

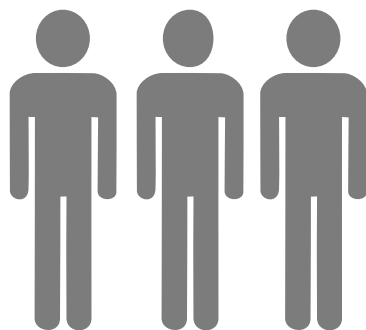


OSCE
Mission in Kosovo



IMPLEMENTING THE ANTI-DISCRIMINATION LAW

A challenge for Kosovo
June 2007



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FOREWORD

Prishtinë/Priština, 26 June 2007

Every process of conflict prevention or post-conflict rehabilitation is based on strategies addressing inequalities and promoting good inter-ethnic understanding. Therefore, it is our conviction that the full enforcement of the Anti-Discrimination Law will significantly contribute to the relationship between the different communities and facilitate reconciliation in Kosovo.

However, the scope of the Anti-Discrimination Law is not limited to inter-ethnic relations; it is providing a framework to protect any group. It therefore plays a key role in the development of a democratic Kosovo, committed to the protection of human rights and to the participation of all communities.

Kosovo can be proud as it has adopted in July 2004 one of the most progressive anti-discrimination laws in Europe. It is a good starting point that needs now to be fully and genuinely implemented.

In particular, during this challenging period for Kosovo, an effective implementation of the Anti-Discrimination Law is an important part of the fulfillment of the standards Kosovo is committed to.

The OSCE Mission in Kosovo and the Office of the Prime Minister have been emphasizing the need of an Anti-Discrimination Law for Kosovo since 2000. The OSCE co-operation with the Kosovo institutions was not only circumscribed to the drafting of the law. The OSCE Mission in Kosovo, in co-operation with the Government, have organized workshops and supported trainings for various stakeholders involved in the implementation of the law.

The effective implementation of the Anti-Discrimination Law is of utmost importance to Kosovo. It is because the OSCE Mission in Kosovo and the Office of the Prime-Minister are fully aware of its vital importance, that we renew once again our full engagement in the difficult process of law enforcement, through initiatives as the present one.

The purpose of this publication, which also represents a joint initiative, is to inform the general public of the importance of the implementation of the Anti-Discrimination Law. The articles underline the significance of the law as a good legal basis and provide recommendations that will help in the huge endeavor that its implementation requires.

Ambassador Werner Wnendt
Head of the OSCE Mission in Kosovo

Agim Çeku
Prime-Minister of Kosovo



Implementation of the Anti-Discrimination Law

By Habit Hajredini¹

The Advisory Office of Good Governance, Human Rights, Equal Opportunities and Gender Matters has operated within the Office of the Prime Minister since March 2002. Its responsibilities, mandate and functions are directly derived from UNMIK Regulation No. 2001/19 of 13 September 2001 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, and UNMIK Regulation No. 2005/15 of 16 March 2005 on Amendment of UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo.

Our office mandate and responsibilities are:

- (i) to supervise and advise ministries in the area of good governance, human rights, equal opportunities and gender issues;
- (ii) to establish action policies and issue instructions in the area of good governance, human rights, equal opportunities and gender issues;
- (iii) to review draft regulations drafted by the Executive Branch in accordance with effective human rights standards and the practices of good governance in co-operation with the Office for Legal Aid Services, and to provide advice and recommendations to the Prime Minister and respective ministries as necessary;
- (iv) to review action policies of the Executive Branch, procedures and action practices in order to ensure compliance with effective human rights standards and with practices of good governance and equal opportunities, and to provide advice and recommendations to the Prime Minister and respective ministries as necessary;
- (v) to assist the development and implementation of public information and other such promotional projects aimed at inciting peoples awareness on international human rights standards, transparency in governance, gender equality, equal opportunities and other basic principles of democratic governance;
- (vi) to consult community representatives, and if needed, to establish advisory bodies for reviewing good governance in the area of human rights, equal opportunities and gender issues.
- (vii) to assist policy development in the area of gender equality and work aimed at promoting the status of women, in co-operation with civil society;
- (viii) to pursue anti-fraud and anti-corruption activities in the Executive Branch and incite anti-fraud awareness;
- (ix) to support democratic decision-making, and undertake extensive consultation within the Government;
- (x) to encourage citizens participation in governance activities;
- (xi) to issue statements and recommendations to the Prime Minister and other respective ministries; and
- (xii) to review, as necessary, governmental records and documents related to the sphere of Office duties and responsibilities, after obtaining the Prime Minister's authorisation.

¹ Head of the Office of Good Governance, Human Rights, Equal Opportunities and Gender Matters in the Office of the Prime Minister.

Office priorities:

- Promotion and monitoring of legislation implementation within its mandate;
- Capacity building and operationalisation of Human Rights Units in the Governmental Ministries;
- Drafting of the Human Rights Strategy;
- Drafting of the Child's Rights Action Plan;
- Drafting of the Community Integration Strategy of Roma, Ashkali and Egyptians;
- Implementation of the Anti-Corruption Strategy and Action Plan;
- Implementation of the Action Plan on Combating Trafficking of Human Beings; and
- Implementation of the Anti- Discrimination Law.

The Office of Good Governance serves also as a secretariat for different governmental mechanisms such as:

- The Inter-Ministerial Committee on Child's Rights;
- The Inter-institutional Group of Anti-Trafficking with Human Beings; and
- The National Council of Disabled Persons.

Anti-Discrimination Law

The Anti-Discrimination Law was adopted by the Assembly of Kosovo with additional amendments on 30 July 2004. The SRSG promulgated the Law on 20 August 2004 and it entered into force thirty days after its adoption. The adoption of this law introduces an abundance of legal background in the context of protection and promotion of human rights in Kosovo.

In accordance with the obligations deriving from the Article 12, Section 12(3) of the Anti-Discrimination Law, the Government of Kosovo started, and is still in the process, to promulgate respective sub-legal acts regarding implementation of the provisions of this law. In accordance with the Anti-Discrimination Law, efforts were also put into the establishment of institutional mechanisms that would act in the function of the legislation implementation adopted by the Government and Assembly of Kosovo.

Administrative Instruction No. 04/2006 on the Implementation of the Anti-Discrimination Law

The Administrative Instruction on the Implementation of the Anti-Discrimination Law was signed by the Prime Minister in August 2006. The aim of this Administrative Instruction is to create practical rules, structural and physical facilities for the purpose of implementing the Anti-Discrimination Law, and to promote equal treatment for all persons to be free of discrimination of racial, ethnic, gender, language, physical and mental disability reasons, sexual preference, nationality, political affiliation or conviction, religion or belief, property and other discrimination.

Comprehensive Action Plan for the implementation of the Anti-Discrimination Law

On 11 October 2005 during its regular meeting, the Government of Kosovo approved the Comprehensive Plan of Action for the implementation of the Anti-Discrimination Law. The Comprehensive Action Plan for the Implementation of the Anti-Discrimination Law, envisaged to be fulfilled during 2005-2007, includes five principal goals which will be achieved through certain activities undertaken by responsible actors and institutions, as outlined in the Action Plan.

During 2005 and the beginning of 2006, the Office of Good Governance began implementing the Project for the promotion of the anti-discrimination legislation, introducing the first stage of the

fulfillment of the Action Plan for the Implementation of the Anti-Discrimination Law. As part of the project, seminars and training sessions were organised (for more detailed information, see the activities dedicated to trainings and seminars on the Anti-Discrimination Law).

Administrative Instruction No. MPS 2006/05 on Organizing and Functioning of the Offices for Receiving Complaints and Requests – Desk Office

The Ministry of Public Services, with the view to implementing the Anti-Discrimination Law, issued the Administrative Instruction No. MPS 2006/03 on Organizing and Functioning of the Offices for Receiving Complaints and Requests – Desk Office. Complaints and requests are fundamental rights of all persons in Kosovo, and in this context, public institutions must create the conditions that enable every citizen of Kosovo to make a request or complaint regarding public services.

This Administrative Instruction regulates the issue of creating Offices for Receiving Requests and Complaints, that is, Desk Offices. Desk Offices are established within every central (Prime Ministers Office and ministries) and local institution (all municipalities of Kosovo).

The purpose of the Desk Offices is to enable the citizens of Kosovo to have direct contact with the institutions of Kosovo as a provider of public services, and to create a system whereby citizens can complain for lack of sufficient public services.

