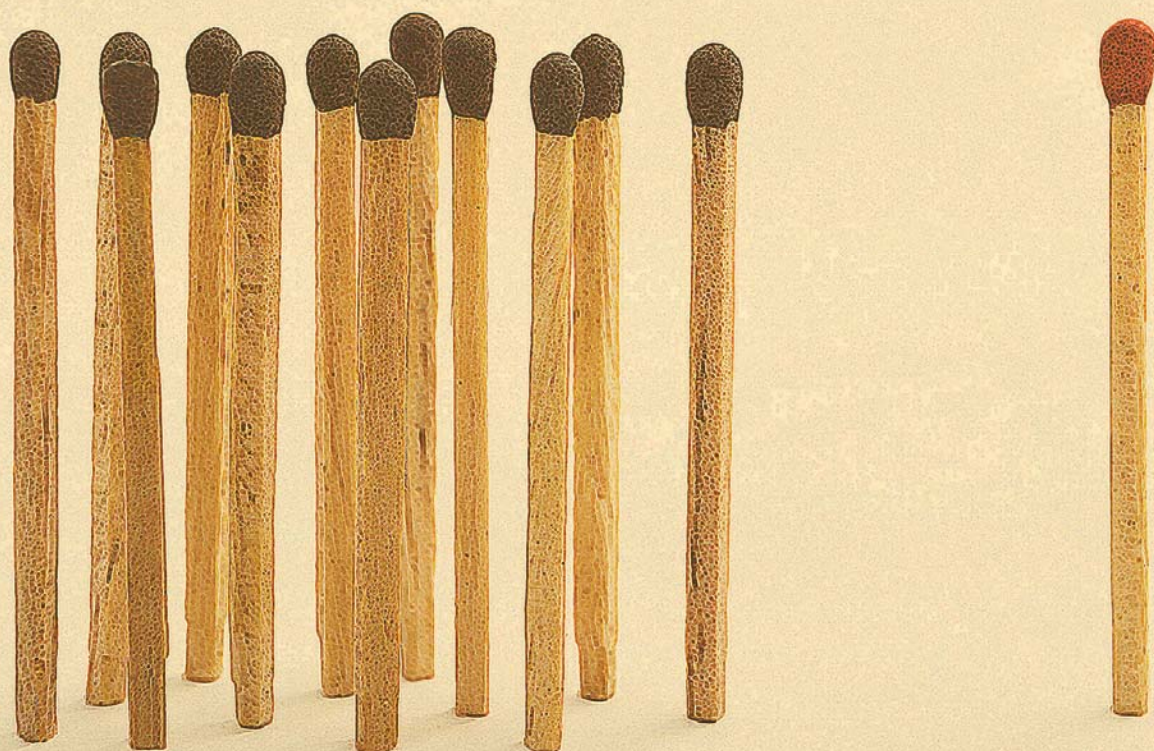


The Ombudsman in the System of Protection against Discrimination in B&H

Situation Analysis and Characteristic Problems



DISCRIMINATION
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Adrijana Hanušić



Sarajevo, 2012.

Title:

The Ombudsman in the System of Protection against Discrimination in B&H:
Situation Analysis and Characteristic Problems

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Publisher:

Analitika – Center for Social Research

Year: 2012

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Address of the publisher:

Kaptol 5, 71000 Sarajevo, Bosnia and Herzegovina

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www.analitika.ba

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We are grateful to Boris Topić for his detailed review and useful comments. We would also like to thank Mervan Miraščija, Legal Program Coordinator at the Open Society Fund B&H, for his very useful and detailed comments. Our gratitude also goes to representatives of the Institution of Ombudsman of B&H, OSCE B&H and Vaša prava, as well as Milovan Batak, Assistant Commissioner for Protection of Equality of Serbia, for their helpfulness and exceptional cooperativeness.

A significant contribution to this report was provided by the experience and expertise of our partner organizations in the Open Society Fund B&H Anti-Discrimination Program: Vaša prava, Mediacentar Sarajevo, ICVA, Prava za sve, Centar za ljudska prava Mostar, Helsinški parlament građana Banja Luka, Forum građana Tuzla and Budi moj prijatelj Sarajevo. Finally, we express our gratitude to Open Society Fund B&H for entrusting us with the production of a series of analyses on the implementation of the Law on the Prohibition of Discrimination of B&H, which we start with this report.

Open Society Fund B&H Anti-Discrimination Program

The report is produced in the framework of the Open Society Fund B&H Anti-Discrimination Program, which brings together partner organizations across B&H divided into four teams committed to key activities in the field of combating discrimination: monitoring, documentation and reporting, strategic litigation, policy analysis, and advocacy.

For more information on the Open Society Fund B&H Anti-Discrimination Program, please visit the website www.diskriminacija.ba.



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1.

Introduction

The Law on the Prohibition of Discrimination of Bosnia and Herzegovina (hereinafter referred to as LPD) accords the Ombudsman of B&H the status of “central institution competent for protection against discrimination”¹ and for that purpose prescribes the establishment of a special department with the sole task of considering cases of alleged discrimination committed by any legal or natural person, in any sphere of life.² The law envisions a broad spectrum of competences for the Ombudsman, ranging from promotional activities, through surveys in the field of discrimination, to acting on complaints filed by individuals alleging to be victims of discrimination and taking an active role in misdemeanor proceedings for protection against discrimination. In this regard, the legislative competences of the Ombudsman of B&H in the field of protection against discrimination to large extent conform with international standards relevant for the operation of equality bodies.

However, for combating discrimination efficiently it is not enough only to adopt legislative solutions harmonized with these standards. The key is to ensure efficient and proper implementation of the Law, which is currently qualified as poor in Bosnia and Herzegovina³, primarily through strengthening institutions that are able to respond to the new important task of anti-discrimination protection accorded to them by the Law and through continuous support to their activities by other key actors. At the same time, in light of some existing legislative innovations, it is important at the earliest possible stage of implementation of the Law to ensure a more precise formulation of certain vague or incomplete provisions which provide the framework for the role of the Ombudsman Institution in the system of anti-discrimination protection, to precisely define and strengthen its concrete competences and conduct on particular issues, as well as to urge its maximum internal engagement in dealing with the problem of discrimination in line with generally accepted standards and obligations.

In line with that, the goal of this research, along with providing an overview of international standards and comparative practice related to equality bodies, is to identify some of the obstacles that stand in the way of more efficient fulfillment

¹ “Zakon o zabrani diskriminacije Bosne i Hercegovine”, *Službeni glasnik BiH*, no. 59/2009, Article 7 (1).

² “Zakon o zabrani diskriminacije Bosne i Hercegovine”, Article 7 (5), 2.

³ European Commission, Bosnia and Herzegovina 2011 Progress Report (Brussels: European Commission, October 12, 2011), SEC(2011)1206, p. 18.

of the Ombudsman's role in protection of individuals against discrimination, as well as to offer potential solutions for overcoming them.

The report is based on an analysis of the legislative framework, available data on the situation in the field of combating discrimination in practice in B&H (such as relevant statistics, information on the course and outcome of individual cases before the Office of the Ombudsman), analysis of relevant recommendations made by the Ombudsman, and interviews with several competent interlocutors. In addition, a comparative survey was carried out with the aim of identifying examples of good practice related to different problem areas and identified obstacles to efficient implementation on the Law on the Prohibition of Discrimination from the perspective of the Institution of the Ombudsman of B&H. Although the countries included in the comparative survey were defined in advance – using as the basic criterion the existence of an Ombudsman or an equivalent institution in the system of protection against discrimination and aiming to encompass primarily European Union countries and countries in the region that share our problems – additional interesting cases were also included if required by a specific aspect of the survey.

In this connection, bearing in mind the still insufficient practice in this field, we focused on analyzing structural conditions and processes in which the Ombudsman of B&H is involved in order to identify the fundamental structural obstacles. Based on contextualized analysis and comparative experience, we produced recommendations on how to advance the position and maximize the contribution of the Ombudsman in efficient implementation of the Law on the Prohibition of Discrimination. Bearing in mind the numerous roles accorded to this institution by the Law, we focused on institutional aspects and on the key competence of the Ombudsman in this field – i.e. on fundamental problems and possible solutions related to acting on individual discrimination complaints.

It is important to emphasize that the final draft of this publication was sent to a large number of experts, Institution of the Ombudsman of B&H and Serbian Commissioner for Protection of Equality, as well as to a wide circle of relevant actors in this field. Their comments and suggestions were integrated into the final version of the report.

The report is structured as follows: relevant international standards related to ombudsman institutions and equivalent equality bodies are presented first. After these introductory considerations, the position and role of the Institution of the Ombudsman of B&H is briefly presented in the context of the Law on Protection against Discrimination of B&H, specifically focusing on the procedure for individual complaints. The third, key part of the report lays out the fundamental legislative, institutional and procedural problems and obstacles that make it difficult for the Ombudsman of B&H to effectively exercise the function of central institution for protection against discrimination in B&H. Recommendations elaborated in detail and aimed at eliminating the identified problems constitute the closing section of this report.

2.

International Standards

2.1. Competences

Anti-discrimination directives of the European Union⁴ require the establishment of equality bodies which have a minimum of mandatory competences in the field of combating discrimination⁵. These directives prescribe the obligation of designating a body whose competences include “providing independent assistance to victims of discrimination in pursuing their complaints about discrimination”, “conducting independent surveys” and “publishing independent reports and making recommendations” relating to discrimination. By using such broad formulations, EU law gives considerable discretion to the member states in deciding which specific competences to accord to this type of body.⁶ The essence is that these bodies, among other things, must provide some kind of legal assistance to victims of discrimination.⁷

At the level of the Council of Europe, introduction of broader and more diverse competences of bodies for combating racial discrimination is recommended. The European Commission against Racism and Intolerance (*ECRI*) has always promoted the idea of introducing specialized commissions, an ombudsman or other bodies at the national level, whose mandate would include racism and racial discrimination issues, and has promoted their strengthening where such bodies already exist. Through the practice of publishing special reports on progress of individual Council

⁴ “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”, *Official Journal of the European Union*, L 18/2000, recital 24 of the Preamble and Article 13; “Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services”, *Official Journal of the European Union*, L 373/2004, Article 12; “Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)”, *Official Journal of the European Union*, L 204/2006, Article 20.

⁵ On grounds of sex, race and ethnic origin.

⁶ Preparatory work on the directives confirms that this was the intention of their creators. Equinet’s Working Group on Dynamic Interpretation and B. D. Jacobsen, *Influencing the law through legal proceedings - the powers and practices of equality bodies* (Brussels: Equinet, 2010), p. 10.

⁷ *Ibid.*, pp. 10–11; In practice, assistance may range from providing advice and information, through conducting investigations and issuing non-binding recommendations or binding decisions, to the right to represent parties in court. Equinet’s Working Group on Strategy Development, *Providing Independent Assistance to Victims of Discrimination* (Brussels: Equinet, 2011), p. 7.

of Europe member states in this field, as well as in important recommendations⁸, ECRI has expressed the principled stand that such independent national bodies should have as many competences as possible, including the competence of classical adjudication of complaints, either through efforts to reach an amicable settlement or by adopting binding and enforceable decisions. In addition, according to ECRI recommendations, such institutions should have investigative powers, the right to bring cases before courts and to participate in legal proceedings as an expert, the right to assist victims by providing general advice and legal aid, including representation in proceedings before courts, as well as competence for monitoring, raising public awareness and an advisory role in this field.⁹

The Commissioner for Human Rights of the Council of Europe recommends to member states that national structures for protection of equality should assume quasi-judicial and promotional functions.¹⁰ This institution points to a division of these bodies into a *quasi-judicial type*, whose dominant activity is focused on investigation, hearing, mediation and adjudication of discrimination cases, and a *promotional type*, where focus is placed on providing assistance to individuals with discrimination complaints, raising public awareness and conducting surveys. A separate type are bodies which combine both of these activities, which is certainly the case in B&H. The Commissioner recommends that bodies with a promotional function be given the power to take cases on their own initiative and bring cases to court and that quasi-judicial bodies be able to order binding sanctions that are proportionate, effective and dissuasive and follow up on the implementation of any recommendations they have made.¹¹

Some global standards also prescribe somewhat broader competences for bodies providing protection of human rights with the goal of more efficient protection of victims of rights violations. Thus, the *Paris Principles of the United Nations*¹², which represent the main source of normative standards for national

⁸ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (Strasbourg: ECRI, June 13, 1997), and European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (Strasbourg: ECRI, December 13, 2002).

⁹ Ibid. *General Policy Recommendation No. 2*, principle 3; European Commission against racism and intolerance (ECRI), Explanatory Memorandum to ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination (Strasbourg: ECRI, 2003), points 51–52 related to principle 24 of General Recommendation No. 7.

¹⁰ Commissioner for Human Rights of the Council of Europe, Opinion of the Commissioner for Human Rights on national structures for promoting equality (Strasbourg: Commissioner for Human Rights of the Council of Europe, 2011), 6.2, point 2.

¹¹ Ibid., 6.2, point 3.

¹² UN General Assembly, Principles relating to the status of national institutions; and Additional principles concerning the status of commissions with quasi-judicial status, Resolution A/RES/48/134 (UN General Assembly, December 20, 1993).

human rights protection institutions, stipulate that these institutions should promote and protect human rights. The protective aspect of these bodies' mandate means that they should be able to conduct investigations and monitoring of human rights and give opinions, recommendations and reports on any human rights related issues to the competent authorities. In addition, the possibility of hearing complaints and conducting investigations concerning individual complaints is also envisioned. The above principles regarding the need to introduce several types of competences for these bodies with the goal of protection and promotion of human rights establish very important standards applicable to national bodies for protection against discrimination.

United Nations standards recognize the competence to access all needed data and protection from victimization as important elements of conducting effective investigations. As conducting an investigation involves gathering evidence and its analysis, the Paris Principles require that such bodies be able to, in the framework of a question they are investigating, hear any person and obtain any information and any documents necessary for assessing situations falling within their competence¹³. This implies being able to compel persons to provide all necessary information, as well as the possibility of protection against victimization for persons who provided such information.¹⁴ This leaves less room for obstruction of investigations into human rights violations.

Bodies that have quasi-judicial powers as part of their protective mandate¹⁵, according to the Paris Principles, must adhere to certain standards. Although these bodies may, but not necessarily, have such powers, where they do exist the Paris Principles prescribe mandatory requirements for exercising them: the obligation to seek an amicable settlement through mediation or through binding decisions, the obligation to inform individuals of their rights and the remedies available to them in the framework of that body or other mechanisms – including information on how to access them – the obligation to hear any complaints or petitions or pass them on to any other competent authority if necessary¹⁶, as well as the obligation to make recommendations to the competent authorities.¹⁷

¹³ Ibid.

¹⁴ This includes not only prohibition of victimization, but also, in case the prohibition is violated, being able to pronounce sanctions or to demand that sanctions be pronounced by other competent bodies. United Nations (UN), *National Human Rights Institutions. History, Principles, Roles and Responsibilities (Professional Training Series No. 4/ Rev. 1)*, (New York & Geneva: United Nations, 2010), p. 79.

¹⁵ Competence to hear and consider complaints concerning individual situations of human rights violations.

¹⁶ In some countries this is prescribed with the goal of preventing duplication in addressing the same question or if it is assessed that a matter may be settled in a better way before another body. United Nations (UN), *National Human Rights Institutions*, p. 84.

¹⁷ UN General Assembly, *Additional principles concerning the status of commissions with quasi-judicial status*.

More specifically, with regard to the role of national bodies in protection against racial discrimination, United Nations bodies advocate the introduction of a broad spectrum of their competences. Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination¹⁸ recommends that state bodies in charge of combating racial discrimination receive complaints from alleged victims, conduct inquiries either in the name of a complainant or in their own name, act as a mediator, bring legal actions either in the name of a complainant or in their own name, and provide legal assistance and support to victims who have instituted court proceedings.

