

CONFERENCE



YEARS OF COMBATING DISCRIMINATION IN BIH

**Summary,
Concluding Remarks,
Observations and
Recommendations**

21 - 22 March 2019
Sarajevo

Conference “10 Years of Combating Discrimination in BiH”

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Observations and Recommendations

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SUMMARY AND CONCLUDING REMARKS

With its conference “**10 Years of Combating Discrimination in BiH**”, which took place on the 21 and 22 March 2019 in Sarajevo, and on the occasion of the International Day for the Elimination of Racial Discrimination (21 March), the OSCE Mission to Bosnia and Herzegovina (the Mission) marked the 10th anniversary of the adoption of the Law on Prohibition of Discrimination (the Law).

Around 150 participants gathered at the conference, including Ambassadors to BiH, the President of the BiH Constitutional Court, the President of the FBiH Constitutional Court, members and representatives of the BiH High Judicial and Prosecutorial Council, around 20 judges (five of them being presidents of the municipal/cantonal courts), the Ombudspersons for human rights of BiH and their advisers, the Deputy Minister for Human Rights and Refugees, members of the FBiH Parliament, the RSNA and the BDBiH Assembly, representatives of both the legislative and the executive, representatives of the international community in BiH, guests from Montenegro, North Macedonia and Serbia, and other representatives of professional associations, civil society organisations, and scholars.

This conference aimed to provide a space for key local and regional actors to exchange opinions and discuss the main issues for the implementation of anti-discrimination legislation. Moreover, the conference attempted to address whether the Law has strengthened the mechanisms designed to combat discrimination and whether these mechanisms have provided a functioning framework, allowing the realization of equal rights and opportunities for all persons in BiH.

The Mission used this occasion to launch its report titled an “**Assessment of the Work of BiH Institutions in Combating Discrimination**”.¹ As part of its efforts in combating discrimination, the Mission analysed the work of three key institutional actors with the mandate and competencies to combat discrimination: the judiciary, the BiH Institution of the Human Rights Ombudsman/Ombudsmen and the BiH Ministry for Human Rights and

1 Please, see more: <https://www.osce.org/bs/mission-to-bosnia-and-herzegovina/414329>

Refugees. Identifying challenges whilst not losing sight of the many achievements that have been made in this field, the Mission offered straightforward, concrete recommendations.

Undoubtedly, discrimination prevails in almost all spheres of life in BiH and there are many challenges the country is facing in combatting this social ill. To be able to effectively break down the barriers of prejudice and hate, co-ordination and co-operation between key stakeholders is essential.

The conference provided an excellent opportunity to discuss a wide selection of important topics. Spread among four panels, themes included judicial protection from discrimination, the role of national human rights institutions in ensuring protection from discrimination and the impact of their recommendations, the utilization of situational testing, as well as mechanisms for prevention from of gender based discrimination.

On the second day, time was allocated for a productive dialogue on these topics, with many participants contributing concrete proposals to improve the status quo. The recommendations elaborated upon in this document reflect the inputs of the Conference participants, for which we are truly grateful, in addition to the Mission's own recommendations.

PANEL I

JUDICIAL PROTECTION FROM DISCRIMINATION

This discussion presented an overview of individual and collective discrimination in the context of human rights in BiH. Additionally, it provided an insight into trends of discrimination cases considering the fact that such judgments are the most potent tool currently available in protection from discrimination.

For that very purpose, special procedural provisions have been introduced, pursuant to which civil proceedings in discrimination cases have been amended. This panel provided an overview of current challenges in the application of certain procedural provisions of the Law. One of the novelties of the Law, the shifting of the burden of proof, has been one of the greatest challenges for judges when applying this rule for the first time. This panel tried to address to what extent and in which manner these procedural provisions have been used. The third-party intervener role, as prescribed by the Law, explicitly reveals the intention for the intervening party to support the plaintiff as the alleged victim of discrimination while case-law to date suggests otherwise. Previous practice in BiH highlighted that third-party intervening parties happened to appear on the side of the defendant, supporting their claims. The importance of strategic litigation was also discussed, for it is another one of the novelties introduced by the Law. Finally, the panel tried to assess to what extent strategic litigation has been used before regular courts in BiH.

Moderator: Miloš Bogičević, Legal Adviser, Anti-discrimination, OSCE Mission to BiH

Panelists:

Goran Nezirović, Judge, the FBiH Supreme Court, *Overview of challenges in application of procedural provisions of the LPD*

Nedim Ademović, Lawyer, *Individual and collective discrimination in the BiH context*

Sevima Sali-Terzić, Senior Legal Adviser, BiH Constitutional Court, *Burden of Proof in cases of discrimination*

Dženana Hadžomerović, Lawyer, *The importance of strategic litigation*

Emir Prcanović, Executive Director of “Vaša prava BiH”: *Challenges in application of institutes envisaged by the LPD: the role of the third-party interveners and collective lawsuits*

PANEL II

THE ROLE OF HUMAN RIGHTS PROTECTION MECHANISMS IN PROTECTION FROM DISCRIMINATION: WHAT ARE THE EFFECTS OF RECOMMENDATIONS?