Civil Servants' Code of Conduct No. 01/2006

In May 2006, the Government of Kosovo approved the Civil Servants' Code of Conduct. The Civil Servants' Code of Conduct provides a set of principles and standards on which all Civil Servants will work.

The Code of Conduct aims to establish rules of behaviour for civil servants, protects their status and regulates their rights and obligations in relation to institutions and citizens in accordance with the law in force. It will incite a (better) quality of both public services for the citizens, and of work ethics and public interest, which are characterised by integrity, honesty, objectivity and impartiality in the fulfillment of duties. According to the Code, civil servants are obliged to fulfil their duties in accordance with the principle of equal treatment and non-discrimination. Civil servants must therefore respect the dignity and equality of all people, without distinction or discrimination.

Promotion and implementation of the legislation

The protection and promotion of human rights and the principle of non-discrimination are constituent elements of democratic institutions. Of particular importance is the promotion and protection of the principle of equal opportunities for all.

According to the legislation in force (Constitutional Framework) which comprises the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Discrimination Against Women CEDAW, the Anti-Discrimination Law and other international standards, all Kosovo citizens are equal before the law, and are therefore bestowed with equal opportunities in all fields of life. However, practical implementation of the above is a different issue. Thus the universal concept of human rights often does not include the rights of certain groups.

Therefore, this has revealed the need for a higher commitment as regards promotion and practical implementation, with a view to preventing and eliminating direct or indirect discrimination, based on

the legislation and international standards.

A number of activities have been undertaken at both central and local level in order to implement the legislation and the principle of non-discrimination, and in order to eliminate and decrease cases of discrimination, in particular the identification of priorities relating to legal obligations and the mandate.

In this context, the priority of the Office for Good Governance/Office of the Prime Minister, was to increase the capacities of senior officials at the central level, as well as the capacities of the municipal senior officials and other high municipal officials, who either have influence or play an essential role in establishing policies in the field of human rights, especially in creating equal opportunities, protection and respect of human rights for all as well as reducing cases of discrimination during the exercise of their legal obligations.

Immediately after the SRSB promulgated the Anti-Discrimination Law No. 2004/3, the Office of Good Governance organised a public information campaign on the promotion of the Anti-Discrimination Law with the following motto: "All different, but all equal before the law". The purpose of this was to inform and raise public awareness of this law and provide information on the rights that it guarantees, especially those relating to anti-discrimination. All information transmitted during the campaign was provided in five languages: Albanian, Serbian, Bosnian, Turkish and Roma.

Also, in accordance with the obligations arising from Article 12 section 12(3) of the Anti-Discrimination Law, and with the purpose of facilitating its implementation, the Office of Good Governance established the working group responsible for drafting the Comprehensive Action Plan for the Implementation of the Anti-Discrimination Law.

The working group was composed of representatives of the Office of Good Governance, the OSCE, the Office of the High Commissioner for Human Rights, the Department of Justice, the Council for the Protection of Human Rights and the Office for Communities, Returns and Minority Issues.

With the purpose of making this document more transparent, and with the intention of eliciting wider involvement of the participants in the drafting process, on 16 September 2005 the OGG/OPM organised a public debate intended to analyse and gather comments from a wider range of the public on the Comprehensive Action Plan for Implementation of the Anti-Discrimination Law (2005-2007).

On 11 October 2005, the Government of Kosovo approved the Comprehensive Action Plan on the Implementation of the Anti-Discrimination Law.

The main objective of this law is to prevent and combat all forms of discrimination, as well as to increase the level of equality and enable equal treatment before the law for all citizens of Kosovo.

The Anti-Discrimination Law offers rights and obligations to all natural and legal persons, in both the public and private sector, in the fields of employment, payment, dismissal, affiliation and involvement in employee organisations, social protection including schemes of social assistance, social insurance, healthcare, education, access to housing and other forms of property (movable and immovable property), access to material goods and other services, equal access before justice institutions and any other right guaranteed by the law.

Immediately after the SRSB promulgated this Law, the Government of Kosovo, in accordance with its obligations under Article 12 Section 12(3) of the Anti-Discrimination Law, began issuing respective bylaws for the purpose of implementing the Law provisions.

The Role of NGOs in Implementing the Anti-discrimination Law: The Bulgarian Experience

By Margarita Ilieva²

The tools whereby NGOs can help enforce the anti-discrimination law (ADL) are diverse. The most important one for public interest law groups is *strategic litigation*. By taking selected test cases of discrimination to courts or other adjudicating authorities, NGOs may bring about social change beyond the immediate case and the individual client. Impact litigation intends, and is designed to affect the broader societal problem, which the individual case represents, through a beneficial change in law or policy, thus servicing multitudes of similarly situated actual and potential cases. Such change may be effected in the legislation, or in the way it is interpreted and applied by the courts, or in executive practice. Social change advocacy is, further, a powerful tool to alter public attitudes toward equality and the plight of disenfranchised groups. Often, strategic cases' evolving impact on public awareness, and deterrent or correctional effect on official or private conduct, is not dependent on the outcome of the lawsuit – the mere bringing of it triggers a debate within society, which leads to reform.

In Bulgaria, the experience after the adoption of the ADL has been that strategic antidiscrimination litigation, brought about via the endeavors of the Bulgarian Helsinki Committee (BHC)³ and other public interest NGOs, has been the single most compelling instrument to focus society's attention on the imperative for development and reform dictated by the new law. Strategic cases brought to challenge the systemic exclusion and neglect of Roma in education, employment and service provision, the physical isolation of disabled persons through confinement in mental health institutions and inaccessible public environment, and the contempt for, and denial of the equal dignity of *lesbian, gay, bisexual, and transgender (LGBT)* people have succeeded in making a mark. As a result, the new ADL has embarked on a vibrant life immediately after its creation, with the whole of society taking the message that this piece of legislation will have, henceforth, to be reckoned with.

An alternative form of litigation NGOs could opt for in pursuit of ADL's enforcement is *client-orientated litigation* against discrimination whose only goal is to service the individual client's needs without regard to any ulterior consequences. For example, legal clinics and legal aid-type organizations can devote themselves to providing legal services to clients affected by discrimination with a view to securing access to justice to the largest number of individuals possible for their sake alone, without attempting to cause repercussions for others.

Both types of litigation may be focused on the non-discrimination rights of a particular group, for instance, women, or Serbs, in one or all spheres of public life. Or, an NGO could devote itself to taking cases in one or more selected specific fields, for example, access to employment and working conditions, and defend workers against discrimination in those fields, regardless of their identity or of the ground they are discriminated against on, be it mental or physical disability, religion, or age. Still another option for NGOs is to target a particular violation of equal opportunities, such as segregation in education, or hate speech, or sexual and other harassment at the workplace.

Further activities NGOs may adopt to enhance ADL's implementation, apart from litigation, include: research and monitoring of discrimination practices, accompanied by documenting and followed by public reporting; advocacy for non-discrimination generally, or for the equality rights of specific groups, or in specific fields, by means of the media or other publicity fora; lobbying with various

² Lawyer, legal consultant of the Bulgarian Helsinki Committee.

³ www.bghelsinki.org.

bodies to push for policy reform; awareness-raising via campaigning, community outreach and delivery of training (for lawyers, judges, NGO activists, journalists, or civil servants). All of these activities may additionally be used to complement and support strategic litigation.

All NGO initiatives to protect and promote equality rights, including litigation, are best carried out while networking and resource sharing with other NGOs, including international ones, or other organizations, such as trade unions. Trade unions, especially, are very important partners because of their massive membership bases, which make it possible for NGOs to access through them large numbers of individuals in terms of raising their awareness and empowering them. Another reason why trade unions are valuable allies in the fight against discrimination is their leverage with employers and the government. In terms of public perception too, trade unions are able to lend a lot of legitimacy and weight to the equality cause. If they are seen as opposing the stereotypes motivating exclusion and oppression, all sectors of society may be influenced. Trade unions may become powerful engines to create diverse work forces, and to help manage them. An additional asset to attracting trade unions is that in many industries their members are not only in a position of potential victims of discrimination, but also of potential discriminators, i.e. as service-providers, teachers, medical personnel, journalists, etc. By cultivating them in the principles and values of equality, including the business case for diversity and inclusion, NGOs may achieve a lot in terms of prevention of discrimination. The challenge with syndicates may be that they themselves may be still immersed to varying degrees in cultures based on discriminatory prejudices, and may need to reform their own value-systems and practices. In such case, NGOs will have to invest in the reform of trade unions by including them in gradual, easy ways in initiatives that will help them see the liberating effect equal opportunities can have on human potential, and on personal achievement, professional, as well as social.