Comparative analyses in the EU indicate that most Ombudsmen and specialized equality bodies have quasi-judicial competences as well. They hear and consider complaints about human rights violations, including violation of equality, first trying to settle a dispute through mediation and, in case of failure to do so, usually making non-binding recommendations. Many of them are also able to instigate administrative and criminal proceedings.¹⁹ These bodies, for example in Bulgaria, Hungary and Ireland, are able to conduct investigative proceedings upon complaints.²⁰ EU member states, however, rarely prescribe that specialized bodies may pronounce sanctions in cases when they establish discrimination.²¹ Instead, these institutions as a rule can suggest the instigation of a separate proceeding (criminal or misdemeanor) with the competent judicial bodies, recommend restitution measures that place the victim in the situation in which he or she would be had the discrimination not occurred, or can focus on preventing similar future violations.²²

¹⁸ UN Office of the High Commissioner for Human Rights, Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination, HR/PUB/96/2 (Geneva: UN Office of the High Commissioner for Human Rights, 1996).

¹⁹ Lilla Farkas, *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives* (Luxembourg: Publications Office of the European Union, 2011), p. 60.

²⁰ Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law in Europe. The 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia and Turkey compared* (Luxembourg: Publications Office of the European Union, 2011), p. 85.

²¹ For example, in Bulgaria, after conducting a public proceeding and hearing both sides, in addition to binding instructions to remedy or prevent the violation, administrative fines are also pronounced, ranging from 125 to 1,250 euros, which go into the state budget rather than to the injured party, while in case of repeated proceedings the fines are doubled. In addition, so-called soft penalties may be ordered, such as a public apology or publishing the decision of the specialized body or information about it. Margarita Ilieva, *Bulgaria – Country Report on Measures to Combat Discrimination* (European Network of Legal Experts in the Non-discrimination Field, 2010), pp. 78 and 82.

²² Recommended preventive measures may consist of appropriate training for staff of a particular body or adoption or change of a certain rule or practice. UN, *National Human Rights Institutions*, pp. 89–90.

2.2. One or More Bodies for Protection against Discrimination?

With regard to bodies for protection of human rights, i.e. protection of equality, dilemmas are often present in some countries as to whether to entrust protection to one institution with a broad mandate or to create bodies specializing in protection of specific vulnerable groups and their rights.²³ Carver, for example, argues in favor of a single body, for several reasons: such a body consistently provides assistance to all victims, facilitates exchange of ideas and findings related to good practice on different discrimination grounds and areas of protection, achieves a reasonable cost-effectiveness ratio²⁴, is better identified in the public which makes it easier for individuals to recognize it as a body that they can address for protection, and also has greater authority and influence on relevant authorities. It is easier for this kind of institution to garner public support because its activities encompass individuals and groups from different areas of protection.²⁵ As a counter-argument to those who advocate creating specialized bodies, arguing that they will be able to provide special protection to specific particularly vulnerable groups, Carver points out the principle of universality and indivisibility of human rights which does not favor creating a hierarchy in the context of their protection.²⁶

Recent comparative practice points to the general tendency of unifying these structures and according the mandate of protection against discrimination to a single body. In some countries with a longer tradition in human rights protection, which are also recognized as positive examples of protection against discrimination and in which, upon the expansion of protection against discrimination to include more grounds, several specialized bodies had been established for the protection of specific vulnerable groups, over time the imperative arose to merge them into a single protection body. In Australia for example, that was done back in 1986 by merging bodies responsible for human rights, community relations, gender discrimination and employment discrimination into the so-called Human Rights and Equal Opportunity Commission (as of 2009 Australian Human Rights Commission).²⁷ A similar example is the United Kingdom, which in the last three decades of the

²³ See Richard Carver, "One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? – Lessons from the European Experience", *Journal of Human Rights Practice*, No. 3 (2011), pp. 1–24.

²⁴ Duplication of costs is avoided and savings that are made this way can be used, for example, to open regional offices, increasing availability of services to individuals.

²⁵ The EU Fundamental Rights Agency (FRA) also supports the creation of single institutions, proceeding from the assumption that this ensures concentration of resources in one place and avoids overlapping of mandates, making it easier for individuals to recognize more easily who to go to for assistance. See Carver, "One NHRI or Many?", p. 5, footnote 7.

²⁶ *Ibid.*, p. 21.

²⁷ *Ibid.*, p. 22.

20th century established three commissions for protection against discrimination, but in 2007 the whole field of protection was entrusted to the Equality and Human Rights Commission.²⁸ Sweden too, the birthplace of the ombudsman institution, unified its four bodies in 2008, with the passing of the Discrimination Law, in one institution, the Equality Ombudsman.²⁹ It seems that a similar process is taking place in Croatia, where the public and parliament are considering merging the current three specialized Ombudsmen (Ombudsmen for protection of children, for gender equality and for disabled persons) with the general mandate of the Office of the Ombudsman of the Republic of Croatia.³⁰

On the other hand, the Venice Commission, for example, points out that it is useful in the framework of an already existing institution of Ombudsman to create specialized organizational units for protection against discrimination. Although it has pointed out that creating a specialized body for combating discrimination is the best solution³¹, the Venice Commission emphasized that it is also a good solution, in contexts in which the Ombudsman is still an institution in a consolidation and development phase, to introduce in the framework of an already existing national Ombudsman institution a specialized Ombudsman for discrimination issues, in the form of a special department and/or appointing a deputy ombudsman for this specific field. This way, the special Ombudsman will benefit from the status and legitimacy of the general Ombudsman and the protection mechanism will be mutually strengthened and more efficient.³² Specialization of a deputy or assistant Ombudsman can be positive because it allows them to deal efficiently with specific problems in the fields entrusted to them, while the Ombudsman is able to ensure coherence and coordination of activities of the special departments.³³

From an individual's perspective, according the mandate of combating discrimination to a single body simplifies the procedure of using existing protection

²⁸ The Commission extends its jurisdiction to England, Wales and Scotland, whereas Northern Ireland maintained its two commissions, one for human rights and the other for protection of equality. *Ibid.*, pp. 3, 6, 18.

²⁹ *Ibid.*, p. 3.

³⁰ *Ibid.*, pp. 2, 13.

³¹ European Commission for Democracy through Law (Venice Commission) and The OSCE Office for Democratic Institutions and Human Rights, Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro (Venice: European Commission for Democracy through Law and The OSCE Office for Democratic Institutions and Human Rights, October 14/15, 2011), CDL-AD(2011)034, point 36.

³² European Commission for Democracy through Law (Venice Commission), Opinion on the possible reform of the Ombudsman Institution in Kazakhstan (Venice: European Commission for Democracy through Law, June 1/2, 2007), CDL- AD(2007)020, point 25.

³³ European Commission for Democracy through Law (Venice Commission), Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro (Venice: European Commission for Democracy through Law, October 9/10, 2009), CDL-AD(2009)043, point 14.

mechanisms. A certainly important fact is that such a unified approach avoids confusion for discriminated individuals as to which body to address. In addition, individuals are rarely defined on the basis of just one characteristic and they are often not aware on what ground they are discriminated against or are a victim of multiple discrimination. From this perspective, it seems only justified in the Bosnian and Herzegovinian context to accord the task of protection against discrimination to a single body – the Institution of Ombudsman of B&H.

Nevertheless, even in the framework of specialized bodies or departments for combating discrimination, it is very important to ensure that the interests of particularly vulnerable groups are considered. The Commissioner for Human Rights of the Council of Europe has pointed out the existence of bodies covering only certain protected discrimination grounds, whereas the mandate of others, such as in the case of B&H, is not limited, but covers all protected grounds. The latter option was assessed as positive due to its administrative simplicity, avoidance of hierarchy created among different grounds of discrimination, and allowing adequate treatment of complaints that are related to discrimination on multiple protected grounds simultaneously. It is pointed out, however, that it is important to make sure that such bodies develop appropriate expertise for each of the different discrimination grounds.³⁴ As an institutional solution in this regard, Carver suggests creating a specialized department with a separate budget in the framework of a single institution.³⁵

2.3. Conditions for Efficient Operation of the Ombudsman Institution

The two core indicators against which to assess national equality bodies emphasized by the Commissioner for Human Rights of the Council of Europe are independence and effectiveness. The former indicator is actually key to the latter one. Independence means that these bodies are able to provide and allocate their resources as they see fit for quality implementation of their activities, to make independent decisions in relation to staffing issues, to determine their own priorities and to exercise their powers as and when they deem necessary.³⁶ Effectiveness, on the other hand, means that these bodies are able to deploy all of their functions and powers in a way that ensures real impact on occurrences of

³⁴ Commissioner for Human Rights of the Council of Europe, *Opinion of the Commissioner*, 4.2.

³⁵ For example, in response to the identified need to give special attention to disabled persons, a specialized committee was formed for protection of their rights in the framework of the UK Commission. Carver, “One NHRI or Many?”, p. 21.

³⁶ Commissioner for Human Rights of the Council of Europe, *Opinion of the Commissioner*, 4.2 and 4.4.

discrimination and inequality.³⁷

Especially important in this context is the level of resources available to these bodies, as well as the nature and scope of the functions accorded to them. It is often pointed out that equality bodies need to be accorded the broadest range of functions, which will enable them to simultaneously use a strategic mix of activities, such as implementing the legislation, educating the public, raising awareness and providing support to policy makers, employers and service providers in adopting good practice, ultimately paving the way for genuine impact in the field of combating discrimination.³⁸

With regard to resources that equality bodies need, the Commissioner for Human Rights of the Council of Europe particularly focuses on the issue of finances and staffing of these bodies.³⁹ He points out in his Opinion that there are considerable differences in this regard among the member states and that the difference between the best and least resourced bodies essentially reflects different levels of commitment to these structures and different understanding of their potential role and the gains that can be realized through such bodies.⁴⁰ Some of these bodies are unable to implement some of their functions solely due to lack of resources.⁴¹ Therefore, an especially important recommendation by the Commissioner is that equality bodies should have sufficient resources to implement all of their functions to the scale necessary to make true impact on discrimination and equality, which states are supposed to assess based on the available evidence and indicators.⁴² In this regard, in assessing the budget of an institution, the following factors need to be taken into account: population size and economic circumstances, nature and levels of reported and estimated unreported cases of discrimination, range and roles of other stakeholders involved in promoting equality and combating discrimination, resources required to enable the body to implement all of its functions in a strategic manner and to a scale needed to make an effective impact in combating discrimination.⁴³ These factors are certainly very important for understanding the current capacities of the Institution of Ombudsman of B&H and determining the optimal financial and staffing resources for the implementation of its function, particularly bearing in mind the very broad mandate under the Law on the Prohibition of Discrimination in B&H.

³⁷ Ibid., 4.5.

³⁸ Ibid., 4.5.

³⁹ Ibid., See specifically sections 4.2, 4.4 and 4.5.

⁴⁰ Ibid., 4.2.

⁴¹ Ibid., 4.5.

⁴² Ibid., 6.2, point 4.

⁴³ Ibid., 4.5.

3.

Role of the Ombudsman in the System of Protection against Discrimination in B&H: The Ideal Legislative Scenario

3.1. Competences

Generally speaking, the legislative competences of the Ombudsman in the field of protection against discrimination are to a large extent in conformity with EU directives, international standards and relevant comparative practice. The Institution of Ombudsman of B&H was accorded quasi-judicial competences by the LPD – acting on individual complaints, carrying out necessary investigation proceedings and issuing opinions and recommendations. Taking into account that legally non-binding recommendations are a rule with regard to the form of decisions made by the Institution of Ombudsman⁴⁴, the only potential shortcoming in the field of protection against discrimination in the current system is that this institution does not use the possibility of instigating civil proceedings for protection against discrimination. We will elaborate on the Ombudsman's potential new roles in this field further on in this report.

The Ombudsman of B&H also has a broader promotional and preventive role in combating discrimination. In addition to protecting individuals in specific discrimination cases, the Institution of Ombudsman has broader competences in this area. A considerable part of its competences is focused on preventive action – education and promotional activities in the context of the right to freedom from discrimination. In this regard, the Institution of Ombudsman of B&H collects and analyzes statistical data on discrimination cases, conducts surveys in the field of discrimination on its own initiative, sends annual reports, as well as, when needed, extraordinary reports on discrimination manifestations to the

⁴⁴ A survey from 2010, encompassing 25 such bodies from 20 different European countries (nearly all of them EU member states) showed that they make legally binding decisions in only three cases (Bulgaria, Denmark and Hungary). Equinet and B. D. Jacobsen, *Influencing the law*, p. 23. This competence is usually accompanied by the ability of the equality body which made the specific decision to address a higher body, such as a tribunal, court or prosecutor's office, if the party does not comply with the decision in the given time. See UN, *National Human Rights Institutions*, p. 91.

competent entity and state parliamentary bodies⁴⁵, informs the public about discrimination manifestations, raises awareness on issues related to racism and racial discrimination in society, monitors legislation, gives advice to legislative and executive bodies and proposes legislative and other solutions, and improves policies and practices aimed at ensuring equal treatment.⁴⁶

Nevertheless, it should be noted that the functions of the Ombudsman of B&H in the field of protection against discrimination go beyond the traditional competences of this institution. According to explanatory notes accompanying the LPD, the functions of the Ombudsman stipulated by the Law were designed in line with European Commission recommendations and “match the competences of the Institution of Ombudsman of Bosnia and Herzegovina.”⁴⁷ However, it should be pointed out that the Law also envisions considerable innovations which accord even broader competences to the Ombudsman in cases related to protection against discrimination, which will be discussed further on in this report.

It is especially important to point out that the Law on the Prohibition of Discrimination prescribes the establishment of a special Department for Elimination of all Forms of Discrimination as part of the Institution of Ombudsman of B&H. Yet, the Department had been practically created back in January 2009, even before the Law was adopted, as a result of recognition of the need to set up a special mechanism for preventing all forms of discrimination. Its main task is to ensure “a harmonized approach to the exercise and protection of citizens’ rights in the entire territory of B&H”⁴⁸ and to undertake measures to prevent different forms of discrimination in the exercise of citizens’ constitutionally guaranteed rights. The department is headed by the Head of Department, who is a Deputy Ombudsman at the same time.

The LPD expands the usual competences of the Ombudsman of B&H in the field of protection against discrimination to cover the private sector as well, a very important novelty. Namely, while the Ombudsman institution, pursuant to the Law on the Human Rights Ombudsman of B&H, primarily protects individuals in

⁴⁵ In relation to this, in February 2012 the Institution of the Human Rights Ombudsman of B&H published *Report on Occurrences of Discrimination in Bosnia and Herzegovina*, available at <http://www.ombudsmen.gov.ba/>.

⁴⁶ “Zakon o zabrani diskriminacije”, Article 7(2).

⁴⁷ Faris Vehabović, Adnan Kadribašić and Midhat Izmirlija, *Komentar Zakona o zabrani diskriminacije* (Sarajevo: Centar za ljudska prava Univerziteta u Sarajevu, 2010.), pp. 82–83; Explanatory notes in the archive of the author.

⁴⁸ Ombudsman, *Izveštaj o pojavama*, p. 2.

cases of violation of their rights by government bodies in B&H⁴⁹, the LPD expands its competences to protection against discriminatory *conduct by all natural and legal persons*.⁵⁰ This competence in the context of the private sector, even in a comparative perspective, is not characteristic of the institution of Ombudsman as such, but is rather specific for separate equality bodies.⁵¹

In addition, the Institution of Ombudsman of B&H has a special role in providing legal assistance in the context of discrimination. The Law on the Prohibition of Discrimination has accorded this institution the responsibility to provide necessary information to both natural and legal persons who filed a discrimination complaint “on their rights and obligations and on possibilities of judicial and other forms of protection”, and to provide those addressing international bodies for protection against discrimination with “guidelines, advice, consultation during a procedure, proposals and recommendations.”⁵² The Law thus directs individuals to the Institution of Ombudsman as the first instance in seeking protection against discrimination.

3.2. Procedure for Complaints – Basic Principles

The procedure for individual complaints before the Ombudsman of B&H has multiple advantages for the individual – it is free, straightforward and involves appropriate assistance. This procedure, which does not require expert legal assistance, is the most important aspect of anti-discrimination protection which the Ombudsman of B&H provides for individuals. Victims of discrimination, natural and legal persons, may address their complaints directly to the Ombudsman (by regular mail, electronic mail, fax or in person), who provides assistance if needed in filling out the specific form used for that purpose, explains their rights and obligations, as well as the possibility of getting judicial and other forms

⁴⁹ Pertaining to all institutions, bodies, agencies and all other government authorities in Bosnia and Herzegovina, as well as private institutions performing public duties. “Zakon o ombudsmanu za ljudska prava Bosne i Hercegovine”, *Službeni glasnik BiH*, 19/02, Article 1, paragraph 2, subsection d), amended with “Zakonom o izmjenama i dopunama Zakona o ombudsmanu za ljudska prava Bosne i Hercegovine”, *Službeni glasnik BiH*, 32/06, Article 1.