This panel examined a wide range of competencies provided by the mechanisms ensuring the protection of human rights, ranging from awareness-raising activities, situational testing, the use of the Institution's recommendations as evidence in court proceedings, research work in the field of discrimination, the drafting of annual and thematic reports, the initiation of mediation procedures, advancement of anti-discrimination public policies and most importantly – acting upon the complaints of individuals claiming to be victims of discrimination and taking an active role in misdemeanour proceedings for protection from discrimination.

Despite overall improvements to legislation, some of competencies are underutilized, while some are not used at all. According to the Mission's findings, the recommendations of the BiH Institution of Human Rights Ombudsman/Ombudsmen (the Ombudsman Institution) are being increasingly used as evidence during court proceedings. As representatives of the mechanisms for protection of human rights from Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia took part in this panel, the main challenges they are facing were discussed, such as the non-implementation of the recommendations and lack of their financial independence.

Moderator: Jasna Dobrić, Deputy Head of Human Dimension Department,
OSCE Mission to BiH

Panelists:

Brankica Janković, Commissioner for Protection of Equality of the Republic of Serbia

Nataša Stanišić, Head of the Complaints Department, Protector of Citizens –
Ombudsman of AP Vojvodina

Šučko Baković, Protector of Human Rights and Freedoms, Republic of Montenegro

Aleksandra Nastevska, Senior Adviser for the Promotion of Human Rights and
Freedoms, Ombudsman of Republic of North Macedonia

Hajrija Adžamija, Acting Head of the Department for the Elimination of all Forms of
Discrimination, Institution of Human Rights Ombudsman/Ombudsmen of BiH

PANEL III

SITUATIONAL TESTING: TO WHAT EXTENT SITUATIONAL TESTING HAS BEEN USED IN ANTI-DISCRIMINATION PROCEDURES

This panel explored situational testing as a novelty in BiH legislation, introduced following the 2016 amendments to the Law. These amendments stipulate that a person who deliberately exposes himself/herself to discriminatory behaviour out of their intention of testing the implementation of anti-discrimination regulations could take the role of either witness or plaintiff in court proceedings.

Developed by human rights organizations combating racial discrimination, situational testing has gained wide recognition as a method well suited to detecting hidden and subtle forms of discriminatory behaviour and to collect evidence in situations where other methods are deemed likely to fail. It has seen broad use over the past 20 years in Serbia, whereby civil society organizations (CSOs) have gained solid experience in the field. Despite not being explicitly stipulated by the Law in Macedonia, situational testing has been used as proof of discrimination before courts as well as ombudsman institutions. In BiH, situational testing has not been used as evidence before the Ombudsman Institution or the courts in even a single case. Understanding that introducing such amendments to legislation may be pointless if not applied, this panel considered the most effective ways forward and what are the pre-conditions for the successful and effective application of this method would be, starting from co-operation and mutual support between the Ombudsman Institution and CSOs, building the capacities of the Ombudsman Institution and CSOs, and establishing internal procedures for documenting cases where situational testing has been used to provide evidence before the Ombudsman Institution and the courts.

Moderator: **Nina Šeremet**, National Legal Officer, Human Rights Section, OSCE Mission to BiH

Panelists:

Dajana Čelebić, Project Co-ordinator, Association for Democratic Initiatives, BiH

Jovana Vuković, Human Rights Expert, Republic of Serbia

Igor Jadrovski, Helsinki Committee for Human Rights, Republic of North Macedonia

PANEL IV

MECHANISMS FOR PROTECTION FROM GENDER- BASED DISCRIMINATION

This panel examined how both the BiH Law on Prohibition of Discrimination and the BiH Gender Equality Law broadly regulate and promote gender equality, guarantee equal opportunities and equal treatment to all persons regardless of sex, gender, sexual orientation, gender identity and sex characteristics, in both the public and private spheres, as well as how these laws regulate protection from discrimination on the aforementioned grounds.

The panel addressed the lack of the official data and knowledge gaps about the situation on the ground, judicial cases, and complaints to non-judicial bodies on discrimination on the grounds of sex, gender, sexual orientation, gender identity or sex characteristics. It discussed why, to whom and where it has happened and whether it has been structural or incidental. One of the focuses of this panel was to explore the impacts gender-based discrimination can have on education and the labour market. The panel also discussed public policies and good practices that contribute to the protection from gender-based discrimination, their implementation, as well as current trends in fighting such discrimination in the wider region.