Advocacy and lobbying efforts before domestic authorities may also be maximized by approaching international bodies with a mandate in equality, to help mobilize extended political pressure on the government to invest in reforms.

Strategic litigation

In equality, as in all other human rights fields, strategic litigation is a powerful tool to foster change. It can clarify and expand the law by setting precedent; it can coerce the government into accountability and reform; it can educate officials, the legal profession, and the public about equality rights; it can expose and document institutionalized injustices; it can alter public attitudes; and it can empower the underprivileged to question the status quo, and, ultimately, to restructure it. In addition, strategic litigation reinforces the rule of law as the one valid means of claiming dignity from social oppression and conflict, while maintaining integrity.

What cases are strategic

Strategic cases are ones that have a potential to cause vast long-term legal and social effects. They are exponent of a pattern affecting multitudes of individuals across society, or entire communities, and by bringing a strategic case to adjudication, an NGO brings the entire problematic situation to light, and demands that it be rectified. The likelihood of success is not always material for a case being strategic. A strategic lawsuit lost may still foster public awareness and transformation, and still stands a chance of causing legal effect if taken to an international tribunal. A case may also have added strategic value if it is high profile in political terms, in addition to being an illustration of a structural, or widespread problem.

In Bulgaria, one of the most strategic cases taken to date under the ADL is a civil suit brought by BHC,

along with a coalition of close to 70 other NGOs and prominent individuals, against a political party leader and MP for radical and systemic hate propaganda against ethnic minorities and homosexuals. BHC and the other claimants took a selection of the most extreme anti-Roma, anti-Turkish, anti-Semitic, anti-Muslim, anti-Catholic, and homophobic statements made publicly by populist politician Volen Siderov to court, alleging those constituted harassment of all minority people in Bulgaria, and incitement to discrimination against them. The actual statements, which were presented as basis for the claim, were the epitome of Siderov's wholesale campaign against all "non-Bulgarians", which he had constantly been delivering via the media for the past few years, and which brought him election to Parliament in 2005, which he then started using to further spread his virulent message. Therefore, the case concerning those concrete statements had wider significance beyond them, for it served to bring Siderov's entire political platform to accountability by legal means. What is more, it sought to target Siderov's hate campaign not simply *per se*, but also as an intense and clear-cut example of the xenophobic and homophobic speech rampant throughout society. Indeed, that case was against the phenomenon of hate speech as such, rather than a case against the individual Volen Siderov. The goal was to try and establish the limit of free expression, where it tramples upon the dignity of others, and incites hatred and ill treatment against them. The means was recourse to the courts under the ADL. The claimant chosen to take the case, the BHC-led 70-strong coalition of NGOs, rather than simply a (set of) minority person(s), was intended to personify the public interest, and to impart the message that hate speech infringed not just the rights of minority people, but harmed society as a whole. The lawsuit throughout its duration at trial received extensive coverage by all the national media, and succeeded in initiating/fostering a public debate on the impermissibility of hate speech. When it was won, this came as a confirmation to a lesson the public had already, it seemed,⁴ distilled itself - that there is a boundary not to be crossed when voicing opinions about the diverse groups making up society. It still remains for the Bulgarian public and courts to establish where this boundary lies exactly.

A strategic case may also have enhanced public impact where it is taken against a national public body liable for institutionalized discrimination. Thus, BHC has initiated a discrimination lawsuit against the Prosecutor's Office of Bulgaria to expose patterns of vivid racist prejudice and disadvantage affecting Roma in the criminal justice system, when they are involved as victims, as well as perpetrators of alleged crimes. In this case, the basis was an explicit anti-Roma statement by an individual prosecutor included in the text of an official prosecutorial decree terminating the investigation into an accident, which had killed a Romani man, and seriously injured his mother and brother. The victims had been gathering mining refuse for a non-Roma entrepreneur, when a landslide occurred and buried them under it. The prosecutor terminated the proceedings, concluding that the victim was to blame for his own death, which he had caused by his own uncivilized greed for more money to earn from gathering more refuse. In his decree, the prosecutor explicitly identified the victims as "Gypsies" and proceeded to portray "this population" by intensely racist language terms, characterizing them as subhuman, "undisciplined, unruly, irrational, greedy and uncivilised", in the words of the judgment the court later handed down against the Prosecutor's Office. The court found there was discrimination at hand consisting of expression of a "slighting attitude", as "if another ethnic group were referred to, no such generalisations would be made [...] It is namely their Romani ethnicity which caused the prosecutor to characterise in this way the mentality of this community's members, in particular that of the victims – the claimant and his family." The court declared a breach of everyone's right to be treated equally and with respect, and to a socially non-aggressive environment. The ruling received excellent coverage in the national press, and, doubtless, contributed to a general public picture of the ADL being enforced in practice, with the courts taking it seriously, even against powerful institutions, such as the *prokuratura*.

⁴ No study has been carried out to actually measure the impact of this lawsuit on public attitudes to hate speech. The conclusions above are solely the author's, and are but tentative.

However, high profile is not a condition for a case to have strategic impact. An example of strategic litigation, which has no political implications, is a case brought up by a Roma rights group, which targeted one particular school in order to expose and challenge the nation-wide pattern of segregated schooling affecting the majority of Roma children in Bulgaria. The selected school had a 100 per cent Romani student body, without one single non-Roma child. The case brought under the ADL against the Sofia local government and the Minister of Education sought a judicial declaration of the status quo of racial segregation as a prohibited form of discrimination, for which the authorities were liable because of their failure to remedy the situation. When the court agreed with the claimants, and declared the racial segregation, this served to document by judicial means an institutionalized form of discrimination, which had prevailed unsanctioned for decades. While the ruling did not impose any concrete remedy, it is a stepping-stone to push for reforms, using it as a warning for the government. In addition, being covered by the media, the case also alerted the public that a situation taken for granted – Roma children studying apart from the others in ghetto schools – is actually a serious breach of the law, causing intense long-term harm, with all the potential for attitudinal change this may have.

A third example of a strategic case in Bulgaria, which successfully ended by settlement, illustrates the fact that test litigation's impact is not conditional on a ruling, but may be achieved by the mere bringing of legal action. A local human rights group in Karlovo, a small town in central Bulgaria, took the local court itself to court over its failure to have a ramp installed to allow disabled persons in wheelchairs access to the courthouse. Vivid attention by the local media and public, triggered by the campaigning efforts of the local NGO, as well as the good chances of success on the merits prompted the court to seek settlement of the case, and it proceeded to build a ramp even before the trial was over.

Where do strategic cases come from

NGOs may set up open offices or help lines, permanent or *ad hoc*, full-time or part-time, to receive and process complaints of discrimination, and screen them in order to identify strategic ones to pursue, helping the rest of the clients with advice only, or not at all. They could also conduct field visits to local communities to gather cases. Or they could liaise with legal aid organisations, or community groups and get referred strategic cases brought to those. Or, NGOs could liaise with trade unions as a source of strategic cases. Trade union partners may be used as focal points for complaints of discrimination, from which test cases may be gleaned. Trade unions' resources can also be employed to investigate and document relevant facts, particularly where there is a pattern or practice of discrimination within an enterprise. Trade union representatives may also be used for establishing facts in court. They may make very persuasive witnesses because of the acquired legitimacy and authority their well-established type of organization has in society. Journalists could also be alerted that an NGO is in pursuit of a particular type of cases, and be asked to forward information on any such that they might uncover.

Strategic cases may also come from monitoring conducted by NGOs as a separate and independent activity contributing to the implementation of equality. Monitoring, which allows NGOs to collect relevant data, and identify the most serious problems in terms of gravity and scope of discrimination, is a means also of identifying impact cases.

Monitoring in its more specialized forms, such as situational testing, may provide a powerful alternative source of strategic cases devised through our own activity to best suit our strategic goals. Thus, rather than use a ready case referred to us, which may not be ideal in terms of fact pattern, available proof, client personality or personal situation, time or place of the fact, or procedural steps already taken or omitted, we may use testing and other methods of monitoring to construct our own case,

thereby controlling ourselves all its characteristics in order to maximise our chances of success. Thus, a strategic litigator may use testing, which is a tool to both document and secure proof, to customise a strategic case of discrimination, for instance.