⁵⁰ “Zakon o zabrani diskriminacije”, Article 7, paragraph 5. The situation is similar in Serbia, where the Commissioner who is in charge of anti-discriminatory protection receives complaints of discrimination committed by both public and private actors and the Ombudsman receives only complaints of discrimination committed by state actors. Equally, the Law on Suppression of Discrimination in Croatia expanded the traditional competences of the Ombudsman in the anti-discrimination field to private actors.

⁵¹ Farkas, *How to Present a Discrimination Claim*, p. 60.

⁵² “Zakon o zabrani diskriminacije”, Articles 7.2 b) and 7.4.

of protection available to individuals, including referring them to bodies and organizations that can represent them in the process of getting court protection. This helps the parties to protect themselves against discrimination, to formulate their allegations and requests in the best way possible, and also to use other forms of protection which, depending on the specific circumstances, may involve litigation, administrative, criminal or misdemeanor proceedings, as well as addressing competent inspection bodies.

The procedure of protection before the Ombudsman is adapted to the needs of poor and marginalized population groups. In the very mechanism of protection by the Ombudsman of B&H, as a rule there is no need for an expert legal representative, which is often emphasized even at the international level as one of the main advantages of a procedure before a body for protection of equality or generally human rights. It is enough for an individual who considers himself/herself discriminated or recognizes himself/herself as a victim of a human rights violation to address the Institution of Ombudsman of B&H, who collects information, evidence, statements and so forth by talking to the individual and using its investigative competences, based on which it is able to identify any violation of the right to equality. As this mechanism is free, in most cases⁵³ it is more accessible to victims of discrimination, including poor and marginalized groups. This is very important as “the majority of citizens who address the institution are legally uneducated or in a state of social need”.⁵⁴

If it decides that a complaint or an issue that is considered *ex officio* provides enough ground for investigation, the Ombudsman institution may open an investigation procedure, which carries an obligation of cooperation for all persons. This involves requesting information and responses from legal persons against which the procedure is instigated. All government institutions and other legal and natural persons have an obligation to deliver all requested data and documents to the Ombudsman no later than 30 days from the day they receive the request.⁵⁵ Under the Law on the Human Rights Ombudsman of B&H (Article 25) and Annex VI (Article 6) of the Dayton Agreement, the obligation of cooperation with the Ombudsman is also prescribed with regard to providing access to all files and documents.

Non-governmental organizations may also initiate an investigation procedure with the goal of protection against discrimination. Although the LPD only prescribes

⁵³ An exception is the potential problem of insufficient presence of the Ombudsman of B&H in some geographic areas, which may have a negative impact on use of this protection mechanism by individuals from that area. For more details, see the chapter on structural problems faced by the Ombudsman of B&H.

⁵⁴ Predrag Raosavljević, Head of the Department for Elimination of all Forms of Discrimination/ Assistant Ombudsman of B&H, personal interview, February 6, 2012.

⁵⁵ “Zakon o zabrani diskriminacije”, Article 7, paragraph 6.

the possibility of filing a complaint by a person who has a legitimate interest, a representative of the Institution of Ombudsman⁵⁶ points out that there have been several cases instigated on the initiative of non-governmental organizations, either based on their report or by drawing attention to certain circumstances that may constitute discrimination, when the Ombudsman of B&H as a rule opens an investigation *ex officio*.

Proceeding from international standards and comparative practice, the LPD also defines the role of the Ombudsman in mediation between opposing parties. Namely, the Ombudsman suggests the instigation of a *mediation* procedure pursuant to the provisions of the Law on Mediation.⁵⁷

It is important to point out that the Ombudsman of B&H also has broad competences that are not related to individual discrimination cases. In this regard, the institution may conduct *general investigations*, which means meetings with relevant ministries, visits to institutions or interviews with vulnerable categories. An example is an investigation into cases of racial discrimination, xenophobia and related intolerance, which the Ombudsman of B&H undertook in 2011 on request of the United Nations High Commissioner, as well as general investigations on certain occurrences and categories of people, such as beggary by Roma children, rights of persons with disabilities, and situation in institutions for special needs children, which resulted in the production of extensive special reports.⁵⁸

The Ombudsman of B&H makes recommendations with measures for elimination of discrimination and monitors their implementation. If a case is not settled already in the investigation phase and if it is established based on information obtained during the investigation procedure that discrimination did occur, the Ombudsman makes a *recommendation* with the aim of preventing and eliminating discrimination, demanding to remedy the violation of rights and suggesting measures (individual and/or general)⁵⁹ for its elimination, usually leaving a deadline of 30 days.⁶⁰ After making recommendations, the case is not closed and there is a system of electronic and technical support for monitoring implementation of recommendations.⁶¹

⁵⁶ Predrag Raosavljević, personal interview, February 6, 2012.

⁵⁷ “Zakon o zabrani diskriminacije”, Article 7, paragraph 2, subsection d).

⁵⁸ Predrag Raosavljević, personal interview, February 6, 2012.

⁵⁹ For example, to harmonize Rule Books with the LPD by inserting provisions on prohibition of discrimination or abolishing provisions favoring a particular category of individuals in the exercise of certain rights, to annul a job posting, to reinstate an individual in the job they held prior to the discrimination, to establish cooperation with the Ombudsman, to educate employees on the need to respect the prohibition of discrimination; Predrag Raosavljević, personal interview, February 6, 2012.

⁶⁰ Predrag Raosavljević, personal interview, February 6, 2012.

⁶¹ Predrag Raosavljević, personal interview, February 6, 2012.

Failure to act in line with recommendations, as well as refusal to cooperate with the Ombudsman in eliminating discrimination⁶², constitutes a misdemeanor. High fines may be pronounced for this misdemeanor in a misdemeanor procedure, both for legal persons and responsible individuals within legal persons, as well as for natural persons. This is another important innovation compared to the previous general role of the Ombudsman which did not envision misdemeanor sanctions for failure to implement a recommendation made by this institution.

The LPD envisions an active role of the Ombudsman in misdemeanor procedures envisioned by the Law. Article 7, paragraph (j), of the Law prescribes that the Ombudsman “has the right to instigate and participate in a procedure for protection against discrimination for misdemeanors prescribed by this Law”. At least at first glance, this is the only court procedure which the Ombudsman of B&H is able to instigate and participate in and another innovation compared to the usual competences of the Ombudsman in other Departments. This is a very important innovation which essentially changes the concept of the Ombudsman’s role and competences that is accepted in B&H. The representative of the Institution of Ombudsman of B&H also confirms that only in cases of violation of the Law on the Prohibition of Discrimination, the Ombudsman of B&H is able to ask the competent court, by filing a request for the initiation of a misdemeanor proceeding against a legal or natural person, to punish these persons and “in a way to sanction failure to comply with his recommendations or failure to act in line with the provisions of the Law”.⁶³

⁶² Including failure to deliver data or documents on the request of the Ombudsman, failure to deliver them in the prescribed time, denying insight into them, lack of written responses or notifications, failure to report the effects of the recommendations made, as well as general lack of cooperation with the Ombudsman.

⁶³ Predrag Raosavljević, personal interview, February 6, 2012.

4.

Key Problems of the Institution of Ombudsman of B&H in Implementation of the Law on the Prohibition of Discrimination

4.1. Structural Issues

4.1.1. Budget Limitations

Financial problems, i.e. budget limitations, have a major effect on the scope and efficiency of implementation of activities of the Ombudsman of B&H. Several reports and analyses by the non-governmental sector speak about this problem. The Helsinki Committee in its Report on the State of Human Rights in Bosnia and Herzegovina in 2010 points to the unsatisfactory activity of the Institution of Ombudsman⁶⁴, which it says is a result of understaffing and the way the institution is funded. As it points out, a consequence of the fact that it is funded from the B&H budget is that it is not able to make independent decisions on human resources needed for combating discrimination. This situation undermines its independence, because representatives of legislative and executive authorities are thus able to limit its capacities for implementation of certain mechanisms envisioned by the law, such as collection and analysis of statistical data on discrimination cases, production of extraordinary reports and informing the public on discrimination occurrences.⁶⁵

Bosnia and Herzegovina has not provided adequate financial and staffing resources for the Ombudsman with the aim of combating discrimination more efficiently. Such limitation of resources, however, is not a problem only in B&H. Problems related to independent management of both finances and staff of

⁶⁴ Helsinški komitet za ljudska prava u Bosni i Hercegovini, *Izveštaj o stanju ljudskih prava u Bosni i Hercegovini za period januar-decembar 2010* (Sarajevo: Helsinški komitet za ljudska prava u Bosni i Hercegovini, 2010); In this regard also see Vaša prava, Javna rasprava u Mostaru "Borba protiv diskriminacije – sadašnje stanje i izazovi u BiH", October 31, 2011.

⁶⁵ Same conclusion in *Izveštaj u sjeni Koalicije nevladinih organizacija o primjeni Međunarodne konvencije o ukidanju svih oblika rasne diskriminacije u Bosni i Hercegovini* (point 7); In such circumstances, the Ombudsman has promoted the Law and informed institutions and the public on its content as part of activities organized by other organizations (among which activities of the OSCE Mission to B&H particularly stand out). Ombudsman, *Izveštaj o pojavama*, p. 8.

national equality bodies are also present in European Union countries.⁶⁶ Moreover, the budgets of many of them have been disproportionately cut in recent years, which has had a negative effect on their independence and effectiveness.⁶⁷

According to the central role in protection against discrimination to the Ombudsman was not accompanied by adoption of an appropriate budget item that is envisioned by the law. In its reports, the Institution of Ombudsman has drawn attention several times to the fact that the LPD is one of the laws that are easily adopted, but at the same time efficient measures are not prescribed to ensure its implementation. Thus, although Article 7, paragraph 5, of the LPD prescribes that the budget for the Institution of the Human Rights Ombudsman of B&H, for the purpose of establishing a special department for protection against discrimination, will include a special budget item required for its operation, that has not yet been done in the B&H budget. This situation heavily impacts the efficiency of implementation of the law and diminishes the institution's ability to fully carry out its legally prescribed obligations – in particular promotion of the Law, monitoring discrimination-related court proceedings, conducting surveys in the field of discrimination and monitoring harmonization of legislation.⁶⁸ In light of similar observed problems, in Croatia, for example, funding for implementation of anti-discrimination legislation by the Ombudsman was allocated from a special European Union project.⁶⁹

The very procedure of funding the Institution of Ombudsman does not provide any guarantees for its adequate treatment either. Namely, the Ombudsman of B&H first submits a proposal to the Ministry of Finance of B&H, which modifies the proposal and fits it into what it considers realistic and feasible in the particular budget year, after which the modified budget is sent to the Parliamentary Assembly of B&H

⁶⁶ Commissioner for Human Rights of the Council of Europe, *Opinion of the Commissioner*, 4.4.

⁶⁷ Examples that are mentioned are Ireland, Latvia and Romania. Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law*, p. 87. In Ireland, for example, in 2009 the budget for this important institution was cut by as much as 43%, while the percentage of cuts for other state institutions was 4%. See European Network of Legal Experts in the Non-discrimination Field, "How to address discrimination across all grounds and share experience between different kinds of discrimination: summary workshop proceedings" (Legal Seminar on the implementation of EU law on equal opportunities and anti-discrimination, Brussels, November 25, 2008), p. 8.

⁶⁸ Institucija ombudsmana za ljudska prava BiH, Godišnji izvještaj o rezultatima aktivnosti Institucije ombudsmana za ljudska prava Bosne i Hercegovine za 2010. godinu (Banja Luka: Institucija ombudsmana za ljudska prava BiH, 2011), p. 121; Ombudsman, *Izvještaj o pojavama*, p. 7.

⁶⁹ Lovorka Kušan, *Croatia – Country Report on Measures to Combat Discrimination* (European Network of Legal Experts in the Non-discrimination Field, 2010), p. 61. This regards IPA funds in the amount of 690,000 euros. See Pučki pravobranitelj Republike Hrvatske, "Otvaranje Twinning projekta", January 25, 2012.

for adoption.⁷⁰ This kind of procedure is not in the best interest of the institution, nor is it in line with best practice in relation to the Ombudsman's independence and effectiveness. The problem, namely, is that the institution has no influence on the considerable modifications that the Ministry of Finance as a rule makes to its budget proposal.⁷¹ For example, although in the budget request for 2012 an item for strengthening capacities for implementation of the LPD in the amount of 91,825 KM was first approved in October 2011 in a meeting with the Ministry of Finance of B&H, as a result of prolongation of the budget's adoption, in early 2012 the Ministry asked the Ombudsman of B&H for a "new request based on the (budget) execution for 2011 which did not include funds necessary for implementation of the Law on the Prohibition of Discrimination", whereby the "Ministry of Finance of B&H reduced the amount at the very start."⁷² At the same time, it should be noted in this regard, if we consider for example the mentioned equivalent item from the budget of the Croatian Ombudsman, that even if the proposed budget item for the Institution of Ombudsman of B&H had been accepted, it would have been a symbolic amount, whose potential for real change in the field of anti-discrimination protection is truly minimal.

4.1.2. Implications of Budget Limitations

First of all, lack of resources is the cause of the problem of insufficient presence of the Ombudsman on the ground among citizens. This is one of the institution's priorities and reflects directly on the level of availability of protection to affected individuals.⁷³ The Institution of Ombudsman has a main office in Banjaluka and four regional offices (Sarajevo, Mostar, Livno, Brčko). Its officials have pointed

⁷⁰ Equally, in Serbia the Commissioner for Protection of Equality submits a budget proposal to the Ministry of Finance, which then has absolute freedom to modify any of the budget items before it is sent into further procedure. Milovan Batak, Assistant Commissioner for Protection of Equality, telephone interview, May 7, 2012.

⁷¹ An interesting example in this regard is the Law on the Protector of Human Rights and Freedoms of Montenegro from July 2012, which prescribes that the Protector directly sends a request for budget funding to the Human Rights and Freedoms Committee of the Assembly of Montenegro. The Committee supported the request for 2012 and sent it as its own request to the Ministry of Finance, the relevant body for drafting the Law on the Budget. Due to the general conditions of the economic crisis, the Ministry, however, responded with a new proposal of funding for the Institution, considerably lower than the Protector's proposal, but still higher than in the previous year. The reason for this was the fact that the Law does not specify that the Ministry has an obligation to only adopt the Committee's request without any intervention. Zdenka Perović, Secretary of the Institution of Protector of Human Rights and Freedoms of Montenegro, e-mail communication, May 23, 2012.

⁷² An amount representing 76% of the amount from the harmonized request from October 2011 was thus sent into parliamentary procedure. Almedina Karić, Communications and International Cooperation Advisor at the Institution of Ombudsman of B&H, e-mail communication, May 9, 2012.

⁷³ On the importance of availability of equality bodies in the field, see Equinet, *Providing Independent Assistance*, pp. 33–34.

out that they try to prevent the lack of funding from affecting the availability of services of the Ombudsman of B&H in the whole territory of B&H. For this reason they carry out some activities, such as visits to municipalities, meetings with associations and promotion of the law, after work hours and on weekends. In addition, employees from regional offices cover a much wider territory than the seat of their office suggests.⁷⁴

According to all indicators, the current capacities of the Ombudsman of B&H are insufficient. The relation between the efficiency of the Institution's work and the influx of cases is certainly indicative in this regard. In 2011 the Department for Discrimination had a staff of two lawyers and one trainee for the whole territory of B&H.⁷⁵ On the other hand, statistical data on the Department's scope of work demonstrates an upward trend in the number of discrimination cases. In 2010, the Department received 135 cases, or 4.09% of the total number of cases received by the Institution of Ombudsman⁷⁶, while in 2011 the number of new discrimination-related cases was 191.⁷⁷ This is an increase of 41.5%, which may partly be explained by promotional activities carried out by the Ombudsman of B&H and other organizations working on protection of human rights and combating discrimination.⁷⁸ The upward trend in the influx of cases year after year, however, requires appropriate adjustment of the institution's staffing capacities.