Moderator: Emina Bošnjak, Executive Director of Sarajevo Open Center

Panelists:

Saša Leskovac, Agency for Gender Equality of BiH

Midhat Izmirlija, Assistant Professor, Faculty of Law of the University of Sarajevo

Vuk Raičević, Advocacy Manager, ERA-LGBTI Equal Rights Association for the Western Balkans and Turkey

Lejla Gačanica, Legal Adviser and independent researcher in the field of gender equality, BiH

RECOMMENDATIONS AND OBSERVATIONS

General Observations

1. **There is a lack of awareness of citizens on discrimination, in all aspects, from general definitions, rights and obligations, through referral mechanisms to awareness on how and to who they should address discrimination. Efforts must be invested, at all levels, to raise awareness of citizens on issues of discrimination, through public campaigns with the ultimate aim to foster trust** in mechanisms for protection against discrimination.
2. There is a lack of political will for the **development and adoption of strategic and programmatic action policies** in the fight against discrimination. It is necessary that all relevant actors support the adoption of these documents.
3. State and entity level legislative bodies must fulfil their legal obligation to **harmonize future and existing legal provisions with the LPD Law**.
4. **The potential of collective lawsuits** has not been adequately taken advantage of. Trade unions and civil society organisations which could play an important role in such cases are in need of expert, logistical and financial support to allow for this. They could benefit of expert, logistical and financial support.
5. Statistics on discrimination cases often provide an inaccurate picture of how endemic discrimination in BiH is. Actual discrimination is insufficiently visible in the courts' statistics and is a problem deeply rooted in the BiH system.
6. Prejudices and stereotypes are often identified as causes of discrimination, particularly in the area of gender-based discrimination, discrimination based on sexual orientation, gender identity and sexual characteristics. In the period ahead it is necessary to suppress negative stereotypes whilst promoting positive narratives.
7. It is necessary to ensure that **recommendations of the human rights institutions are implemented** to avoid lengthy court proceedings, causing an additional burden as well as distress for victims of discrimination.
8. It is necessary to ensure that human rights institutions are **financially independent** and take into account the financial and human resources and capacities required in ensuring the smooth operation of mechanisms for protection against discrimination.

Recommendations for the Judiciary

9. **Enhance the judicial protection against discrimination through civil proceedings and use of strategic litigation in the combating discrimination of marginalized and vulnerable groups.** This is of crucial importance since judgments represent the most effective tool in the protection of citizens from human rights violations and discrimination. The courts in BiH apply this Law already, notably in the field of labour and employment yet fail to use it to combat systemic discrimination in its most serious forms, or to combat discrimination against marginalized and vulnerable groups. Thus it is of utmost importance to use strategic litigation in the combatting discrimination against these groups.
10. The Supreme Court, as well as the Panels for the Harmonization of Court Practice within the BiH High Judicial and Prosecutorial Council should **provide a uniform interpretation of the new legal institutions, especially when it comes to burden of proof.**
11. **The principle of burden of proof should be applied properly and consistently** throughout each stage of court proceedings, as well as before the Ombudsman Institution.
12. It is necessary for the courts to come up with a particular rationale **if there is a departure from the recommendations of the Ombudsman Institution.**
13. **Ensure that discrimination cases are promptly processed before the courts.** As the costs of proceedings often discourage victims from coming forward, one of the options that should be examined is to establish a state fund to cover costs of these proceedings or exempt certain groups from paying these costs.
14. **Reconsider the caseload for discrimination cases** as it is not appropriate to treat discrimination cases in the same way as other civil cases, given their relative complexity.
15. Ensure sustainable and continuous education of **judges and the legal community, as well as engaging in debates on Law on Prohibition of Discrimination.** The interpretation of legal provisions among judges and legal professionals is not consistent.
16. **It is necessary to change the rules of non-contentious procedure** in order to regulate sex changes and to allow for the modification of an entry in the birth registers to reflect this fact.

Recommendations for the Ombudsman Institution

17. The Ombudsman Institution should make efforts in achieving and maintaining **sustained co-operation with CSOs** as well as in adopting bylaws for dealing with strategic cases in which situational testing is used as evidence.
18. **The Ombudsman Institution should strengthen** communication between the institution and all other **human rights institutions in regards to the recommendations and impact.**
19. **The Ombudsman Institution should strengthen** communication between the Institution and the recipients of recommendations. Additional efforts should be invested to this end.

Recommendation for the BiH Ministry for Human Rights and Refugees

20. It is necessary that existing databases and methodologies on gathering data on discrimination are uniform whereas the BiH Ministry for Human Rights and Refugees should ensure that **the central discrimination database is fully operational.** Data collection systems must be consistent and updated on a regular basis.