Example: An NGO receives anecdotal evidence of a practice by court security personnel in various cities of not allowing entry to Roma members of the public unless they are accompanied by a lawyer or produce written summons as proof that they are to attend a hearing as parties or witnesses. On the other hand, any other member of the public is allowed to freely enter after having produced an ID. The NGO then sends a team of testers comprised of Roma, as well as non-Roma individuals, to try this practice by visiting a selection of courthouses and attempting to gain entry. The testers control their clothing and general appearance, as well as behaviour, to be as similar as possible, in order to isolate the ethnic difference. In addition, they strictly avoid provoking the officials in any way so as to deprive them of any other reason to refuse entry, such as, for instance, impropriety or carrying food. All testers then observe the manner the Roma testers are treated compared to the non-Roma, and witness any refusals of entry to Roma, along with admittance granted to non-Roma. Once the testing is done, the team have documented any refusals in a comparative context by witness testimony, thus securing proof to use before the court, and have at their disposal claimants on whose behalf legal action can be brought. The NGO can then select of all documented refusals the best set of circumstances to use as a basis for the case, including in terms of jurisdiction and, thus, forum-shop. No less importantly, the future claimant is a member of the NGO team, therefore at one with its strategic goal, not having personal interests that might conflict with that at a future time, as a real client might, and reliable in constancy, which a real client may not be. That claimant is likely articulate, presentable, educated, which makes her well suited to represent the case in media advocacy surrounding the lawsuit, and to provoke understanding and support. The tester witnesses, too, will likely do a better job than many real-life witnesses of human rights abuses, who, like their victims, may tend to be socially excluded and less commanding than a competent NGO professional, who, in addition, will be trustworthy to be there when needed throughout the years of a lawsuit.

In Bulgaria, BHC and other rights groups have extensively used the method of testing to document and prove discrimination against minorities. Testing has been carried out to uncover and record exclusion of Roma from access to employment, as well as public services, such as hotels, restaurants, cafes, or swimming pools. A series of discrimination cases have been taken to court and won on the basis of tester evidence. Testing in access to employment cases has followed the following typical scenario: Romani tester appointed by NGO places a phone call with employer in response to a job advertisement published in a paper. The tester has the necessary qualifications as per the ad, and is selected so as to be identifiable as Romani by appearance. S/he asks after the procedure to apply for the job, and is invited to an interview. When s/he appears, s/he is told that the job is already taken, or some other pretext to be sent away. Or she is told openly that she can't be hired because no Roma are accepted. Then, following this a non-Roma tester goes through the same motions, but unlike her Roma counterpart, is admitted to interview, or even, in some cases, invited immediately to take the job. In extreme cases, the person answering the initial phone call will explicitly state that Roma need not apply, as they stand no chance of being hired. Subsequently, in court the non-Roma tester would testify as witness, while the Roma tester would stand as claimant. In cases where the statement by the employer is explicit to the effect that Roma in principle are excluded as job applicants, denoting an overall practice affecting any and all Roma, BHC and other groups have brought legal action on their own behalf, using a possibility under the Bulgarian ADL for public interest NGOs not only to represent consenting victims, but also to initiate proceedings in their own capacity where the equality rights of many individuals are affected by a particular act or practice, without need for authorisation from those affected. A similar approach has been followed in litigation targeting anti-Roma refusals of access to public places, or services. BHC has also used testing to try police identity checks practices

to establish any racial profiling disadvantaging migrants of African or Asian descent.

BHC has also used its human rights complaints programme, as well as classical monitoring of general social patterns, and of closed institutions in particular, to search out test cases. Many of our cases taken in defense of mentally disabled clients have come from our monitoring programmes, whereas our complaints offices have been the source of cases of discrimination against religious minorities, women and non-nationals. We have also been consistently referred cases by local community activists, many of whom have become strategic ones, including in the European Court of Human Rights, such as, among others, the case of *Nachova v. Bulgaria*, the first decision ever by the Court finding race discrimination in Europe.

Types of NGO involvement in strategic lawsuits

NGOs can support individual victims of discrimination taking their cases to court by providing them with legal representation. Or the NGO itself could bring a case on behalf of the victim, with the latter's authorisation. Also, if the statutes or case law allow it, public interest groups may initiate proceedings in their own capacity, provided that they can show the public interest to be affected in the concrete case. Where standing rules are not explicitly liberal for public interest groups to bring *actio popularis* lawsuits, a strategy for NGO litigators may be to initiate impact litigation specifically aimed at liberalizing the jurisprudence on standing by soliciting public-interest minded, expansive purposive judicial constructions of the written rules, which would allow NGOs to take public interest legal action against discrimination.

Alternatively, NGOs could join proceedings brought by individuals or other NGOs as interested party, or *amicus of the court*, and present briefs on specific theoretical issues, providing the court with international and comparative standards and case law, in order to help it reach an informed and competent judgment. Some of the *pros* of this choice are that third party intervention is far less costly in terms of time, as well as human resource and finances (no court fees, no risk of adverse order to pay other party's expenses, no proof-related costs). Access to litigation may be easier as *amicus* than as claimant since rules on *amicus* standing may be more liberal, with a lower threshold for the requisite legal interest. Unlike parties to a lawsuit, an *amicus* of the court is unbound by the *res iudicata* of the judgment, and may pursue the matter again. In addition, an *amicus* is not constrained by the matter of the case as formulated and established by the parties, and may present in a brief to the court additional facts and legal issues. Importantly, an *amicus* has no client other than the strategic goal, and is free of all the restraints of the client-lawyer relationship. On the negative side, an *amicus* has no control over the proceedings the way a party has, and is precluded from contributing to the disclosure of the evidence. Unlike parties, an *amicus* does not benefit from being summoned to hearings, and is not entitled to recover costs and expenses, even in case of a favourable judgment.

Even if the law does not explicitly provide for a possibility for NGOs to intervene in proceedings as *amici*, NGOs could proactively seek such standing on the basis of general legal principles, as well as common sense arguments. In the worst case, where they fail to be formally recognized as party to the proceedings, they could still provide a brief informally through one of the parties, for the court's notice. Joining antidiscrimination lawsuits as *amicus*, whether formally or informally, is a tactic BHC lawyers have consistently employed with Bulgarian courts, and successfully so, including on behalf of international NGOs, such as the European Roma Rights Centre (ERRC). An issue we have consistently presented the courts with international and comparative legal material on is the principle of the shift of the burden of proof, and its application in practice.⁵

⁵ This quite illustrative paper, done on behalf of ERRC, may be freely obtained from the author upon request.

Another possibility for pro-equality litigation is to initiate proceedings solely aimed at obtaining interpretive rulings by the constitutional or supreme courts, where this is envisaged by the applicable procedural rules. Similarly to third party interventions, such litigation is less expensive in terms of time and resources, as factual issues are not dealt with, and there is no adversariness to the proceedings.

A further type of equality litigation, one which may be highly influential, are class actions and the like, where a large or indeterminate number of individuals similarly affected by a particular act, or pattern or practice of discrimination unite in one joint legal action against the respondent party.⁶ This can have enormous deterrent effect on private entities and public authorities alike, which are made to face this way potentially huge amounts of compensation awards due to the claimants. In addition, this type of lawsuits saves a lot of cost and strain on individual victims because it allows them all to benefit from a one-time establishment of the facts, argument on the merits, and enforcement proceedings in case the debtor defaults on the judgment. And last but not least, class actions capture the public's attention, raising awareness, educating, and empowering people against discrimination, as well as having a preventative effect.

When initiating the *Siderov* case in Bulgaria mentioned above, BHC attempted to have precisely this type of class, or collective action. As noted, the claim was brought jointly by around 70 NGOs, along with about 20 individuals belonging to various minorities in addition. However, while this massiveness to the action produced its continuing public effect, it didn't quite work out in the legal arena. The judge who was appointed the joint case decided, using her discretion under procedural law, to divide it along the identities of the claimants into eight separate sets of proceedings, to be examined each individually by a different judge. Thus, the 68 NGOs ended up in one separate case, the Roma people in another, the Jews in still another, and so forth with the Macedonian, the Turk, the Armenian, the Vlach, and the gay and lesbian people. As a result, we had to work eight times more than if we had taken a simple single claimant case – proving the same facts eight times over for the eight different judges, filing eight times various similar motions, etc. On the positive side, this had the effect of diversifying the risk of losing such a highly consequential case. Even if we lost one or two of the divided cases, we still would have won at least one of all, consummating the public impact sought. By the same token, this might be counterproductive. The public will, at the end of the day, have received various, possibly conflicting, answers to one issue – is it permissible to verbally assault minorities in public, or is it not. And it would not be conducive to forming a coherent standard for all to learn to adhere to.