Insufficient capacities negatively reflect on the speed of settling cases. In 2011 the Ombudsman institution was working on 81 cases in the area of discrimination which had been carried over from 2010, out of which it settled 40 cases in 2011 (by a decision to close, a recommendation or enforcement of the party's rights during the procedure). In 2011, out of a total of 191 newly registered cases, only 88 were closed.⁷⁹ This means that a considerable number of cases from 2010 and 2011 were carried over into 2012. With such a scope of work and with insufficient funding and staffing resources, greater efficiency in settling cases cannot be expected.⁸⁰

⁷⁴ Predrag Raosavljević, personal interview, February 6, 2012.

⁷⁵ Ombudsman, *Izveštaj o pojavama*, p. 2.

⁷⁶ Ombudsman, *Izveštaj o pojavama*, p. 12. It should be noted that these cases sometimes include several complainants and it is decided that they should be treated as one case.

⁷⁷ For a detailed analysis of cases by office, form and area of discrimination, see Ombudsman, *Izveštaj o pojavama*, pp. 11–15.

⁷⁸ Ombudsman, *Izveštaj o pojavama*, p. 12.

⁷⁹ Ombudsman, *Godišnji izvještaj za 2010*, p. 121; Ombudsman, *Izveštaj o pojavama*, p. 11.

⁸⁰ Mario Reljanović, "Zabrana diskriminacije u Bosni i Hercegovini – Pravni okvir i praksa", in *Pravo zemalja u regionu*, ed. Vladimir Čolović (Belgrade: Institut za uporedno pravo, 2010), p. 347, points out that the Ombudsman is an institution that has primary competence for protection of human rights and warns: "It cannot be expected of one person to devote adequate attention to another aspect of protection of citizens, especially bearing in mind that the start of implementation of anti-discrimination legislation as a rule is accompanied by an extraordinary number of complaints/claims".

Moreover, their additional accumulation can be predicted in the coming years, which will most certainly have a negative effect on the speed and efficiency of the Ombudsman's procedures.⁸¹

Insufficient staffing resources negatively reflect on all activities of the Ombudsman. Primarily, as the representative of the Ombudsman of B&H points out, although they act on nearly every case within one month at the latest⁸², "the Department does not have sufficiently strong staffing or financial capacities to fully and most efficiently fulfill all obligations envisioned by the law"⁸³, and "institutions working on protection against discrimination in the region are far better equipped". In this context, an indicative example is the Professional Service of the Serbian Commissioner for Protection of Equality, which had a staff of 18 at the end of 2011, including three Assistants to the Commissioner, five employees in the Sector for Acting upon Complaints and four employees in the Sector for Improvement of Protection of Equality, International Collaboration and Projects, which, among other things, is in charge of producing reports and publications and normative and legal issues.⁸⁴ Even taking into account the fact that the estimated population of B&H is half that of Serbia, the number of two full-time employees in the Department for Discrimination is incomparably smaller and insufficient for ensuring the efficient realization of all aspects of legal competences of the Ombudsman of B&H. In the absence of support from decision-makers, the Ombudsman tried to find a creative solution to the problem of strengthening the Department by hiring a trainee. However, at the same time, due to inadequate capacities of the institution as a whole, the Department's employees also needed to work on proceedings for complaints related to violations of rights that fall

⁸¹ An illustrative example is a case in which the NGO "Vaša prava" filed a complaint with the Ombudsman on August 27, 2010 regarding violation of employment rights of a member of a national minority in an institution that has a public character. After the Ombudsman's initial two letters to the complainant in October and November 2010 stating that the filed complaint "provides sufficient ground which points to discrimination and launch of investigation", and after two such letters were sent to the alleged violator requesting additional information on the national structure of its employees, there was no information on any further activity undertaken by this institution. Representative of the NGO Vaša prava, e-mail communication, July 3, 2012.

⁸² With regard to this, it is important to bear in mind that in circumstances of insufficient human resources, even very desirable efforts to act fast upon complaints with the goal of protecting victims of discrimination may affect the quality of the action. In relation to this, see Equinet's Working Group 2 on Strategic Enforcement, *Strategic Enforcement. Powers and Competences of Equality Bodies* (Brussels: Equinet, 2006), p. 14.

⁸³ Predrag Raosavljević, personal interview, February 6, 2012.

⁸⁴ Poverenik za zaštitu ravnopravnosti, Redovan godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2011. godinu (Belgrade: Poverenik za zaštitu ravnopravnosti, 2012), pp. 15–16; Even in these circumstances, Miroslav Batak, Assistant Commissioner for Protection of Equality, points out that employees work very hard and that the staffing classification envisions a staff of 60 employees, but he believes that the number of 30 employees is an optimal solution. Telephone interview, May 7, 2012.

under the competence of other departments.⁸⁵ As a result, even such efforts were drowned in the institution's numerous general shortages of resources.

In such circumstances it is not possible to fulfill even an important international standard requiring that in the framework of a single body working on protection against discrimination, expertise should be ensured for different grounds and forms of discrimination. Strengthening the Ombudsman's staffing capacities, of course, is a precondition for creating an appropriate job classification by placing individual employees in charge of specific forms of discrimination.⁸⁶ In Serbia, the first step was taken in this direction, as the Sector for Acting upon Complaints of the Commissioner's Professional Service is composed of two sections, between which work is divided based on two groups of discrimination grounds⁸⁷, and even within these sections the goal is to develop individual employees' expertise for specific discrimination grounds.⁸⁸

Lack of resources is also reflected in the inability to conduct adequate investigations and monitor court and administrative proceedings. The institution's officials are not always able to go on the ground and they continue procedures in writing, in a more formal way, by seeking written responses from the parties. This problem is particularly important if viewed in the context of the Ombudsman's insufficient presence in the whole territory of B&H. It would certainly be more useful if the Ombudsman employees had resources to "establish the factual situation directly".⁸⁹ An OSCE representative also draws attention to this problem, as well as to the need for serious human resource capacity building for the Institution of Ombudsman of B&H with regard to protection against discrimination. The representative points out that, due to insufficient resources, the Ombudsman's recommendations often indicate lack of expertise necessary for consistent proper implementation of the Law.⁹⁰

Considering all of the above, financial and staffing strengthening of the institution is an imperative without which a genuine step forward in the institutional battle against discrimination is not possible, particularly bearing in mind the numerous legal competences and levels of engagement of the Ombudsman of B&H in this field.

⁸⁵ Ombudsman, *Godišnji izvještaj za 2010*, p. 121; Ombudsman, *Izvještaj o pojavama*, p. 12.

⁸⁶ Predrag Raosavljević, personal interview, February 6, 2012.

⁸⁷ Information taken from the website <http://www.ravnopravnost.gov.rs/lat/organizacija.php> (Accessed on May 7, 2012).

⁸⁸ Milovan Batak, telephone interview, May 7, 2012.

⁸⁹ Predrag Raosavljević, personal interview, February 6, 2012.

⁹⁰ Lori Mann, Legal Advisor to the OSCE Mission to B&H, personal interview, March 12, 2012.

4.2. Legislative Vagueness and Dilemmas

4.2.1. Status of the Institution

The legislative definition of the role and competences of the Ombudsman of B&H in the field of protection against discrimination is insufficiently clear. The Annual Report for 2010 points to the fact that the Institution of Ombudsman is the central institution for protection against discrimination, but at the same time

“(...) the relevant Law does not precisely define the methods to implement this mandate, as a result of which the need for the creation of instruments to be used for the realization of this legal obligation has arisen. This is particularly related to use of mediation mechanisms, giving opinions, relation to court protection etc.”⁹¹

First of all, it is not entirely clear for what reason, in what regard, and with what implications this institution was given the status of central body for preventing and combating discrimination. In Croatia, for example, the Ombudsman’s role of “central body” is also mentioned. However, in Croatia that makes sense because there are three additional Ombudsmen specializing in specific discrimination grounds and a coordinating role and role of central rapporteur had to be accorded to one of these bodies. In the absence of a better explanation, the only reasonable justification would be reflected in the importance attached to its role and in the broad scope of its competences and multiple nature of its mandate, which includes both preventive and protective mechanisms. At the same time, it is possible that it was the lawmaker’s intention that protection against discrimination should be exercised primarily before the Ombudsman rather than courts. In any case, legal clarification and elaboration of the institution’s overall mandate would be useful in many ways.

4.2.2. New Institutes in the Law on the Prohibition of Discrimination

Insufficient promotion of new institutes, such as the possibility of getting protection against discrimination in the private sector, in practice limits their positive impact on protection of victims of discrimination. As stated above, the Law expands protection against discrimination to include the private sector too. As a representative of the institution points out, the Ombudsman institution of B&H “has not yet had much difficulty explaining its mandate and seeking cooperation

⁹¹ Ombudsman, *Godišnji izvještaj za 2010*, p. 182.

on a specific matter” from legal or natural persons from the private sector who are identified as violators of rights, but “the idea has not yet taken root among the public that the Institution of Ombudsman, as the state’s mechanism for protection of human rights, is competent to help them with problems they may have in the private sector”.⁹² As our interlocutor points out, the vast majority of complaints still regards the public sector, whereas the number of complaints related to the private sector is much smaller and mostly concerns mobbing and protection of employment rights.

Potential for positive impact of the rule on shifting the burden of proof on protection of discrimination victims also appears to be insufficiently used. When establishing whether discrimination occurred, the Ombudsman of B&H chooses to apply the rule on shifting the burden of proof to the person identified in the complaint as the right violator, but points out that lack of public awareness on the importance and strength of this provision diminishes its practical implementation.⁹³ In this regard, the interlocutor emphasizes that general and partial responses are often received in communication with the parties, which slows down the complaints procedure, resulting in that discrimination is not proven or does not appear likely.⁹⁴ Problems of this kind, of course, are familiar in comparative practice too.⁹⁵ It is noteworthy, however, that the Institution of Ombudsman must apply this rule in line with its purpose: in case of *prima facie* discrimination it must ensure that the burden of proof is shifted to the alleged right violator and, in line with that, it must actually establish a violation of the prohibition of discrimination in case of his unsatisfactory defense.⁹⁶ It is noticeable, namely, that in some decisions the existence of discrimination is established, but that is done without mentioning this

⁹² Predrag Raosavljević, personal interview, February 6, 2012.

⁹³ Ombudsman, *Izvještaj o pojavama*, p. 16.

⁹⁴ *Ibid.*

⁹⁵ See, for example, Equinet’s Working Group 2 on Strategic Enforcement, *Strategic Enforcement*, pp. 19–21.

⁹⁶ Recommendation number Ž-BR-04-66/10 of July 13, 2010 is an example of a decision which, in response to an alleged violator’s refusal to deliver requested data to the Ombudsman, points out that the described behavior, pursuant to the rule on shifting the burden of proof, “may lead to the conclusion of justifiability of the complainant’s complaint”. If, however, *prima facie* discrimination was established, proper application of this rule does not only indicate the possibility of establishing discrimination, but requires that discrimination be established, because in this case the other party did not succeed in proving that discrimination did not occur. What also seems unacceptable in this regard is a recommendation to the violator to urgently deliver proof “from which it is visible that discrimination against the complainant in this case did not occur”.

rule at all⁹⁷, or by applying it with insufficient or inadequate⁹⁸ elaboration. As the central institution for protection against discrimination with quasi-judicial competences, however, the Ombudsman is in the best position and has considerable responsibility to develop in practice the rule on shifting the burden of proof, which may later help courts to apply this institute properly too.

The Ombudsman of B&H is not doing enough on prevention of victimization and protection against victimization of participants in proceedings. Despite potentially positive effects provided by protection against victimization introduced by the Law on the Prohibition of Discrimination, one of the main factors of under-reporting discrimination to the Ombudsman and relevant courts in B&H, as in comparative practice, is still the fear of victimization.⁹⁹ The OSCE representative notes that competent institutions are not contributing enough to eliminating this fear, highlighting the example of the Ombudsman's reports, which as a rule only mention this problem in passing, with no details or elaboration. Although the first two examples of misdemeanor proceedings initiated by the Ombudsman¹⁰⁰ regard precisely victimization, there are important other examples of occurred victimization that should be given attention. A characteristic example is a situation in which not only was the Institution's recommendation in the specific case not complied with, but the discriminated individual was even pronounced a disciplinary measure in disciplinary proceedings for gross violation of job duties and was declared responsible for "making untrue allegations to the Institution of the Human Rights Ombudsman of B&H about having been discriminated against on professional and national grounds".¹⁰¹ Multiple misdemeanor acts were committed here, including victimization which is easy to prove. But it appears that the Ombudsman of B&H has not as yet initiated a misdemeanor proceeding

⁹⁷ See, for example, Recommendation number P-116/11 of July 18, 2011.

⁹⁸ Thus, for example, in Recommendation number Ž-SA-06-870/10 of February 2, 2011 – although it is commendable that it points to the rule on shifting the burden of proof, points out the violator's omissions in trying to prove that discrimination did not occur and explains that the motive of discrimination is not relevant for establishing the existence of discrimination – what seems inadequate and incomplete is the explanation that the "burden of proof in case of discrimination lies on the alleged violator". This way, namely, the mechanism of shifting the burden of proof, which consists of two phases of providing proof, the first of which is proving *prima facie* discrimination by the victim, was not explained or elaborated.

⁹⁹ Commissioner for Human Rights of the Council of Europe, *Opinion of the Commissioner*, 3.1.

¹⁰⁰ See section 4.3.3.

¹⁰¹ Case registered under number Ž-MO-04-66/10, with issued recommendation number P-261/10. Ombudsman, *Godišnji izvještaj za 2010*, pp. 31–32.

in this case.¹⁰² Although it is possible that in some victimization cases the party subsequently abandons further proceedings before the Ombudsman, even this indicator is worrying and as such calls for attention, as the victimizer easily accomplishes his goal and is given an encouraging message. In addition, the general structural limitations in promoting innovations to the LPD apparently make prohibition of victimization and its potential consequences unfamiliar to both individuals and potential victimizers.

4.3. Procedural Issues

4.3.1. Unclear Mediation Parameters

In its report on discrimination, the Ombudsman institution points out that it settled a number of cases already in the investigation phase, precisely “through mediation, encouraging an amicable solution or mediation between the parties to the dispute”.¹⁰³ The Head of the Department for Discrimination¹⁰⁴ says that the Ombudsman institution of B&H tries to achieve an amicable solution to disputes even in other cases that it handles, “by pointing out possible omissions to both sides and encouraging them in some way through discussion, direct talk and contact to come up with a joint solution which is mutually beneficial”, which sometimes has a successful outcome. On the other hand, he points out that the provision of Article 7. d) related to mediation is insufficiently defined and vague, i.e. it is unclear what exactly is meant by it. He says it may be interpreted in two ways: that the Ombudsman institution itself conducts a mediation procedure or that it only refers the party to the official Association of Mediators. In this regard, our interlocutor explains that the institution’s current interpretation is that the latter case is true: when it ascertains that discrimination occurred, “regarding the scope of discrimination and compensation for any damage it directs the parties to mediation, and it goes without saying that it takes place before the competent Association of Mediators of B&H”. This, however, does not rule out the possibility that an Ombudsman’s official will undergo necessary training with the goal of obtaining a license which will enable a mediation procedure to be conducted with the parties.¹⁰⁵ In this regard

¹⁰² Similarly, see Case Ž-SA-04-330/10, in which the Ombudsman made the recommendation that “an unfounded report to the Institution of Ombudsman may not be a subject of disciplinary procedure against the complainant”, but the report fails to state that a misdemeanor proceeding was initiated in this case. *Izveštaj o pojavama*, p. 17.

¹⁰³ Ombudsman, *Izveštaj o pojavama*, p. 11.

¹⁰⁴ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁰⁵ Predrag Raosavljević, telephone interview, May 8, 2012.

the Ombudsman institution of B&H points out in its report that it will “examine the possibility of establishing a mediation mechanism, pursuant to the provisions of the Law”¹⁰⁶.

Comparative experience also points to different approaches of Ombudsmen in the mediation procedure. For example, in Croatia, employees of the Office of the Ombudsman received education in the field of mediation from the official association of mediators¹⁰⁷, while the Office of the Serbian Commissioner for Protection of Equality is currently working on a mediation model development project, in the framework of which they plan to educate around 40 mediators across Serbia, who will assume this role in discrimination cases appearing before the Commissioner.¹⁰⁸ Similarly, in Canada, a group of external, and as of recently also internal, mediators was created as part of the Human Rights Commission and they are both qualified and sensitized to human rights protection issues.¹⁰⁹ In line with that, although the omnipresent limitations in resources of the Institution of Ombudsman of B&H require the option of the mediation procedure being carried out in line with general rules, strengthening capacities for internal mediation would certainly be a desirable option considering the specific characteristics of discrimination and expertise of the Ombudsman of B&H in this field.

