of this Law shall apply in the proceedings conducted based on this Law in cases when other laws are not harmonized with this Law.

(2) All laws and general regulations shall be harmonized with the provisions of this

Law within a year of entry of this Law into force.

(3) This Law does not preclude the provisions and conditions determined in international treaties and agreements with religious communities, which do not interfere with their working, normative and organizational autonomy and the principle to fully exercise the right to religious freedom and expression.

(4) All public bodies and other legal persons shall be required to regulate principles of equal treatment in their general legal acts or special legal acts, in addition to being required to ensure that efficient internal procedures are in place to protect from discrimination.

Article 25⁹⁸

(Entry into Force)

This law shall enter into force on the eight day of its publication in the Official Gazette of BiH.

Article 25⁹⁹

(Entry into Force)

(1) Proceedings in cases that are still ongoing pending first instance decision at the moment of entry of this Law into force, shall be conducted in line with the provisions of this Law.

(2) Proceedings in cases in which first instance decision has been made prior to the moment of entry of this Law into force, shall be conducted in line with the provisions of this Law previously in effect.

(3) This law shall enter into force on the eight day of its publication in the Official Gazette of BiH.

98 In line with the Law on Prohibition of Discrimination, "Official Gazette of BiH", No: 59/09

99 In line with the Law on Amendments to the Law on Prohibition of Discrimination, "Official Gazette of BiH" No: 66/16.

ANNEX II

THE MISSION'S QUESTIONNAIRE SENT TO BiH CSO'S

The OSCE Mission to Bosnia and Herzegovina (the Mission) is currently drafting the Assessment of the Work of the BiH institutions in Combatting Discrimination. Although the Law on Prohibition of Discrimination (the LPD) adopted in 2009 (amended in 2016) provides comprehensive framework for protection against discrimination in Bosnia and Herzegovina (BiH), significant steps aiming to improve legal and institutional framework are yet to be undertaken.

Taking into account proactive role your organizations have undertaken regarding the implementation of this Law, the Mission would appreciate your inputs, if possible not later than 14 November.

Questionnaire:

Name of organization: _____ Date: _____

Name of person(s) who answered: _____

1. Please identify major concerns regarding discrimination (reported cases, practices) in your respective work.
2. Please identify main obstacles in the implementation of the Law on Prohibition of Discrimination.
3. Has your organization closely worked with relevant stakeholders regarding certain discrimination cases and how would you assess their performance?
4. In your opinion, what further needs to be done in order to improve the level of implementation of this Law?
5. What has your organization done regarding the implementation of this Law and what are your next steps?

ANNEX III

LIST OF APPLICABLE UN TREATIES AND STANDARDS

The most significant United Nations treaties and standards that contain the anti-discrimination clause are as follows:

1. Universal Declaration of Human Rights (UDHR);
2. International Covenant on Civil and Political Rights (ICCPR);
3. International Covenant on Economic, Social and Cultural Rights (ICESCR);
4. International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
5. International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
6. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
7. International Convention on the Rights of the Child (CRC);
8. International Convention on the Rights of Persons with Disabilities (CRPD),
9. UNESCO Convention against Discrimination in Education.

In addition, discrimination has been subject of many concluding observations, such as:

- The United Nations Human Rights Council, through its Universal Periodic Review (UPR),
- The United Nations Special Procedures,
- The United Nations Treaty Bodies, in charge of overseeing the implementation of the human rights treaties at the signatory states level, such as: the Human Rights Committee (ICCPR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (ICESCR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), etc.

- The Human Rights Commissioner of the Council of Europe,
- The European Commission against Racism and Intolerance (ECRI),
- The European Court of Human Rights,
- The European Committee of Social Rights,
- The Advisory Committee on the Framework Convention for the Protection of National Minorities.
- UN Universal Periodic Review for Bosnia and Herzegovina (recommendation no. 125, second cycle from 2014).