This serves to illustrate some of the risks ambitious NGO-driven strategic lawsuits run, as well as some of the limitations of the environment. The rules may allow judges leeway, which they may use to the possible detriment of the public interest for selfish or cowardly reasons, such as to avoid assuming responsibility for complex, weighted, politically intense, and highly controversial issues.

Tactics to maximize strategic cases' impact

Needless to say, all concrete strategizing in practice will vastly depend on the specifics of the particular political and legal context. However, certain pragmatic considerations may be valid across contexts. For instance, selecting the proper set of facts (one which strongly and clearly exemplifies the targeted issue and has strong persuasive potential); the proper legal basis/bases (best suited to reflect the nature of the violation, and most authoritative); the proper remedy to seek in terms of maximizing

⁶ The notion of *class action* is used here in a sense broader than that of the classical class action as practiced in the US. It is meant to generally connote any type of lawsuit involving a large number of individuals or entities, acting as one party.

impact; the proper procedural standing to use (as representative, or claimant or *amicus* of the court, among, possibly, others); the proper evidence (including not only available evidence, but evidence to be collected, including statistics); and the proper actor to engage in litigation (whether as claimant, or in another capacity - a client with a personality or circumstances capable of provoking public and judicial understanding and solidarity, and also someone reliable and steadfast, who will have resolve to endure the strain of litigation and the surrounding campaigning; or a well-respected influential NGO).

An important and tricky point to take into account when deciding on whose behalf an impact case shall be brought is the potential for counter productivity if the case is identified with someone seen as controversial, or partisan. This is particularly valid when the issue challenged via the case is itself seen as controversial. Thus, when preparing to bring the high-profile hate speech *Siderov* case, we at BHC considered it more expedient to publicly promote the case as one driven by a civil society coalition of non-controversial NGOs, such as child protection groups, disabled people's NGOs, freedom of expression groups, eco-protection groups, women's NGOs and others similarly seen as universally acceptable, rather than as an action of BHC as a political human rights group seen by many as partisan in standing up for ethnic minorities, in particular, the Roma, who are the object of much hate and contempt throughout Bulgarian society. We feared that the case might be seen as a partisan act by the "Gypsy defenders", without significance for society as a whole. On the contrary, if respectable professional associations and children and disability rights NGOs assumed this position as their own, then the message would be that mainstream civil society opposes hate speech directed at others without being personally affected, therefore, that such speech is harmful to all, as well as wrong in principle. To lend a further degree of authority and mainstream legitimacy to the lawsuit, we had well-respected public figures, such as academicians, writers, actors, directors, political scientists and a former constitutional judge represent it publicly by giving a press conference and subsequent interviews. All this contributed to the positive perception of the case by many in society.

An additional point with similar expediency logic is that an NGO may specifically pursue certain equality issues relatively more acceptable to the judiciary/public in order to gain via them credence both for itself and the equality cause in general, in order to transfer from this credibility to other, more controversial subjects of discrimination. For instance, a discrimination litigator may deliberately take up age and gender discrimination cases, which are more likely to be supported, in order to cultivate the authorities'/public's understanding, which then to use for race discrimination, which may be more controversial.

Also, it may be useful to start with simple, obvious cases of direct discrimination for which enough evidence is available, so as to, by winning, pave the way for more complex cases. Even if such cases are sufficiently clear in terms of proof, it is good to introduce the principle of the shifting burden of proof from the outset in one's arguments, educating the judges about it, so that they may get used to it and gradually accept it, without being under pressure to immediately apply it. Thus, when the time comes later to put this principle into effect in a difficult case that couldn't be won, unless the burden of proof shifts, judges would be better prepared, and less reserved to do so.

In terms of choice of legal arguments, it is useful to consistently remind judges of their duty to interpret internal law so that it is consistent with international law, including customary international law (which is binding on all states regardless of ratification), relying on a presumption that Parliament meant the law to be compatible with constitutional and international law, one not easily rebutted. This judicial duty stems from art. 27 of the Vienna Convention on the Law of Treaties which binds courts, as well as all other state authorities, to give effect to the international obligations of the state regardless of the content of domestic law. By arguing that domestic laws must be construed in a

manner as to give effect to international law, we seek to read international law into deficient domestic statutes by invoking the state's duty, which also binds its courts, to give full effect to its international obligations. We rely on the rule that a state may not invoke its internal law to justify not giving effect to an international treaty.

It is useful to accentuate, as a matter of course, the supremacy of international and constitutional law over other legislation, and to specifically ask the courts to ignore conflicting discriminatory legislation in order to apply superior equality norms.

Other useful arguments to expand equality rights protection is to rely on the principle of practical and effective protection to prevent rights from being theoretical and illusory; on the overriding goals and values of the law as a basis for expansive purposive interpretations; on the principle that equality law is to be a "living instrument" to be interpreted in the light of evolving social conditions; on construed positive duties; on constructed legal and factual analogies with other established rights to obtain read-in remedies; on factual presumptions and inferences; on comparative law and case law. When compiling comparative material it is useful to have in mind the local legal culture, and the judges' receptiveness or, conversely, imperviousness to certain foreign jurisdictions. Such judicial bias may stem, for instance, from perceived doctrinal incompatibility between common law norms and case law, and continental law. To convince an Eastern European judge who perceives herself as continental to look at the example of her Irish colleagues, it may be pragmatic to refer to analogies between concepts in the two systems, and to employ continental terminology to name common law institutes to facilitate their reception by domestic judges. Building on comparative law arguments, it may be valuable to rely on an international/regional "common consensus" on certain equality issues.

In terms of campaigning to support strategic litigation, media advocacy is vital. As a consequence of aiming at societal change, such as public education and awareness raising, empowerment, and mobilization, public speaking explaining and promoting litigation becomes indispensable in order for it to have effect. Forming coalitions of domestic NGOs for joint advocacy, as well as litigation, can be very useful, as shown by the Bulgarian experience in the *Siderov* case.

Risks of strategic litigation

Strategic litigation sometimes will risk being counterproductive to the interests of those affected by its result. For example, a lawsuit driven by an NGO's public interest agenda to challenge interference by one school board with a Muslim girl's decision to wear a headscarf at school, if unsuccessful, may result in triggering a broader-scale official crackdown on all girls wearing headscarves in all schools, thus inflicting harm upon vulnerable individuals, rather than improving the overall equality situation.

An NGO needs to take into consideration also the fact that a lawsuit may be productive, or counterproductive, not only by being won, or lost, but already by being merely brought. For instance, the very bringing of a lawsuit for hate speech against a politician whose popularity is on the rise, even if it is later won, may be politically damaging to the cause of equality and dignity, because public perception of that politician being victimized for his free speech might make him even more popular and impune.

Other NGO activities to further equality

Apart from training and dissemination of information, in the BHC experience in Bulgaria the following ideas have been identified as useful for NGOs to pursue:

Analyse domestic legislation, case law and policies to identify areas in which positive action measures are needed to equalise the opportunities of specific disadvantaged groups. Publish a report with

concrete recommendations. Engage in advocacy and lobbying to put those forth as policy proposals to the government.

Analyse domestic legislation, case law and policies to identify directly or indirectly discriminatory provisions and practices. Publish a report and engage in lobbying for legislative/policy reforms. Bring impact litigation to overturn discriminatory jurisprudence.

Monitor the case law implementing the ADL, and after several years of implementation, analyse and appraise that case law in light of international and comparative equality standards. Publish a report identifying strong, as well as weak points, and distribute it to all courts in the country.