4.3.2. Effect and (Non)Implementation of the Ombudsman's Recommendations

Human rights protection bodies with similar competences as in B&H as a rule are not directly able to enforce their recommendations. This is so because it is believed that such competence would constitute an unacceptable combination of investigative and quasi-judicial functions in one body.¹¹⁰ In one of its opinions the Venice Commission states that

“(...) from the very nature of the institute of ombudsperson, it follows that he or she can only make recommendations. There cannot be a direct obligation to follow these recommendations. However, there should indeed be an obligation for the administrative authority to react within a given time span to

¹⁰⁶ Ombudsman, *Izvještaj o pojavama*, p. 25.

¹⁰⁷ See Pučki pravobranitelj Republike Hrvatske. “Activities of the Ombudsman as the Central Body for the Suppression of Discrimination (Equality Body)”.

¹⁰⁸ See Equinet, “The Serbian Commissioner for the Protection of Equality in the Spotlight”.

¹⁰⁹ Olivera Vučić, ed., *Perspectives of use of alternative dispute resolution techniques in cases of discrimination in Serbia* (Belgrade: UNDP and Ministry of Labor and Social Policy, 2009), p. 35.

¹¹⁰ International Council on Human Rights Policy & Office of the United Nations High Commissioner for Human Rights, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva: International Council on Human Rights Policy, 2005), pp. 21–22.

the ombudsperson's recommendation, either by accepting it and redressing the situation, or by giving a motivated refusal."¹¹¹

A considerable number of recommendations made by the Ombudsman of B&H in the field of discrimination have not been complied with. In 2011, out of 128 completed discrimination cases, in 102 cases the Ombudsman institution made a decision to close, whereas in 26 it conducted an investigation and made recommendations to the perpetrators to take measures to stop the discrimination.¹¹² Out of that, 6 recommendations were complied with, two were partly complied with,¹¹³ and 18 of the mentioned 26 recommendations were not complied with. The structure of recommendations that were not complied with is as follows: cooperation was established in 7 of them,¹¹⁴ there was no response to 5 recommendations, and 6 remained not complied with.¹¹⁵ It is evident from these statistics, as the Ombudsman of B&H also points out, that "the number of recommendations that are followed must be higher".¹¹⁶

Although recommendations made by the Ombudsman of B&H generally have a non-binding character, the LPD prescribes sanctions for failure to follow them, through a misdemeanor mechanism that has not yet been used.¹¹⁷ The very fact that these are recommendations means that they do not have a legally binding character. Article 7 of the Law specifically prescribes only the obligation of timely delivery of requested information and documents, written responses and notifications, as well as information on the effect of recommendations made with the goal of eliminating discrimination. To remind, Annex VI, Article 5, paragraph 4, of the Dayton Peace Agreement also prescribes the obligation of the party to which

¹¹¹ European Commission for Democracy through Law (Venice Commission), the Commissioner for Human Rights, Directorate General of Human Rights of the Council of Europe, Joint Opinion on the Draft Law on the Ombudsman of Serbia (Venice: European Commission for Democracy through Law; Commissioner for Human Rights; Directorate General of Human Rights of the Council of Europe, December 3/4, 2006), CDL- AD(2004)041, point 32.

¹¹² Of that, the largest number regards mobbing (7) and discrimination on grounds of ethnic origin (4). Ombudsman, *Izveštaj o pojavama*, pp. 11 and 15.

¹¹³ For example, a recommendation to annul a job posting due to established discrimination. Instead of doing so, the responsible body offers the complainant another suitable job, which the individual agrees with. Predrag Raosavljević, personal interview, February 6, 2012.

¹¹⁴ According to Mr. Raosavljević's explanation (personal interview, February 6, 2012), this means that "certain steps were taken by the body toward complying with the recommendation, but it was not fully complied with".

¹¹⁵ Ibid. The interlocutor points out that they were usually notified that the recommendation would not be followed, generally due to issues of a financial nature, or by invoking various general and individual acts.

¹¹⁶ Ombudsman, *Izveštaj o pojavama*, p. 27.

¹¹⁷ See section 4.3.3.

the recommendations refer to inform the Ombudsman of B&H in writing and within the given time how it will comply with the conclusions. Therefore, an obligation to act in accordance with the recommendation is not specifically prescribed there either. At the same time, however, several provisions further in the Law¹¹⁸ prescribe misdemeanor liability for both natural and legal persons, and for the responsible persons within them, for discrimination against an individual committed by failing to act in accordance with a recommendation of the Ombudsman of B&H, with particularly high fines, up to 6,500 KM, as well as, provided that conditions are met, the protective measures of seizure of goods and prohibition of exercise of certain professional activities. Looking at these provisions as a whole, it may be concluded that, indirectly, they do make compliance with these legal acts mandatory. In other words, it may be concluded that the LPD establishes an important exception when it comes to recommendations in the field of discrimination: unlike other decisions by the Institution of Ombudsman of B&H, discrimination that occurs despite its recommendation for contrary action is subject to specific misdemeanor liability.

Better use could also be made of the specific mechanism for holding competent government bodies accountable in the context of implementation of the Ombudsman's recommendations, with the goal of providing more efficient protection to victims of discrimination. With regard to mandatory cooperation with the Ombudsman, competent institutions are specifically referred to in Article 7, paragraph 7, of the LPD.¹¹⁹ At the same time, the Law on the Ombudsman prescribes, in case of failure by a government body to act in line with the Ombudsman's recommendation, or in case of lack of notification on reasons for not taking measures, that a higher competent body is to be notified first. If a solution is unjustifiably not reached even then, the problem is cited in the B&H Ombudsman's special or annual report, with mention of the names of the responsible government bodies or officials, which is sent to the Parliamentary Assembly of B&H, Parliament of FB&H, National Assembly of RS and Presidency of B&H.¹²⁰ In its annual reports, the Ombudsman institution uses a tabular presentation of recommendations in which violations of rights were established, including the status of their implementation, and in the first special report on discrimination, it mentions in passing in a few places in the text several examples of non-compliance with its recommendations.¹²¹ In both cases, however, it treats these cases marginally, focusing more on implemented recommendations or pending

¹¹⁸ "Zakon o zabrani diskriminacije BiH", Article 19, paragraph 4.

¹¹⁹ As indicated above, this provision emphasizes their obligation to cooperate with the Ombudsman of B&H, to provide written responses and notifications within the time given by the Ombudsman, including notifications on the effect of recommendations made with the goal of eliminating discrimination.

¹²⁰ "Zakon o Ombudsmanu", Article 32, paragraph 2.

¹²¹ See Ombudsman, *Izveštaj o pojavama*.

proceedings, without even mentioning the names of responsible officials. Therefore, the envisioned mechanism appears insufficiently used.

The Institution of Ombudsman explains that “names of responsible officials are not included primarily due to the fact that not all mechanisms, which consist of sending reminders or notifying higher bodies, have yet been exhausted”, and also because the deadlines given for some of the recommendations in the report which were made in 2011 have not yet passed.¹²² Nevertheless, as described above, for a substantial number of recommendations it is clear that they were not complied with despite the expiration of deadlines. Moreover, in some cases the violators even responded that they would not follow them. On the other hand, in the annual report for 2011, the tabular presentation of recommendations lists even recommendations establishing discrimination which were made at the beginning of 2011 and were not complied with, where not even a response was received to them from the government bodies.¹²³

Along with the fact that their inclusion in the annual report indicates that all other possibilities had been previously exhausted, in such cases the period that passed appears to be sufficiently long for exhaustion of other mechanisms. Nevertheless, the Special Report on Occurrences of Discrimination¹²⁴ does not mention these cases at all, while the names of responsible officials are not cited in the annual report.

A systematic mechanism for parliament to monitor compliance with the Ombudsman’s recommendations does not exist. In its annual report (2010), the Ombudsman institution points out that “(...) support of parliaments at the B&H level and level of the entities is a key mechanism that ensures respect of human rights and a guarantee that ensures institutional action.”¹²⁵ More precisely, this is related to parliaments’ ability to “ensure continuation of monitoring (...) on why full compliance with the Ombudsman’s recommendations has not taken place” in terms of seeking information from specific institutions, but also in terms of compliance with recommendations related to the obligation of parliaments themselves to ensure harmonization of specific regulations with the LPD.¹²⁶ The annual report thereby does not evaluate parliaments’ past support, but only points out its potential significance. With regard to recommendations adopted in the framework of the Ombudsman of B&H Office for Elimination of all Forms of Discrimination, a

¹²² Institution of Ombudsman of B&H, e-mail communication, June 11, 2012.

¹²³ See, for example, Recommendation number P-28/11, adopted on March 9, 2011, or number P-36/11 of March 25, 2011. Institucija ombudsmana za ljudska prava BiH, *Godišnji izvještaj o rezultatima aktivnosti Institucije ombudsmana za ljudska prava Bosne i Hercegovine za 2011. godinu* (Banja Luka: Institucija ombudsmana za ljudska prava BiH, 2012), p. 120.

¹²⁴ See Ombudsman, *Izvještaj o pojavama*.

¹²⁵ Ombudsman, *Godišnji izvještaj za 2010. godinu*, p. 37.

¹²⁶ Predrag Raosavljević, personal interview, February 6, 2012.

mechanism for parliament to carry out systematic monitoring of implementation of recommendations that have not been complied with is currently not provided.¹²⁷ In contrast, in Slovenia for example, the Ombudsman reports recommendations that have not been complied with in a special report to the competent working group in the Parliament or to the Parliament itself,¹²⁸ which in response to the Ombudsman's report, along with a general conclusion on the need for compliance with the Ombudsman's recommendations, adopts concrete recommendations and guidelines for state institutions.¹²⁹

4.3.3. Unused Potential of Misdemeanor Proceedings

The Ombudsman of B&H has not yet sufficiently used the potential of misdemeanor liability envisioned by the LPD. The Ombudsman's reports, among other things, indicate problems related to obstruction of the Ombudsman's recommendations which are only formally complied with, as a result of which it may be concluded, in the absence of information to the contrary, that the Ombudsman did not further use the existing mechanisms of misdemeanor liability. For example, two recommendations were followed by reinstating the parties in their jobs, but after that, through pressure and harassment, attempts were made to bring the complainants into a situation of having to leave their jobs of their own accord.¹³⁰ In only two cases¹³¹ in which complainants to the Ombudsmen were faced with the threat of dismissal from work as a result of filing a complaint, as well as addressing the responsible Labor Inspection, the Ombudsman established victimization and filed motions to the relevant municipal courts to initiate misdemeanor proceedings against the responsible individuals. We may say that these first known misdemeanor proceedings have strategic importance, although it remains to be seen what kind of stand the responsible courts will ultimately take. In both of these cases, misdemeanor proceedings were initiated after the Ombudsman made a recommendation.

The Ombudsman has not yet initiated a misdemeanor proceeding for discrimination unrelated to a specific recommendation or for lack of cooperation with the institution. Theoretically speaking, it is possible to conceive a situation in which the Ombudsman initiates a misdemeanor proceeding if discrimination was committed, even if he did not previously issue a recommendation. In addition, the Institution will "consider in the coming period also the possibility of initiating

¹²⁷ Predrag Raosavljević, telephone interview, May 8, 2012.

¹²⁸ "Zakon o Ombudsmanu za ljudska prava", Article 33, paragraph 5, and Article 40, paragraph 2.

¹²⁹ See Human Rights Ombudsman of Slovenia website <http://www.varuh-rs.si/publications-documents-statements/recommendations-of-national-assembly/?L=6> (Accessed on May 8, 2012).

¹³⁰ Ombudsman, *Godišnji izvještaj za 2010. godinu*, p. 125.

¹³¹ Cases Ž-SA-05-509/11 and Ž-BL-06-255/11; Ombudsman, *Izvještaj o pojavama*, p. 17.

a misdemeanor proceeding, for example, in case of absence of a response to a recommendation by the violator”¹³² However, if we keep in mind the primary goal of the law – to ease the position of the victim of discrimination, it is not advisable to tie this important option only to the specific situation of non-compliance by a violator with a recommendation or victimization of a complainant after addressing the Ombudsman of B&H. Generally speaking, judging from available official data from the Ombudsman’s reports, the institution makes insufficient use of the above legal options which are potentially important both for protection of victims of discrimination and for strengthening the authority of the Ombudsman of B&H. The OSCE expert in B&H also confirms this, assessing precisely this option of initiating misdemeanor proceedings as potentially efficient due to the concrete consequences that it envisions.¹³³

4.3.4. Limited Legal Assistance

According to an explanation given by the Ombudsman’s representative,¹³⁴ this institution is usually the first instance that individuals address. Some citizens address them after already initiating a court proceeding, asking for monitoring of the trial, some address them requesting assistance and legal advice in initiating a court proceeding, and some come to them after having already addressed certain administrative bodies, but are unable to enforce a right they realized that way. Individuals also address them when they already have a legal representative, such as several well-known cases in which the NGO Vaša prava composes a petition on behalf of a party and sends it to the Ombudsman, and they act on it as if the complaint was filed by the party.

The scope of legal assistance that the Ombudsman institution is able to provide to victims of discrimination is, however, limited by the structural problem of unavailability of its services in the whole territory of B&H. Officials of the Institution provide advice and guidance to victims regarding their rights and possible protection mechanisms. Although a somewhat different legislative formulation was used for addressing domestic and international bodies, the Institution of Ombudsman points out¹³⁵ that in practice there is no difference¹³⁶ in the scope of provision of advice before these bodies on all protection options¹³⁶ available to complainants. However, the impossibility of the Ombudsman’s presence in the field due to a

¹³² Predrag Raosavljević, personal interview, February 6, 2012.

¹³³ Lori Mann, personal interview, March 12, 2012.

¹³⁴ Predrag Raosavljević, personal interview, February 6, 2012.

¹³⁵ Predrag Raosavljević, personal interview, February 6, 2012.

¹³⁶ The Ombudsman, as needed, refers individuals to judicial and administrative bodies or relevant inspections, as well as bodies that are able to provide them with free legal assistance in the form of representation in individual proceedings. Ibid.

shortage of resources¹³⁷ directly reflects on the availability of legal assistance to all citizens in B&H.

In a comparative perspective, institutions for protection of equality find different ways to provide assistance to victims of discrimination. As a rule all these bodies provide some form of general information on their websites¹³⁸ or in special publications, and most of them provide necessary advice to victims on request.¹³⁹ Similarly to competences of the Ombudsman of B&H, in Canada the human rights official of the Human Rights Commission which is set up at the federal level¹⁴⁰ for example explains to victims which institution is relevant for dealing with their complaints, i.e. if it is the Canadian Human Rights Commission or provincial and territorial commissions.¹⁴¹ Similarly, the Equality and Human Rights Commission in Great Britain provides assistance to individuals in exercising their rights before courts and tribunals or provides other forms of legal assistance and legal advice.¹⁴² With regard to ensuring availability of advisory services to all citizens, different solutions have been developed in comparative practice.¹⁴³ The Equality and Human Rights Commission in Great Britain has a telephone line where it offers advice on protection of rights – and the line receives around 50,000 calls a year.¹⁴⁴ A similar solution is envisioned in Australia¹⁴⁵ and Sweden¹⁴⁶, while the Equality Commission for Northern Ireland, which created a special advisory team for individuals who believe they are victims of discrimination, additionally advertises the possibility for victims to contact its telephone service.¹⁴⁷ A particularly innovative solution was adopted in Belgium. Namely, the Belgian Center for Equal Opportunities and Opposition to Racism has introduced and continues to develop a network of local

¹³⁷ See section 4.1.

¹³⁸ See, for example, Equality Commission for Northern Ireland, Equinet, *Providing Independent Assistance*, p. 17.

¹³⁹ Farkas, *How to Present a Discrimination Claim*, p. 69.

¹⁴⁰ The Commission is the first instance that discriminated individuals can address, without being able to directly present their cases in court.

¹⁴¹ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000), Chapter 11: Assistance in the Claims Process.

¹⁴² However, it is not obliged to do this and is expected to limit it to strategic cases. Aileen McColgan, *United Kingdom Country Report on Measures to Combat Discrimination* (European Network of Legal Experts in the Non-discrimination Field, 2010), p. 157.

¹⁴³ Equinet, *Providing Independent Assistance*, p. 18.

¹⁴⁴ Joint Committee on Human Rights (JCHR), *Equality and Human Rights Commission: 13th Report of Session 2009-10* (London: House of Commons, 2010).

¹⁴⁵ More information on the Australian Human Rights Commission website <http://www.hreoc.gov.au>.

¹⁴⁶ The Equality Ombudsman is a 2-4 hour telephone service operated by case officers. Equinet, *Providing Independent Assistance*, p. 16.

¹⁴⁷ *Ibid.*, p. 17.

mechanisms for providing advice and assistance to victims of discrimination, so-called ‘anti-discrimination centers’, signing protocols on cooperation with different local partners, such as municipalities, employment bureaus, syndicates or non-governmental organizations for human rights protection, which assume this role with appropriate training and supervision from the Center.¹⁴⁸ The Ombudsman of B&H can certainly learn from these experiences, especially from the Belgian model, which does not necessarily require additional resources.

As regards support in other proceedings in which individuals are able to exercise protection, the role of the Ombudsman of B&H is limited. As mentioned above, the Ombudsman of B&H may monitor a proceeding, thus contributing to adherence to the rule on urgency of proceedings and proper implementation of the LPD.¹⁴⁹ However, this institution is not able to write briefs for them or represent them before other public bodies. The institution’s representative points out in this regard: “We cannot do anything more in this case. We cannot represent anyone, we cannot give legal advice during the proceeding, we do not take any form or part of responsibility for anyone.”¹⁵⁰ In light of some familiar comparative experiences in providing assistance and being able to represent victims of discrimination before relevant judicial bodies, the competences of the Ombudsman of B&H are quite limited, which will be elaborated in more detail in the next section.

4.4. Problems in the Relation between the Ombudsman and Judicial Protection

4.4.1. Status of Recommendations Adopted by the Ombudsman of B&H in Decision-Making in Court Proceedings

In the Bosnian and Herzegovinian system of protection against discrimination, a proceeding before the Ombudsman and a proceeding before the court are not

¹⁴⁸ Whereas 14 contact points have already been set up in Flanders and Brussels, which can act in individual cases and carry out mediation, in Wallonia a network is being built which will be in charge of information dissemination activities, initial contact with victims and their referral to the Center. Equinet, *Providing Independent Assistance*, pp. 36–37; ECRI in particular welcomes this fact. European Commission against Racism and Intolerance (ECRI), Fourth Report on Belgium (Strasbourg: ECRI, May 26, 2009), CRI(2009)18, point 48.

¹⁴⁹ An example of this is the Janja Martina Katović case, heard by the Municipal Court of Livno (preliminary ruling number 68 0 P 017561 11 P of December 7, 2011). According to information provided by Mr. Emir Prčanović from *Vaša prava*, the presence of an Ombudsman representative had a positive effect on the overall atmosphere in the courtroom. Internal communication in the framework of the AD program, April 18, 2012.

¹⁵⁰ Predrag Raosavljević, personal interview, February 6, 2012.

mutually exclusive. With regard to the relationship between the Ombudsman or equality bodies and judicial protection against discrimination, in comparative practice, the issuance of non-binding recommendations by them usually does not prevent an individual from initiating a court proceeding resulting in a binding court judgment in that same case.¹⁵¹ Generally speaking, cases in which non-binding recommendations were made may afterwards be subject to examination in a court proceeding. In Norway for example, recommendations by the Ombudsman for Equality and Anti-discrimination may be contested by the parties to the conflict before the Tribunal for Protection of Equality and Anti-discrimination.¹⁵² In Bulgaria, even binding decisions by the Commission for Protection against Discrimination may be contested before the Supreme Administrative Court.¹⁵³

In this regard, an important aspect of complementarity/conflict of the two procedures is certainly the issue of status of the Ombudsman's recommendation in a court proceeding regarding the same discrimination case. Namely, due to the very nature of the Ombudsman's recommendations, it should be possible to use them as an important argument, i.e. as evidence, in a judicial protection procedure. In line with that, the Ombudsman's representative points out that "in most cases the Ombudsman's recommendation is used as evidence that a violation of rights occurred" and courts usually decide the same way as the Ombudsman. In such situations, the court "only establishes to what extent the violation of rights occurred and how high is the potential compensation of damages or another sanction prescribed by the law"¹⁵⁴, which the Ombudsman does not cover by his recommendation anyway. But there are opposite examples too, in which, contrary to the Ombudsman's decision on the same case, the first-instance court established that there was no discrimination.¹⁵⁵ Of course, it is hard to say generally who is in a better position to make good decisions in these cases. In the current scenario, practice shows that the quality and legal foundation of decisions varies: in some situations the Ombudsman acts correctly, whereas in other cases it appears that the court is the one that passes a better, legally founded and well-argued decision.¹⁵⁶ Such situations further underline the importance of second-instance proceedings in these and similar cases.¹⁵⁷

¹⁵¹ Farkas, *How to Present a Discrimination Claim*, p. 61.

¹⁵² European Commission against Racism and Intolerance (ECRI), Fourth Report on Norway (Strasbourg: ECRI, February 24, 2009), CRI(2009)4, point 39.

¹⁵³ Ilieva, *Bulgaria – Country Report*, p. 82.

¹⁵⁴ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁵⁵ Predrag Raosavljević, personal interview, February 6, 2012; Emir Prcanović and Nermin Hanjalić, Executive Director and employee of NGO Vaša prava, personal interview, February 21, 2012.

¹⁵⁶ Lori Mann, personal interview, March 12, 2012.

¹⁵⁷ Lori Mann, personal interview, March 12, 2012.

In B&H there is no legal obligation for courts to observe the views from an Ombudsman's recommendation. Although the NGO sector voices dissatisfaction over the very possibility, as well as practice of disharmony in decision-making in these two proceedings, which jeopardize the principle of legal security,¹⁵⁸ the representative of the Institution of Ombudsman of B&H points out that the Ombudsman only issues a recommendation, that a ruling by a court and a recommendation by the Ombudsman should not be compared at all, and that the principle of independence of the court and free evaluation of evidence allows the court to take its own stand on the specific recommendation. In line with that, in case of a different court decision, the Ombudsman institution may only conclude that its recommendation was not complied with and inform the parliament accordingly.¹⁵⁹ He says it is positive that at least in one such case in which a conflict in decision-making occurred, the court offered a rather detailed explanation why it took a different stand than the Ombudsman regarding each single statement from the recommendation.¹⁶⁰ He points out that it is very important that the court, "even if it does not follow the Ombudsman's recommendation, gives reasons why it acted that way."¹⁶¹ The problem is that court practice does not have to be this way, because relevant regulations do not specifically prescribe such a court's obligation.

But it should be pointed out that the current B&H solution in this field is generally in harmony with practice in other countries. In many countries courts are not explicitly obliged to respect the authority of the Ombudsman's recommendations.¹⁶² Nevertheless, there are examples of systems in which better coordination has been achieved between these mechanisms for protection against discrimination. In Austria and Holland, in which Equal Treatment Commissions operate and issue non-binding opinions, in case an individual afterwards initiates a court proceeding, the courts have an obligation to take these opinions into account, and in case they pass contrary decisions, to provide clear explanations why they did so.¹⁶³ This solution seems to be good – it does not encroach upon the independence of the courts, but it does ensure a certain level of coordinated action among key actors competent for discrimination.

¹⁵⁸ Emir Prcanović and Nermin Hanjalić, personal interview, February 21, 2012.

¹⁵⁹ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁶⁰ This regards a preliminary ruling on discrimination against a member of the Roma national minority. Predrag Raosavljević, personal interview, February 6, 2012.

¹⁶¹ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁶² An exception are cases in which equality bodies conduct administrative proceedings and pass decisions which become final. Farkas, *How to Present a Discrimination Claim*, p. 61. Although there are exceptions here too, such as the previously described case of Bulgaria, these examples are not relevant as the nature of the mentioned decisions essentially differs from the recommendations of the Ombudsman of B&H.

¹⁶³ Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law*, p. 66.

4.4.2. Deadlines, Ombudsman and Court Protection

An individual may address the Institution of Ombudsman of B&H within 12 months of the occurrence of facts, events or decisions complained of.¹⁶⁴ This is a general deadline for lodging complaints with the Ombudsman of B&H. It is important to point out that in this regard there is no room for application of a subjective 3-month deadline, which Article 13, paragraph 4, of the Law on the Prohibition of Discrimination explicitly ties only to lawsuits for protection against discrimination, not for addressing the Ombudsman. Therefore, caution is required in order not to create confusion by promoting a different interpretation,¹⁶⁵ which may easily lead to an undesirable effect – further discouraging individuals from attempting to exercise this form of protection against discrimination. The institution's representative, however, remarks that Ombudsmen also have a discretionary right in exceptional cases to consider complaints lodged beyond the 12-month deadline, based on the legislative formulation that the Ombudsman “may decide not to consider complaints filed beyond the deadline”. Nevertheless, he points out, “very rare are cases... that we reject a complaint because it is untimely.” That would only happen in an extreme case when, for example, a “person complains about a decision of, say, seven years ago”. Therefore, the Institution of Ombudsman of B&H considers the prescribed deadline adequate.¹⁶⁶

Comparative experience as a rule also suggests flexible deadlines in this regard. For example, the Law on the Australian Human Rights Commission does not specify a strict deadline for lodging discrimination complaints with the Commission. However, the Commission president has a discretionary right to not consider a complaint filed 12 months after the alleged discrimination was committed.¹⁶⁷ Similarly, the Canadian Human Rights Commission acts on complaints lodged within 12 months of the last act or omission, but may also, depending on specific circumstances and if deemed appropriate, decide on a claim lodged after that deadline¹⁶⁸, without any obligation to provide an explanation. If the Commission, however, establishes that such requirements for admissibility of a complaint are

¹⁶⁴ “Zakon o Ombudsmanu BiH”, Article 21, paragraph 2; Ombudsman, *Izveštaj o pojavama*, p. 3.

¹⁶⁵ See in this regard ICVA and Prava za sve, *Vodič za zaštitu od diskriminacije kroz zakon i institucije* (Sarajevo: ICVA and Prava za sve, 2011), p. 9.

¹⁶⁶ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁶⁷ “Australian Human Rights Commission Act” (Act No. 125 of 1986), amended on July 1, 2012, Article 46PH(1)(b); Australian Human Rights Commission, *Federal Discrimination Law* (Australian Human Rights Commission, 2011 ed), 6.10.

¹⁶⁸ “Canadian Human Rights Act” (R.S.C., 1985, c. H-6), amended on March 13, 2012, Subsection 41(1).

not met, it must inform the individual in writing why it passed such a decision.¹⁶⁹ In Serbia, the deadline for lodging a complaint is not specified and the only restriction that would lead to discontinuing a proceeding is a situation in which the procedure would not be effective due to the fact that too much time had passed since the violation was committed.¹⁷⁰ In this light, the deadline for lodging a complaint with the Ombudsman of B&H, from the aspect of protection of victims, is essentially well defined.

The second question concerning interaction between deadlines for addressing the Ombudsman and deadlines for court protection is more complex. As already stated, addressing the Ombudsman does not prevent an individual from also initiating civil proceedings. Therefore, an individual who believes to be a victim of discrimination in B&H may either lodge a complaint with the Ombudsman or initiate civil proceedings for protection against discrimination, or both. For addressing the court, a subjective three-month deadline and an objective one-year deadline are prescribed.¹⁷¹ However, it is important to keep in mind the fact that in B&H addressing the Ombudsman does not suspend deadlines for seeking judicial protection, which practically means that waiting for the Ombudsman to act on a lodged complaint could lead to missing deadlines for judicial protection. With an adequate explanation by the Ombudsman as part of providing legal protection to individuals, but also as part of informing the general public, with particular focus on marginalized groups, this solution, at first glance, should not pose particular problems for victims of discrimination.

In contrast to this model, in which coordination of these two protection mechanisms is effectively left to the practice of the Ombudsman of B&H, neighboring countries have opted for an approach that prevents the two proceedings from being conducted parallelly. That way, the legislative solution itself ensures coordination between the two mechanisms of protection against discrimination. In Serbia, the Commissioner may not act on a complaint if a proceeding has already been instigated before the court or has ended with a valid ruling.¹⁷² In Croatia too, the Ombudsman may consider an individual claim provided a court proceeding has not started.¹⁷³ Pointing out that the possibility and practice described in the previous section, whereby the Ombudsman and courts make different decisions on the same case, represent “inefficient use of resources”, the OSCE representative to

¹⁶⁹ Canadian Human Rights Tribunal, *Syndicat des employés d'exécution de Québec-Téléphone and Canadian Human rights Commission v Telus Communications (Québec) Inc.*, Decision on Previous Questions, September 15, 2005, points 45, 46.

¹⁷⁰ “Poslovnik o radu Poverenika za zaštitu ravnopravnosti”, Article 22, paragraph 1, point 4.

¹⁷¹ “Zakon o zabrani diskriminacije”, Article 13, paragraph 4.

¹⁷² “Zakon o zabrani diskriminacije”, Article 13, paragraph 1.

¹⁷³ “Zakon o suzbijanju diskriminacije”, Narodne novine 85/08, Article 12, paragraph 2(3).

B&H¹⁷⁴ also indicates that simultaneous overlapping of competences of these institutions should be reconsidered.

Transposition of such solutions into the B&H context however, poses certain dangers for efficient protection of victims. Namely, it is important to view these comparative solutions in the context of other elements of protection offered by these legislations. For example in Serbia, no deadlines are prescribed for filing a lawsuit for protection against discrimination, giving victims of discrimination time to address the Commissioner and, in case the discrimination continues, to instigate a court proceeding too. In contrast, the existence of a subjective 3-month deadline for court protection would as a priority make individuals in B&H use this option in the prescribed time. If the Serbian solution were to be adopted, it would mean total elimination of the possibility for the Ombudsman to act on discrimination cases in which the complainant also strives for court protection. In the context of the Ombudsman's legal role of central institution for protection against discrimination, which is also statistically confirmed by the fact that for example in 2011 around 191 new discrimination complaints were received, while it is estimated that around 20 discrimination cases are pending before courts,¹⁷⁵ such a solution would mean implicit referral to courts as the primary protection mechanism, which does not appear to be the lawmaker's intention.¹⁷⁶

The role of the Ombudsman as the central and also in a way the primary mechanism for protection of victims needs to be taken into account. Considering that examples are familiar in practice in which the Ombudsman of B&H established that discrimination occurred and formulated a recommendation accordingly while a lower-level court took a different stand, taking away the victim's opportunity to address the Ombudsman because he/she initiated a court proceeding could in practice mean *a priori* elimination of the potentially positive effect of a proceeding before the Ombudsman of B&H on further development of the situation. This is particularly important considering that some complaints are settled positively already in the phase of investigation and contacting the other side,¹⁷⁷ and that this process can sometimes be faster and contribute more easily to protecting the victim of discrimination than a long, costly and formal court proceeding. In this context, it also happens sometimes that "in some way, through an agreement and direct talk and contact", the parties, "when faced with the various legal sanctions and long and potentially costly proceedings (...), find a common solution that is

¹⁷⁴ Lori Mann, personal interview, March 12, 2012.

¹⁷⁵ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁷⁶ As regards Serbia, the very fact that the Commissioner possesses clearly prescribed active legitimacy for representing individuals in judicial protection proceedings justifies preventing him from acting if a proceeding has already been instigated, which, again, is not the case in B&H.

¹⁷⁷ Predrag Raosavljević, personal interview, February 6, 2012.

mutually beneficial”.¹⁷⁸ The mechanism of protection before the Ombudsman in this regard also has the secondary effect of preliminary evaluation and categorization of discrimination cases, alleviating the burden on the judiciary.

On the other hand, the Ombudsman does not jeopardize the principle of independence of the judiciary. A representative of the Institution of Ombudsman of B&H,¹⁷⁹ in relation to this, points out the Law on the Ombudsman, which prescribes that the Ombudsman “shall not interfere in the process of decision-making by courts (...)”¹⁸⁰, and emphasizes that, as in Serbia, in case a proceeding has ended with a valid ruling the Ombudsman of B&H in principle has no competence to decide differently and is only left with the possibility of influencing for example the process of execution of a court decision. On the other hand, acting on a complaint lodged with the Ombudsman during a court proceeding “again does not mean that the Institution will interfere in the work of courts, or prejudge the court’s decision. It may happen regarding some aspects of protection of rights that the Ombudsman makes a recommendation to remedy a conduct until the court proceeding is completed (...), it is also possible to urge through a letter or through a recommendation or contact with the responsible body, influencing it to change its conduct”.