Networking

The advantages of networking with other NGOs, including international ones, are that we are able to benefit from the experience, know-how, and resources of others. Especially with international partners, it has been the experience of BHC in Bulgaria that those can be particularly helpful to amass comparative case law, which to submit to our judges for purposes of educating them in the course of proceedings. International partners' authority could be directly used in court by having them intervene in proceedings as *amicus curiae*, or, even, as claimants themselves, either on behalf of the victim(s), or in their own right, where procedural law allows it. BHC's experience, for example, includes a several years long litigation partnership with **ERRC**⁷, in the course of which we jointly took a number of race discrimination cases in defense of Roma in Bulgaria. ERRC sponsored the lawsuits, intervened as *amicus*, and public interest actions were initiated on its own behalf as claimant. Similarly, BHC has on an-going joint programme for legal defense of mentally disabled people with the **Mental Disability Advocacy Centre** (MDAC)⁸ in Budapest. **INTERIGHTS**, London,⁹ another valuable partner, has on many occasions assisted BHC lawyers with valuable legal material from other jurisdictions. Likewise, BHC lawyers have on occasion contributed to INTERIGHTS' work drafting *amicus* briefs in strategic international cases, such as the *Nachova* case in the Strasbourg court, for instance, as well as in consultations on strategic projects and in delivering training in anti-discrimination law for lawyers. Another long-term international partner of BHC is the **Migration Policy Group** (MPG),¹⁰ based in Brussels. Together with MPG we have carried out a series of surveys and comparative analyses of Bulgarian anti-discrimination legislation and practice. We also have an on-going project mapping NGOs engaged in anti-discrimination work, and delivering antidiscrimination training for NGO activists, trade unionists, and employers, which originated in 2005.¹¹ BHC lawyers have also assisted ERRC by delivering training in anti-discrimination law at ERRC-organised seminars, as well as the **Minority Rights Group** of London (MRG).¹²

All these international NGOs may become partners to Kosovo NGOs as well. Other well-established international NGOs eligible as partners for equality groups include, among others: the **European Network Against Racism** (ENAR);¹³ the **Platform of European Social NGOs**;¹⁴ the **European Disability Forum**;¹⁵ the **International Gay and Lesbian Association** (ILGA-Europe);¹⁶ the **European**

⁷ www.errc.org. All links given below, including this one, were last viewed on March 11, 2007.

⁸ <http://www.mdac.info/index.html>.

⁹ www.interights.org.

¹⁰ <http://www.migpolgroup.com>.

¹¹ Our partnership with MPG has been in the framework of activities sponsored by the European Commission.

¹² www.minorityrights.org.

¹³ <http://www.enar-eu.org/en>.

¹⁴ <http://www.socialplatform.org>.

¹⁵ <http://www.edf-fepb.org/>.

¹⁶ <http://www.ilga-europe.org>.

Older People's Platform;¹⁷ **Inclusion – Europe**, an NGO working for people with intellectual disabilities;¹⁸ **Mental Health Europe**;¹⁹ the **European Blind Union**;²⁰ the **European Union of the Death**;²¹ **Autism – Europe**, defending the equality rights of people suffering from autism;²² the **European Women's Lobby**;²³ the **Justice Initiative** of the **Open Society Institute**, quite active in intervening in strategic anti-discrimination litigation internationally.²⁴

Working together with other NGOs in a concerted effort towards a common goal also enhances our political influence. It allows us to impress the public perception to a greater degree. Thus, when BHC brought the high-profile *Siderov* case described above, we considered it wise to do it on behalf of a large civil society coalition, christened “Citizens Against Hatred”, rather than on behalf of BHC alone. Therefore, we invested quite an effort, as well as time, in mobilizing such a coalition. It was worth it, for the legal action, had it been brought on our behalf only, would have undoubtedly been perceived differently by the journalists and the public, and would have, arguably, been less able to claim mainstream legitimacy and authority, than in the present case. In the present case, the very number of NGOs involved (close to 70), as well as their diversity (journalists' associations, women's groups, child protection NGOs, ecological ones, disability groups and so forth) sent out a strong message that the lawsuit was representative of a wider will than that of a single human rights group, such as BHC.

Resources

The websites of all the above-mentioned NGOs may contain helpful information for Kosovo NGOs involved in equality work. Some international NGOs, such as the **Public Interest Law Institute** associated with **Columbia University**, and **MRG** have created and maintain very useful anti-discrimination law databases.²⁵ INTERIGHTS' website also contains a valuable database on case law from a number of jurisdictions, as well as *amicus briefs* on various human rights issues, including equality concepts. In particular, their briefs on the shifting burden of proof in direct discrimination cases, and on the concept and proof of indirect discrimination are quite valuable.²⁶

Further, useful antidiscrimination resources are available on the websites of the **European Commission (EC)**,²⁷ the **European Union Monitoring Centre on Racism and Xenophobia**

¹⁷ <http://www.age-platform.org>.

¹⁸ <http://www.inclusion-europe.org>.

¹⁹ <http://www.mhe-sme.org>.

²⁰ <http://www.euroblind.org>.

²¹ <http://www.eudnet.org>.

²² <http://www.autismeurope.org>.

²³ <http://www.womenlobby.org>.

²⁴ <http://www.justiceinitiative.org>.

²⁵ http://www.pili.org/dadel/index.php?title=Main_Page. http://www.minorityrights.org/Legal/legal_themes_anti-discrimination.htm.

²⁶ At <http://www.interights.org/page.php?dir=Legalbriefs>, respectively, *Nachova v Bulgaria* and *D.H. and Others v the Czech Republic*.

²⁷ http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (on EC and civil society, including a list of European equality NGOs); http://ec.europa.eu/employment_social/fundamental_rights/civil/civ_en.htm; http://ec.europa.eu/employment_social/fundamental_rights/index_en.htm; http://ec.europa.eu/employment_social/fundamental_rights/roma/index_en.htm (on EC and Roma); http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#comp (on the EU Network of Legal Experts in Anti-Discrimination); the **European Anti-Discrimination Law Review & Thematic Reports** at http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm#lawrev.

(EUMC),²⁸ which is to be transformed in the EU Fundamental Rights Agency; the **Council of Europe European Commission on Racism and Intolerance (ECRI)**;²⁹ the **European Parliament Disability Intergroup**;³⁰ the **European Parliament Anti-racism and Diversity Intergroup**.³¹

Further reading

Strategic Litigation of Race Discrimination in Europe, a valuable manual by ERRC, INTERIGHTS and MPG, available online.³²

Non-Discrimination in International Law: A Handbook for Practitioners, a comprehensive compilation covering every aspect of the subject worldwide, also available online.³³

Pursuing the Public Interest: A Handbook for Legal Professionals and Activists, a publication by PILI on public interest litigation, also applicable to discrimination litigation.³⁴

Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering, a further publication on strategic litigation applicable to lawsuits in pursuit of equality.³⁵

²⁸ <http://eumc.europa.eu/eumc/index.php>.

²⁹ http://www.coe.int/t/E/human_rights/ecri.

³⁰ <http://www.edf-feph.org/apdg/index-en.htm>.

³¹ <http://www.enar-eu.org/anti-racism-diversity-intergroup/>.

³² <http://www.migpolgroup.com/multiattachments/2497/DocumentName/litigation.pdf>.

³³ <http://www.interights.org/doc/Handbook.pdf>.

³⁴ <http://www.pili.org/en/content/view/352/53/>.

³⁵ http://www.globalrights.org/site/PageServer?pagename=wwd_promoting_justice.

Kosovo's Anti-Discrimination Law and the Ombudsperson's Role in it

By Hilmi Jashari³⁶

Diversity and non-discrimination are fundamental elements of a modern society, and the development of a democratic legal system cannot be imagined without a law prohibiting all forms of discrimination. All key international and regional instruments, which regulate the protection of human rights, now include provisions on the prohibition of discrimination. The Kosovo Anti-Discrimination Law (ADL) is a necessary first step towards creating a legal framework for combating discrimination in all spheres of public life, and towards suppressing the phenomenon of unequal treatment of individuals.

Awareness within the Kosovo society of the principle of discrimination and the fight against it is still poor. All reports on the human rights situation in Kosovo, particularly those concerning so-called 'vulnerable' groups of people such as minority communities, persons with disabilities, women, children etc., talk about the huge marginalisation of these categories of people, thereby confirming the presence of discriminatory practices in all spheres of public life.

It is precisely for this reason that the promulgation of Kosovo's Anti-Discrimination Law in 2004 was important as a key measure in combating all forms of discrimination.

Alongside the local courts, the Anti-Discrimination Law also identifies the Ombudsperson Institution of Kosovo (IOK) as body authorised to receive and investigate complaints involving discrimination, which includes complaints regarding discrimination in the private sector. Even before this law was passed, Section 3 of UNMIK Regulation No.2000/38 on the Establishment of the IOK stated that "the Ombudsperson shall give particular priority to allegations of especially severe or systematic violations, allegations founded on discrimination, and those founded on discrimination". In this section, 'actions' include acts, omissions and decisions. This jurisdiction was also explicitly mentioned in the Constitutional Framework for Provisional Self Government in Kosovo, which stated in Chapter 10 "The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations, allegation founded on discrimination, including discrimination against Community and their members, and allegations of violations of rights of Communities and their members". Again, Section 4 (1) of the new UNMIK Regulation 2006/6 states that "the Ombudsperson Institution shall have the following responsibilities (...) to publicize human rights and efforts to combat all forms of discrimination, in particular racial and ethnic discrimination, by increasing public awareness, especially through information and education and by making use of the media".