Although the B&H model of protection against discrimination, as already explained, has its advantages which are not insignificant, it should be noted that the excessively short subjective deadline for exercising court protection against discrimination may have a negative effect on the use of mechanisms of protection against discrimination before the Ombudsman. Proceeding from the goal of providing the highest quality of protection against discrimination to an individual, the existing timeframe for addressing the Ombudsman, as well as the possibility of parallel use of this mechanism and the mechanism of court protection, seem to be adequate. At the same time, however, prescribing an excessively short subjective deadline for instigating a court proceeding for anti-discrimination protection does not ensure complementarity of use of these two protection mechanisms and potentially jeopardizes the legal role of the Ombudsman of B&H as the central institution for protection against discrimination. Namely, the subjective three-month deadline may be interpreted as an implicit incentive to victims to address the courts, without losing time before the Ombudsman.¹⁸¹ This is particularly relevant considering the discouraging statistics on compliance with recommendations in discrimination-related cases.

¹⁷⁸ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁷⁹ Predrag Raosavljević, personal interview, February 6, 2012, as well as telephone interview, May 8, 2012.

¹⁸⁰ “Zakon o ombudsmanu”, Article 4, paragraph 2.

¹⁸¹ The OSCE representative to B&H also underlines that precisely due to short deadlines, officials of the Ombudsman of B&H often automatically refer victims to get court protection. Lori Mann, personal interview, March 12, 2012.

4.4.3. Role of the Ombudsman in a Court Proceeding

In comparative practice, there are different ways in which equality bodies participate in court proceedings: representation of individuals, instigating proceedings in their own name and intervening in pending proceedings.

4.4.3.1. Instigating Civil Proceedings for Protection against Discrimination – Legislative Vagueness or a Neglected Opportunity?

An Ombudsman may initiate a misdemeanor proceeding and criminal proceeding. As already stated, pursuant to the provisions of the LPD, the Ombudsman institution may initiate the instigation of a misdemeanor proceeding for protection against discrimination, including a situation in which cooperation with this institution is absent. In addition, it may file a criminal report under the general rules of criminal proceedings. But, as is often emphasized, the Ombudsman of B&H may not instigate litigation with the goal of protection of an individual against discrimination.

At first glance, however, the Law also leaves open the possibility of instigating civil proceedings for protection against discrimination. Article 4, paragraph 2, of the Law on the Human Rights Ombudsman of B&H, namely, prescribes that the Ombudsman “...may instigate court proceedings or intervene in pending proceedings, whenever he or she finds that such action is necessary for the performance of his or her duties.”¹⁸² Besides that, the Law on the Prohibition of Discrimination should not be an obstacle either, considering that Article 17 gives active legitimacy for the conduct of litigation for protection against discrimination, among others, to bodies and institutions which “deal with protection against discrimination of a certain group of persons in the scope of their activities”.

Despite this legislative openness for the Ombudsman’s active work toward instigating a court proceeding, the dominant interpretation and view is that the Ombudsman of B&H does not have the competence to instigate civil proceedings. A representative of the Institution of Ombudsman of B&H also expresses the opinion that use of the possibility of instigating litigation for protection against discrimination would “draw (the Institution) away from its primary function – a preventive human rights protection mechanism through recommendations to public government bodies, primarily on how to raise the standard of protection”. In this regard, he points out, it is better that lawyers, organizations and bodies that are already competent continue to do this work, while the Ombudsman institution limits itself to referring individuals to these different protection options, as well as monitoring trials and analyzing information collected from trials and forwarding

¹⁸² It appears, considering the general focus of protection which is limited to public bodies in B&H, that this refers to proceedings involving these bodies, not proceedings between private persons, to which protection by the Ombudsman extends only in the field of discrimination.

observations to relevant institutions with the goal of improving the implementation of the Law.¹⁸³

Even in a comparative perspective, the issue of coordination and maximizing the efficiency of these two mechanisms of protection against discrimination is raised. In Serbia, for example, the Commissioner for Protection of Equality is allowed to instigate civil proceedings for protection against discrimination.¹⁸⁴ Some other specialized bodies may also file lawsuits with the goal of protecting victims. For example, in Hungary, such bodies may instigate an *actio popularis*, i.e. an action in public interest, with the goal of protecting the rights of an individual or a group of individuals whose rights have been violated. Similarly, in Belgium, the state body for protection against discrimination may represent the interests of a specific victim, either a legal or natural person, with their prior consent.¹⁸⁵

Comparative analysis shows that in a considerable number of countries national institutions for protection of human rights or protection of equality have the power to instigate a court proceeding for protection against discrimination. Yet, its use in practice varies. According to the Equinet survey, out of the total 25 surveyed bodies, 17 bodies from 14 EU states may represent individuals in court proceedings for protection against discrimination.¹⁸⁶ Statistics for 2008 and 2009, however, show that nearly half of these bodies did not use this opportunity at all.¹⁸⁷ The main reason given by the bodies for this situation is lack of state funding or staffing resources,¹⁸⁸ particularly emphasizing the deterrent effect of the possibility of ordering these bodies to cover the costs of the proceeding, for example in Austria, Belgium, Finland and Malta. Some bodies also mention procedural rules as one of the causes, which limit the possibility of their participation in legal proceedings only to some specific situations.¹⁸⁹

¹⁸³ Predrag Raosavljević, personal interview, February 6, 2012.

¹⁸⁴ The Ombudsman in Croatia, on the other hand, only has a role in a conciliation procedure.

¹⁸⁵ Isabelle Chopin and Thien Uyen Do, *Developing Anti-Discrimination Law*, p. 86.

¹⁸⁶ This usually regards representation in court (15 bodies, for example in Belgium, Britain, Bulgaria, Denmark, Hungary, Slovakia, Sweden, Finland, Romania) or at the same time also before a tribunal (10, in Belgium, Britain, Finland, Malta, Sweden, Ireland, Northern Ireland, Romania); in case of Denmark before a quasi-judicial body, which passes legally binding decisions; and in the case of Austria before a commission which issues non-binding statements. Equinet and B. D. Jacobsen, *Influencing the law*, p. 13.

¹⁸⁷ Ibid.

¹⁸⁸ This is the case, for example, in Austria, Belgium or Slovakia. Ibid.

¹⁸⁹ This is the case, for example, in Austria, when the competent commission in a proceeding instigated by the Ombudsman for Equal Treatment passes a decision which the latter does not agree with, or when the commission's decision that discrimination occurred, which it orders to be stopped, is not complied with. Equinet and B. D. Jacobsen, *Influencing the law*, p. 14; Also see Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law: Synthesis Report* (Brussels: Milieu, 2011), p. 21.

The Ombudsman's expertise might certainly be a success factor when it comes to settling the gravest forms of discrimination in court. Of course, it is not realistic to expect, nor would it serve any purpose, if the Ombudsman turned into a regular representative of victims of discrimination in every court proceeding. But, if there are sufficiently strong reasons in a specific case to use that opportunity, for example because an individual case points to particularly grave forms of discrimination or a major structural problem that should be addressed, the Ombudsman institution, by using this option which even in a comparative perspective, as we have stated, is more a rule than an exception, thanks to its expertise and active work could influence particularly unacceptable social occurrences, making an effect on both the individual and society. Illustrative examples of such structural problems in B&H are segregation and discrimination on grounds of disability in the education field. In these cases a non-governmental organization took action that might in fact be expected from the Institution of Ombudsman.¹⁹⁰ After all, even from the legislative formulation used, it appears that the intention of the lawmaker was to enable the Institution of Ombudsman of B&H, in cases in which it deems necessary in the performance of its duties, to exercise the potentially important role of instigating court proceedings in discrimination cases.

4.4.3.2. Instigating Proceedings in Strategic Cases

Along with the option of representing specific individuals, the second possible way in which these institutions are able to participate in court proceedings is by instigating them in their own name, as a rule for the purpose of protection of public interest. This may happen if there is no identified victim, but there is a regulation or provision that appears to have discriminatory elements or a job posting with that effect, but no one has filed a complaint about it. A second conceivable situation would be if the Ombudsman learns that discrimination occurred, but the victims are afraid to file complaints and/or instigate court proceedings due to potentially negative consequences for them.¹⁹¹ In a comparative perspective, 17 out of 25 surveyed bodies from a total of 16 European countries¹⁹² said they

¹⁹⁰ Both examples were taken from court practice as a result of strategic litigation by the NGO Vaša prava. The first problem concerns ethnic segregation of children in schools in the Herzegovina-Neretva Canton, while the second problem regards 165 children with special needs in the Mostar area. Emina Trhulj, "Različitost u klupama – (nedostižni) ideal?", and diskriminacija.ba portal news-room, "Prva sudska presuda u BiH protiv 'Dvije škole pod jednim krovom': etnička diskriminacija je diskriminatorna!".

¹⁹¹ Equinet and B. D. Jacobsen, *Influencing the law*, p. 16.

¹⁹² Among them are Austria, Bulgaria, Belgium, Finland, Malta, Croatia, Czech Republic, France, Holland, Britain, Ireland, Northern Ireland, Sweden, Hungary, Romania, Slovakia. *Ibid.*, p. 16, fn. 40.

have this power, six bodies do not have it¹⁹³, and two were unable to answer this question either affirmatively or negatively.¹⁹⁴

However, in comparative practice the potential offered by this option is not used often either. Thus, only six out of these 17 bodies in European Union countries, i.e. less than one-half, used this power in 2009 (in a total of 40 cases).¹⁹⁵ In Belgium the Center for Equal Opportunities instigated litigation in 5 cases in 2011, which is 1-2% of the total number of such cases.¹⁹⁶ The Commission of the Province of Ontario (Canada), which has the competence to file systematic claims with the Human Rights Tribunal, only used this option once in 2009-2010, similarly to other Canadian commissions, primarily due to a reported shortage of resources for this additional activity.¹⁹⁷ Similar obstacles are present in most countries: shortage of financial and staffing resources, limitation to cases in which a victim gives consent (e.g. in Austria, Belgium, Czech Republic, Sweden) or cases where legislation is considered unconstitutional (Hungary), or problems related to getting information and learning about the existence of laws or policies with discriminatory effect (Great Britain).¹⁹⁸

In this regard, shortages of resources are usually compensated for with a strategic approach, which may certainly be an option in B&H. Pursuant to the provisions of the Law on the Ombudsman and the LPD quoted above, even the second option of instigating a proceeding in their own name, with the goal of protecting public interest, seems acceptable in B&H. In response to the fact that the conduct of these proceedings requires both money and time, equality bodies in some other countries, such as Belgium, Britain and Ireland, have also opted for a strategic approach.¹⁹⁹ They established internal criteria, based on which they select strategically important cases in which they initiate court proceedings – for example cases in which application of an existing rule may be tested, application of certain standards explained, specific discriminatory practices presented before

¹⁹³ For example Germany and Norway. *Ibid.*, p. 16, fn. 41.

¹⁹⁴ *Ibid.*, p. 16.

¹⁹⁵ *Ibid.*, p. 16.

¹⁹⁶ Equinet, *Providing Independent Assistance*, p. 25.

¹⁹⁷ Heather MacNaughton, "Lessons Learned: the BC Direct Access Human Rights Tribunal".

¹⁹⁸ Equinet and B. D. Jacobsen, *Influencing the law*, p. 17. Sometimes, however, there are positive examples too, in which there is simply no need to address such issues in court. For example, responsible bodies in Britain and Northern Ireland in 2008 and 2009, when they identified potentially discriminatory conduct, gave advice to the employer or service provider, which the latter followed, resolving the problem without any need to instigate court proceedings. *Ibid.*, p. 18.

¹⁹⁹ For more information see Equinet, *Providing Independent Assistance*, pp. 23 and 40.

the court, or through which an important precedent can be created.²⁰⁰ This approach would be particularly desirable in B&H, both with regard to participation in their own name as well as on the side of an individual. Along with the secondary effect of saving money and time, it would enable the Ombudsman to act strategically with the goal of eliminating widespread or grave discriminatory practices and occurrences of structural discrimination which affect different groups of people.

4.4.3.3. Role of the Ombudsman in a Pending Civil Proceeding for Protection against Discrimination

The third possible form of participation in proceedings for protection against discrimination is intervention in an ongoing court proceeding. According to comparative data, 13²⁰¹ out of 25 surveyed bodies in EU countries stated that they have this power. Yet, only three bodies actually used it in 2008 and 2009.²⁰² The causes, again, are of a financial nature – costs of participation in the proceeding, lack of other resources, as well as unwillingness of courts to allow such interventions, for example in Croatia and Bulgaria.²⁰³ As for the latter factor, it is certainly important to bear in mind that in some countries it may be related to lack of a legal tradition of allowing such interventions. However, interesting in this regard is an inspiring example of one such country – Hungary, in which, in spite of that, the Ombudsman successfully succeeded in intervening in a court proceeding, arguing that assisting courts in interpreting anti-discrimination law is a natural part of an equality body's role.²⁰⁴

A specific type of conceivable participation in a proceeding is participation in the role of “friend of the court” – *amicus curiae*. This is a practice in which a third party that is not a party to the proceeding takes part in it to clarify a point of law that would otherwise not be considered at all or would not be considered properly. This mostly takes place in the form of the third party providing a written brief for the information of the court.²⁰⁵ For example, in Ireland, in which *amicus curiae* is

²⁰⁰ Examples of this are equality bodies in Britain, Ireland and Northern Ireland. Sweden was also working on a strategic litigation policy in 2010. Equinet and B. D. Jacobsen, *Influencing the law*, p. 14; For specific descriptions of strategic approaches in Belgium, Ireland and Northern Ireland, see Equinet, *Providing Independent Assistance*, pp. 23–27.

²⁰¹ In Britain, Ireland, Northern Ireland, Bulgaria, Czech Republic, Croatia, Denmark, Hungary, Malta, Norway, France, Slovakia, Italy. In contrast, countries in which this is not possible are, for example, Belgium, Finland, Luxembourg, Sweden, Holland and Romania. Equinet and B. D. Jacobsen, *Influencing the law*, p. 19, fn. 55–56.

²⁰² Britain is the only body that extensively uses this power (32 interventions cited), which has to do with the generally strong tradition of using interventions in Anglo-Saxon legal cultures. *Ibid.*, p. 19.

²⁰³ *Ibid.*, p. 20.

²⁰⁴ *Ibid.*, pp. 20–21.

²⁰⁵ Farkas, *How to Present a Discrimination Claim*, p. 71.

relatively unfamiliar and new, in two cases (related to the issue of accommodation of the Traveller community) the Irish Equality Authority was allowed to appear in the proceedings as *amicus curiae*.²⁰⁶ In Romania, an interesting solution is prescribed – their equality body does not have the right to intervene in a proceeding, but anti-discrimination legislation prescribes that it is to be summoned in every case, *de facto* giving it the role of a mandatory court expert in this type of litigation.²⁰⁷ On the other hand, in France for example, along with the power of the body in charge of combating discrimination²⁰⁸ to ask to be allowed to present its observations in both civil, as well as administrative and criminal proceedings, it also has the role of a legal advisor (*auxiliaire de justice*). This practically means that courts themselves (civil, criminal or administrative), either *ex officio* or on request of the parties, may invite it to present its observations in ongoing anti-discrimination proceedings.²⁰⁹ In this case, the body appears solely in the role of representative of public interest – fight against discrimination and equality protection.²¹⁰

The Law on the Prohibition of Discrimination allows the possibility for the Ombudsman to participate as a third party in proceedings for protection against discrimination on the side of potential discrimination victims. Article 16 conditions this form of participation on victims' consent and prescribes that, regardless of the outcome of the proceeding, the third party covers the costs of its participation. Based on experience in other countries, precisely the possibility of incurring additional costs in conditions of chronic lack of resources has a discouraging effect on these bodies. Also, in the B&H context this provision is vague in relation to whether the Institution of Ombudsman would have this option if it already made a recommendation that was not complied with. Considering that it does not prescribe a limitation of this kind, it may be assumed that this is possible.²¹¹

As past experience shows, the different options for the Ombudsman's participation in a pending proceeding are not yet being used in B&H practice, which is certainly a shortcoming. So far there have been no court proceedings in which the Ombudsman participated as an intervenor on the side of the plaintiff, which is

²⁰⁶ Ibid., p. 71.

²⁰⁷ Ibid., p. 70.

²⁰⁸ Formerly High Authority for the Struggle against Discrimination (HALDE) and now Institution of the Right Mediator.

²⁰⁹ Loi n°2004-1486 du 30 décembre 2004 portant création de la haute autorité de lutte contre les discriminations et pour l'égalité; Article 13 (amended Loi n° 2006-396 du 31 mars 2006 pour l'égalité des chances).

²¹⁰ Cour de Cassation, Chambre sociale, ruling no. 08-40.628, June 2, 2010.

²¹¹ This can be logically explained by the fact that in some situations it is not enough to use a recommendation as evidence and additional explanation and comments are required from the Ombudsman, for example because an administrative body or another party explicitly refused to comply with the Ombudsman's recommendation or new developments indicate new elements of discrimination or elements that lead to a change in the Ombudsman's opinion on the given situation.

primarily explained by the fact that the institution has not yet received a relevant request in this regard.²¹² As for a conceivable situation in line with comparative experience – that the courts request the Ombudsman’s opinion on a particular matter – not a single court has yet asked for an opinion from the Institution of Ombudsman. Something like that would certainly be useful because the Department for Elimination of Discrimination already has considerable experience in performing an advisory role, which it exercised before some other public bodies (head of municipality, syndicate, etc.) by giving opinions or taking a legal stand on whether a specific situation constitutes discrimination – based on European Court of Human Rights practice, interpretation of international conventions that courts may not be applying in their work, and practice of the Institution itself.²¹³ It is important, however, to bear in mind the above described comparative experience, which points to the fact that in order for equality bodies to fully exercise a potential advisory role in strategically important cases, what is often needed is their own initiative and asserting themselves as a relevant factor, in particular in conditions in which this role is relatively unfamiliar in the domestic judicial system.²¹⁴

Provision of adequate resources coupled with a strategic approach is the key to success of each of the three possible forms of the Ombudsman’s participation in civil proceedings on anti-discrimination protection. That is why in B&H too, when considering the use of active legitimacy in litigation proceedings for the Ombudsman of B&H and the possibility of participating in a proceeding in the role of a third party, account should be taken of the important recommendation that equality bodies must be given adequate resources to be able to utilize the described competences.²¹⁵ In addition, the bodies themselves, with the goal of effectively using the resources available to them, are encouraged to use the method of strategic litigation, i.e. to focus on the most important cases that may test or clarify the law or create a precedent²¹⁶.

²¹² Predrag Raosavljević, personal interview, February 6, 2012.

²¹³ Predrag Raosavljević, personal interview, February 6, 2012.

²¹⁴ See the examples of Hungary and Ireland presented at the beginning of the section (4.4.3.3.).

²¹⁵ Equinet and B. D. Jacobsen, *Influencing the law*, p. 32.

²¹⁶ *Ibid.*, p. 32.

5.

Concluding Observations

Although the legislative framework provides a good platform for an important role of the Ombudsman of B&H in combating discrimination, numerous problems that the institution faces in its work in practice diminish the potential offered by its broadly defined legal mandate. With regard to that, in this research we attempted to identify the fundamental problems that should receive attention in the coming period.

Equality bodies can be an efficient means of protecting the individual against discrimination – they are specialized and available. Comparing them to judicial protection, they can be a simpler, faster and more efficient means of getting protection against discrimination. Over time they develop specific expertise and experience and can have an important impact on the law and its application. In order for the Ombudsman of B&H, who was accorded the role of central institution for protection against discrimination, to become a true catalyst of social change in this field, however, conditions need to be ensured for this institution's unhampered, independent and effective activities – primarily its financial and staff equipping.

The Ombudsman of B&H to large extent shares the problems faced by equality institutions in other countries, which are first of all related to limited resources and lack of understanding of the authorities that approve the budget. This is illustrated by the fact that the legally envisioned special budget item required for the operation of the Department for Elimination of all Forms of Discrimination has not yet been adopted. This directly impacts the implementation of all of the institution's competences: among others, the speed of handling complaints, presence on the ground, organization of public awareness raising activities, implementation of various surveys and normative-legal analyses, as well as taking a more active role in initiating and participating in different forms of court proceedings.

But some problems are related to the procedures, processes and conditions in which the Ombudsman institution exercises its function. On one hand, in conditions of an insufficiently developed culture of rule of law, its recommendations are not always given due attention, while necessary support by other key actors, primarily parliaments, for improving the implementation of recommendations that have not been complied with is often missing. This also means that support for strengthening the institution's reputation and authority is lacking.

Further, along with unclear provisions in the law regarding its role on some matters, such as, for example, mediation and instigating civil proceedings for protection against discrimination, we identified the existence of clear legal powers

and new institutes whose potential has not yet been fully utilized. Examples are misdemeanor proceedings for protection against discrimination, promotion of numerous innovations offered by the Law, such as extending the competences of the Institution of Ombudsman of B&H to act on complaints related to the private sector, or prohibition of victimization.

Although it is clear that the majority of these issues are directly influenced by the scope of resources available to the Ombudsman of B&H and that account must be taken of the fact that the role of the Ombudsman in this important field is relatively new, we believe that the current moment is optimal for revising the existing practices and establishing, in light of best comparative experiences, strategic steps needed for optimizing the efficiency of this key mechanism for protecting the individual against discrimination in B&H.

6.

Recommendations

Status of the Institution of Ombudsman of B&H

1. The meaning, content, as well as practical requirements and implications of the status of the Ombudsman of B&H as the central institution for protection against discrimination should be precisely defined.

Budget and Structural Issues

2. Financial resources should be ensured for efficient exercise of the mandate of central institution for protection against discrimination accorded to the Ombudsman by the LPD. In this regard, the ECRI recommends in its latest report on B&H²¹⁷ that the “authorities make sufficient financial and human resources available to the Human Rights Ombudsman to enable this institution to carry out effectively all the tasks that have been assigned to it in the field of combating racial discrimination.” Therefore, the absolute priority is that the national authorities of B&H fulfill their legal obligation from Article 7, paragraph 5, of the LPD and insert a separate item in the budget which is necessary for the operation of the Department for Combating Discrimination. A further possibility for strengthening the Department, following the model of Croatia, is to provide additional resources from an available European Union assistance program targeted at strengthening efficiency of protection against discrimination.

3. Creating an optimal budget framework for the Ombudsman of B&H requires a realistic assessment of a variety of factors. In determining the institution’s optimal budget and staffing capacities, as relevant international standards show,²¹⁸ it is particularly important to bear in mind the population of the country and the number of reported and estimated discrimination cases. It should be noted in this regard that statistics by themselves, at least in the B&H context, are not the only relevant factor in determining the optimal capacities of the Institution of Ombudsman

²¹⁷ European Commission against Racism and Intolerance (ECRI), Second Report on Bosnia and Herzegovina (Strasbourg: ECRI, February 8, 2011), CRI(2011)2, point 41.

²¹⁸ See section 2 of this report.

of B&H in the context of fulfilling its role of central body for protection against discrimination. Namely, based on past experience, as the Institution's institutional capacities grow, the number of citizens' complaints rises.²¹⁹ Therefore, along with the population factor and statistical data on past complaints, it is important to take into account the expected number of new complaints, which is conditioned by both the Institution's bigger field presence and gradual rising of awareness of individuals on discrimination and existing mechanisms for protection against it.

4. Procedural guarantees should be provided to make sure the Ombudsman's budget requests are adequately considered by the Parliamentary Assembly of B&H, which should be particularly sensitive to implementing the legal regulations that it itself had adopted. In this regard, in line with the recommendations of the Venice Commission,²²⁰ this proposal in unchanged form should be included in the state budget proposal that is submitted to the Parliamentary Assembly, or the Ombudsman's original proposal should be submitted too so that it can be compared to the reduced proposal of the responsible government body – in our case the Ministry of Finance of B&H. Another option is for the Institution of Ombudsman of B&H to directly submit its budget proposal to the responsible Assembly committee, similarly to the solution adopted in Montenegro. In that case, however, it would be necessary to ensure the implementation of the committee's request without additional interventions by the Ministry of Finance.

5. The staffing capacities of the Department for Elimination of all Forms of Discrimination should be strengthened by making optimal use of provided resources. This means, similarly to Serbia but also taking into account the population factor in B&H, creating a team of approximately 15 employees and reorganizing the Department by establishing special sectors for dealing with complaints, surveys and production of reports and publications, and analysis of normative-legal issues. Among employees who act on individual complaints, it is desirable to create a division of competences for different, especially important or common discrimination grounds, which would, with minimal costs and continuous education, in the long run ensure focused development of employees' expertise for different grounds and forms of discrimination.

²¹⁹ For example, after the Ombudsman introduced so-called office days in Tuzla in November 2010 (which means that legal experts from the office in Brčko are present in Tuzla two days every week), a significant rise in the number of cases from this canton was reported. Predrag Raosavljević, personal interview, February 6, 2012.

²²⁰ Venice Commission, *Opinion on the possible reform*, point 28.

Availability of the Institution of Ombudsman of B&H

6. Bigger presence of the Ombudsman should be provided in the field by opening regional offices in Tuzla, the most populated canton in the Federation of B&H, as well as Trebinje and Bihać. This will, on one hand, strengthen the availability of the Ombudsman's services to individuals across B&H and, on the other, create conditions for efficient implementation of other important activities – investigations, monitoring proceedings and raising awareness on combating discrimination.

7. With the goal of ensuring availability of the Ombudsman's advisory services to all citizens in B&H, a special telephone line should be set up and advertised. The line should offer advice to individuals and/or, in partnership with reliable local institutions and organizations, establish a network of "anti-discrimination centers" serving as first contact points and advisory service providers to victims of discrimination, with appropriate training and supervision by the Ombudsman.

Improving the Procedure of Protection against Discrimination

8. If the other party fails to respond adequately, the Ombudsman of B&H must place the burden of lack of defense on that party,²²¹ rather than on the victim. At the same time, the general obligation of providing adequate assistance to complainants, along with carrying out investigative activities, should contribute to more effective identification of *prima facie* cases of discrimination.

9. A model of mediation in reported discrimination cases should be established, either by educating the Ombudsman's staff, as in the case of Croatia, or by making a list of mediators specializing in the field of human rights/protection against discrimination or educating them in this regard, using practice in Serbia as a model.

Relation between the Procedure Before the Ombudsman and Judicial Protection

10. In the procedural area, an appropriate regulation should prescribe the obligation for courts to provide a specific, clear and detailed explanation in cases of deviation from an Ombudsman's recommendation. This solution, familiar in

²²¹ See also Equinet, *Strategic Enforcement*, p. 21.

comparative practice, would result in better harmonization of a proceeding before the Ombudsman and a proceeding before the court.

11. Based on existing legislative options, the Ombudsman of B&H should assume a more active role in court proceedings. An avalanche of lawsuits filed by the institution, as in comparative practice, cannot be expected, but it is important to use the Ombudsman's expertise and experience in strategic cases, which are related, for instance, to occurrences of structural discrimination, setting precedents or clarifying specific rules in anti-discrimination legislation. Any dilemmas regarding active legitimacy of the Ombudsman of B&H in this regard might be resolved by seeking authentic interpretations of specific provisions of the Law on the Ombudsman of B&H and Law on the Prohibition of Discrimination of B&H from the lawmaker.

12. A strategic approach should also be taken in particularly important cases in the context of using the legal option of participating in a proceeding on the side of a victim of discrimination. Introducing the legal option for courts to seek the Ombudsman's advisory opinion in proceedings on protection against discrimination should be given additional consideration. Such options might also contribute to coordinated operation of courts and the Ombudsman. In light of these bodies' expertise compared to the broadly defined mandate of courts, this may be of great assistance, with consideration for the independence of courts which ultimately decide independently whether to seek/allow the opinion and whether to accept it. As comparative experience shows, the Ombudsman institution itself should assume a more active role in identifying such cases and offering its expertise, regardless of the absence of requests for its participation. Along with discrimination cases that the institution is already acquainted with through the complaints it receives and the proceedings it monitors, it is essential to establish cooperation with relevant civil society organizations in identifying strategically important cases.

13. The excessively short subjective three-month deadline for exercising court protection against discrimination should be eliminated. This will ensure greater complementarity of anti-discrimination proceedings before the Ombudsman and before courts in B&H. It will also pave the way for primary use of the option of protection before the Ombudsman and after that, if needed, before the responsible court. In the meantime, until the proposed changes are made, particular attention should be paid to the issue of informing the public, in particular marginalized groups, about the non-suspensive effect of addressing the Ombudsman.

Mechanisms for Improving Implementation of Recommendations of the Institution of Ombudsman of B&H in the Field of Discrimination

14. In the annual report and especially in special reports on discrimination, the Ombudsman institution should focus on cases of prolonged discrimination resulting from non-implementation of its recommendations. A separate section should be devoted to cases of unjustified non-implementation of the Ombudsman's recommendations, noting the name of the responsible government bodies and/or officials. This will ensure that adequate attention is drawn to both socially negative occurrences of discrimination and government bodies in the framework of which it occurs, which will secure public pressure for its elimination.

15. Standardization and institutionalization of mechanisms for supervising the implementation of the Ombudsman's recommendations related to public bodies which have not been complied with should be ensured in parliament, and civil society organizations and media should be included in the supervision process.²²² Focused presentation of negative examples in reports will thus be accompanied by adequate complementary support from parliaments in terms of seeking information from government bodies on established occurrences of discrimination/non-implementation of recommendations, issuing recommendations to these bodies by the parliament itself and also ensuring normative changes that might result in the elimination of some forms of discrimination. In this regard, better parliamentary support may be an important complementary factor in successful elimination of discrimination occurrences and compliance with the Ombudsman's recommendations.

16. It is essential to use the full potential of the legal option of initiating and participating in misdemeanor proceedings on protection against discrimination and to strategically disseminate information on any positive outcomes. It is important to ensure this in all cases of victimization of individuals until potential victimizers understand the dangers brought to them by such conduct and until victimized individuals get protection and start to trust the protection that the Law accords them. If we bear in mind the statistics for each category of recommendations that have not been complied with, misdemeanor liability should also be used more often in cases of discrimination that continues despite the recommendations made. From that viewpoint, there is essentially no difference between a recommendation that has not been complied with, lack of response to a recommendation, or poor

²²² In relation to this, see Conclusions and Recommendations from the International Conference "Cooperation of Parliaments and Independent Regulatory Bodies in South East Europe", held April 3/4, 2012, at the House of the National Assembly of the Republic of Serbia.

arguments for non-compliance. We assume that the lawmaker envisioned this option bearing in mind the special significance of combating discrimination and potentially negative statistics related to compliance with recommendations in this field. The Ombudsman should act equally in all such instances.

17. In strategic cases, misdemeanor proceedings for protection against discrimination should also be initiated, regardless of whether the Ombudsman previously made a recommendation or not.

Promotional Activities

18. Special attention should be given to promoting innovations to the LPD, focusing on the possibility of getting protection against discrimination in the private sector, rules on shifting the burden of proof, prohibition of victimization and misdemeanor liability prescribed by the LPD. This can have a dual positive effect – encouraging victims to file complaints and deterring potential violators from prohibited actions. Along with educating the public, it is especially important to immediately inform every individual identified as a potential discriminator about the prohibition of victimization of individuals participating in a procedure and sanctions that may follow in case it is not abided by. On the other hand, timely explanation of the rule on shifting the burden of proof will generally stimulate responses and cooperation with the Ombudsman with the goal of adequate defense.

19. The Ombudsman of B&H should particularly make sure to use his expertise in the field of protection against discrimination in the form of explaining and developing practice related to implementation of this rule and other legislative innovations in his decisions and recommendations, which may have an educational effect on the broader judicial community.

20. It is essential to ensure the implementation of legally prescribed broader educational and informational activities related to the LPD, to the protection options it offers, the role of the Ombudsman as a particularly important protection mechanism, as well as occurrences of discrimination in B&H society, and to give special attention to raising public awareness on negative occurrences of racism and racial discrimination in B&H.

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