The Ombudsperson Institution of Kosovo has a complementary role in the courts' implementation of the Anti-Discrimination Law. As a mechanism for the protection against discrimination, this role has some advantages compared with the court procedure. Since the role of the Ombudsperson itself is that of a kind of mediator between the public authorities and citizens, the procedures in the institution are not formal and often much faster than a court procedure. Also, services of the Ombudsperson Institution are free of charge. Another advantage is also that the Ombudsperson Institution can open *ex officio* investigations if it has information from different sources that violation might have occurred. The Ombudsperson Institution has the right according to its jurisdiction to give advice and recommendation to the public authorities. However, the Ombudsperson Institution cannot enforce those recommendations or make sure that they are implemented in some other way. This is different in other countries and regions where the Ombudsperson may impose fines for non-compliance or initiate court proceedings.

³⁶ Acting Ombudsperson of the Ombudsperson Institution of Kosovo.

However, even before establishing the “Non-Discrimination Team“ (hereinafter NDT), the Ombudsperson tried to take action and investigate allegations of discriminatory practices by public authorities. In one of these cases on 16 April 2001 the Ombudsperson opened an *ex officio* investigation into allegations presented in a Weekly Report (3 April - 9 April 2001) of the Human Rights/Rule of Law section of the OSCE Mission in Kosovo (OMIK). According to the report, a Kosovo Serb employee of the Centre for Social Work (the CSW) in Fushe Kosove/Kosovo Polje had complained about the alleged discrimination with regard to the provision of social assistance to Kosovo Serb families in the municipality. In this case, a report was published in 2002, in which the former Ombudsperson following investigation concluded that there was no violation of human rights or any abuse of authority in the present case.

On 29 June 2005, the Ombudsperson published a report in the case of Selvije Beqiri and others against UNMIK Railways. Selvije Beqiri and others used to work for UNMIK Railways. When they were dismissed, they thought that this was due to the fact that they were women. In its report, the former Ombudsperson concluded that it was a violation of the applicants’ right to access to court as guaranteed by Article 6 of the European Convention on Human Rights. According to the ADL, Chapter II Article 7.1. guarantees everyone the right to access to the competent court in order to appeal against discrimination. However, the women who used to work for UNMIK Railways and complained that were dismissed from their jobs in a discriminatory manner, could not take their case to court because UNMIK Railways was managed partly by UNMIK staff, who are immune to civil and criminal procedures according to the UNMIK Regulation 2000/47.

The Ombudsperson Institution, referring either to the Anti-Discrimination Law or to international instruments prohibiting discrimination, has also published a number of reports involving discrimination issues; reports were issued on matters such as age and gender discrimination in advertisements for employment competitions in the public sector. Those reports were based on general inquiries by the Ombudsperson into certain job vacancy notices and advertised competitions in the public sector published in the daily newspaper “Koha Ditore” during certain period time, in which age and gender limitations were set for potential candidates. The Ombudsperson recommended to the Special Representative of the Secretary General that he should ensure that Public Institutions respect the relevant legal provisions concerning the prohibition of age-based discrimination with regards to access to employment, and also to recommend the dissemination of those reports to all public institutions. The media in Kosovo was particularly interested in these reports; most of the main newspapers in Kosovo wrote articles about these reports which were discussed among citizens. This is one example of how the institution may use the media in future in order to raise public awareness on the issue of discrimination.

However, due to its mandate, the Ombudsperson Institution has a dual function in this respect – it not only attempts to combat discrimination by investigating complaints, it also tries to prevent it by encouraging the proper implementation of the law and engaging in the promotion of human rights, which includes the right of each individual to be free from all forms of discrimination.

In order to fulfil its mandate in this respect, the former Ombudsperson, Mr. Marek Antoni Nowicki, established the so-called NDT within the Investigations Department of the Ombudsperson Institution in March 2004. The lawyers working for this team, while working on other complaints filed with the Ombudsperson Institution, have a special focus on cases involving all forms of discrimination, apart from that involving gender discrimination, which are dealt with by a separate Gender Equality Unit within the Investigations Department. The Ombudsperson Institution’s Deputy Director of Investigations

co-ordinates the team, along with the other special teams in the Investigations Department. The NDT tries as much as possible to co-ordinate with public authorities in resolving such complaints, but unfortunately, the response has not always been positive. We hope that by hearing more cases and promoting stronger awareness of the problem, we will help attract the authorities' attention to discrimination and how to prevent it.

Investigations by the NDT over the last three years have included complaints involving the banning of the Islamic veil for female students in schools; the incomplete implementation of the Law on Pensions for Persons with Disabilities; the problems faced by disabled persons trying to receive driving licenses; the non-payment of civil service salaries to members of minority communities; the lack of funding for multi-ethnic medical centres; discrimination against minorities within the Ministry of Communities and Returns; lack of elementary schooling in the Bosnian language for Bosniak children; the lack of kinder gardens for Bosniak children; the inability to use the Bosnian language before courts, and the discriminatory confiscation of cars initially registered with Yugoslav license plates. Some of these cases were resolved positively due to the Ombudsperson Institution's intervention, while others so far remain a human rights problem.

Another matter raised over the last few years, by both the former Ombudsperson and the Acting Ombudsperson, has involved complaints received from former Serbian workers of socially-owned enterprises, who have alleged that they had been excluded from the privatization process of their enterprises. Both the former Ombudsperson and the Acting Ombudsperson recommended that the burden of proof in such discrimination cases be shifted from the former employee to the former employer, in accordance with European standards and the Anti-Discrimination Law. At the beginning of this year, the Acting Ombudsperson was informed by the Special Chamber for the Kosovo Trust Agency Related Matters, that such a shift of the burden of proof had taken place, and that if persons complaining of discrimination could present *prima facie* evidence that they had been discriminated against, the burden would be upon their former employer to prove that there had been no discrimination.

Further, the Ombudsperson published a report on discriminatory practices regarding the allocation of municipal apartments, or in the distribution of municipal aid to victims of a natural catastrophe. Currently, the NDT is preparing a report following complaints of discrimination lodged by ethnic Albanian individuals who formerly worked for Trepça/Trepča Company in northern Kosovo, and on the use of minority languages in the offices of central and local administrations.

However, soon after the NDT was constituted, the lawyers involved in it realised that as a result of the little, and often one-sided, perception of what discrimination actually is in large parts of Kosovo society, it was impossible to work on discrimination complaints without engaging in awareness-raising activities. Thus while the original focus of the NDT has remained the same, it has become increasingly engaged in the promotion of anti-discrimination principles as well. Events planned for this year include visits to schools all over Kosovo, as well as public authorities at the local and central levels and the publication of information materials. Currently, the Ombudsperson Institution is also contacting NGOs such as the Youth Initiative for Human Rights to encourage co-operation in this and other related matters. The NDT and the Ombudsperson Institution, together with the Youth Initiative planned several promotion activities for the NDT within IOK and also for the ADL and its implementation. The NDT is currently preparing materials for the campaign such as leaflets, posters, stickers and also t-shirts. The NDT plans to visit all major municipalities in Kosovo, particularly those populated by people of various ethnicities, where they are planning to meet representatives of public municipal authorities, representatives of civil society and teachers, and to disseminate the materials mentioned above. Together with the NGO Youth Initiative for Human Rights, the NDT has also planned

to organise a competition for the best visual work of art with the subject “what is discrimination for you?” in order to raise public awareness on the issue of discrimination. The materials from the competition will be exhibited in each municipality during the NDT campaign. Furthermore, the NDT is trying to organise one pop concert for youth in order to promote non-discrimination and the NDT in the Ombudsperson Institution.

It is these problems that instruments like the Anti-Discrimination Law have sought to resolve by informing people about what discrimination – direct and indirect – is, and where they can turn to complain about it. However, this very purpose has so far been defeated by the lack of information in Kosovo society about the law and about discrimination on the whole. Discrimination has often served as an argument in politicised debates, or it has been used when people have felt wronged for one reason or another, but there have been very few debates or public campaigns regarding the nature of discrimination itself. The persons or group of persons who are mostly marginalised and frequently discriminated against are in the worst position regarding information about this law. When a man applies for a building permit and is refused, while his neighbour, who has a similar house in the same location as his own, bribes the relevant municipal official and gets the building permit, it is not only nepotism and corruption, but also discrimination; two people who are in a similar situation are treated differently based on unreasonable grounds. However, the victims of such situations rarely complain about discrimination because they do not know to identify it as such.

The lack of information in the public domain is not the only reason that this law is not being implemented. Executive authorities do not know the content of the law and have so far not made its implementation a priority. Also, in many courts there is a limited awareness of the law and how it should be implemented. When a lawyer from NDT asked the court whether it had any discrimination cases pending the court was very surprised and was not aware of any case. The claimants lawyer should also be more active in challenging the courts when bringing a case. Implementation would be improved if there existed a specialised organisation or NGO with lawyers experienced in discrimination cases especially if they operated within a legal aid framework.

While the Anti-Discrimination Law is not perfect and certainly needs revision, (especially with regard to some definitions and principles which remain quite vague), this does not excuse the lack of implementation over the last two and a half years. It is important that the Government proactively engages in pursuing the implementation of the law by organizing, for example, sustained public awareness-raising campaigns. It is important that any information campaign addresses the problem of ignorance of this law from both sides – people should be informed about it, and the Executive and Judiciary should be properly trained in how to deal with future complaints.

Only when there is greater public awareness of what discrimination is (and what the law is prohibiting) will a system be created where higher administrative bodies and courts will be required to decide on such complaints. Immediate action is required, or proper human rights protection in this all-important area will remain little more than a fairytale.

The Anti-Discrimination Law as a Confidence-Building Measure for Kosovo

By Nuno Luzio³⁷

1. Introduction

The enactment of the Anti-Discrimination Law³⁸ (hereinafter ADL) is given as one of the examples of good and productive co-operation between the Government of Kosovo and the international organizations using international best practices.³⁹ Not only the OSCE emphasized the need for such a law since 2000⁴⁰, but the organization also assisted the drafting of the law through the Human Rights and Rule of Law Department of the OSCE Mission in Kosovo.⁴¹

The initiative was in conformity with the need to harmonize the internal legislation with the European standards as prescribed in the Constitutional Framework for Provisional Self-Government in Kosovo:

“The Provisional Institutions of Self-Government shall be responsible for aligning their legislation and practices in all areas of responsibility with relevant European and international standards and norms, with a particular view to facilitating closer economic, social and other ties between the people of Kosovo and other Europeans, and in awareness that respect for such standards and norms will be central for the development of relations with the Euro-Atlantic community.”⁴² Likewise the ADL followed up the provision of Section 3.1 of the same Framework: “All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.”⁴³

On 30 July 2004, the Assembly of Kosovo adopted “one of the worlds most comprehensive and detailed domestic laws banning discrimination.”⁴⁴ The law entered in force on 19 September 2004 after its promulgation by the Special Representative of the Secretary General on 20 August 2004.⁴⁵

The Law has three main functions. Firstly, “it consolidates and strengthens currently existing law on discrimination in Kosovo by conforming it to international and European anti-discrimination standards”; moreover “it promotes uniformity in the adjudication of a variety of forms of discrimination, including

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³⁸ Law No. 2004/3.

³⁹ Baldwin, Clive (2006) “Minority Rights in Kosovo under International Rule”, UK, Minority Rights Group International, p. 18.

⁴⁰ OSCE/UNHCR (2000) “Assessment of the Situation of Ethnic Minorities in Kosovo” (Fifth Assessment), Pristina, OSCE/UNHCR.

⁴¹ Fabian, Gregory “Implementation of the Anti-Discrimination Law in Kosovo: A Plan in Need of Execution”, available at <http://www.errc.org/cikk.php?cikk=2459&archiv=1>.

⁴² Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, Section 5.7.

⁴³ Ibid. Section 3.1.

⁴⁴ Cahn, Claude (2007) “Birth of a Nation: Kosovo and the Persecution of Pariah Minorities”, *German Law Journal*, 8 (1), no page, available at <http://germanlawjournal.com/print.php?id=790>.

⁴⁵ UNMIK Regulation No. 2004/32 On the Promulgation of the Anti-Discrimination Law adopted by the Assembly of Kosovo, of 20 August 2004.

discrimination in employment, in access to essential services” and finally “it provides effective judicial and administrative remedies for victims of any form of discrimination, and effective, proportionate, and dissuasive sanctions to address violations in both the public and private sectors.”⁴⁶

2. Analysis of the law

One of the main interesting aspects of the ADL is that it not only complies with several international and European standards, but it also goes further in what aims to protect.

The law follows two main European Directives: the European Union's Council Directive 2000/43/EC of 29 June 2000 and the Council Directive 2000/78/EC of 27 November 2000. The first Directive implements the principle of equal treatment between persons irrespective of racial and ethnic origin, while the other one establishes a general framework for equal treatment in employment and occupation prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation.⁴⁷ However while the Directive 2000/43/EC prohibits direct and indirect discrimination based on racial or ethnic origin, Article 2 of the ADL prohibits discrimination based on any ground. Concerning this last point, the legislator followed the Charter of Fundamental Rights of the European Union, article 21 (1).⁴⁸ Moreover, the same Directive limits the scope of the rights which are protected, while Article 4 of the ADL prohibits discrimination in access and enjoyment of any rights set forth by applicable laws.⁴⁹

2.1. Chapter I

The purpose of the ADL is to prevent and combat discrimination and to enforce the principle of equal treatment of all the people of Kosovo under the rule of law⁵⁰. The law is based on three principles: the principle of equal treatment⁵¹, fair representation⁵² and good understanding and interethnic tolerance.⁵³ The law benefits from a very broad principle of equal treatment as mentioned before. The legislator prohibits discrimination based on listed grounds, but explicitly extends the prohibition to any other ground. Another interesting aspect is that discrimination is prohibited on the basis of one or several grounds. This is particularly important when applied to a society divided along ethnic lines as Kosovo. It means that discrimination can have multiple grounds, for instance a Romani woman can be discriminated based on gender or ethnic origin, or both. This possibility increases the scope of the law.

Article 3 gives a clear explanation of different forms of discrimination. The direct discrimination is the most classic type of discrimination. It dictates that the treatment should be equal and it protects any individual or group of having less access to a service or less protection based on one of the prohibited

⁴⁶ Chirizzi, Katja (2004) “Anti-Discrimination Law signed into law by the SRSG”, in *Assembly Support Initiative Newsletter no. 13*, Pristina, OSCE Mission in Kosovo.

⁴⁷ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (Official Journal L 180 of 19 July of 2000, pp. 22-26) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education (Official Journal L 303 of 2 December of 2000, pp. 16-22).

⁴⁸ Charter of Fundamental Rights of the European Union, Nice, December 2000, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

⁴⁹ Fabian, Gregory “Implementation of the Anti-Discrimination Law in Kosovo: A Plan in Need of Execution”, available at <http://www.errc.org/cikk.php?cikk=2459&archiv=1>.

⁵⁰ Law No. 2004/3, Article 1.

⁵¹ *Ibid.*, Article 2 (a).

⁵² *Ibid.*, Article 2 (b).

⁵³ *Ibid.*, Article 2 (c).

grounds. However, a difference of treatment based on one of the prohibited grounds is allowed when “by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a real and determining occupational requirement.”⁵⁴ The same goes with “a measure to prevent or compensate for disadvantages linked to one or more grounds (...) provided that it is also in compliance with international human rights standards.”⁵⁵

Non-discrimination is not circumscribed to treating persons in an equal way. Therefore, the ADL targets the indirect discrimination as well.⁵⁶ The prohibition of indirect discrimination is useful “to unmask instances of intentional discrimination which seek to achieve indirectly what may not be done directly” or “to permanently revise institutionalized habits and procedures, in order to make them more hospitable to difference.”⁵⁷ However, the legislator underlines that if the provision, criterion or practice is objectively justified by a legitimate intention and the means to do it are appropriate, one cannot consider it an indirect discrimination.⁵⁸

According to the ADL, harassment is considered a discriminatory behaviour, an unwanted conduct that has the intention or the effect of violating the dignity of a person.⁵⁹ This implies that the legislator took under consideration, not only the intention but also the outcome of the behaviour. In this point, the legislator should maybe have gone further, protecting not only single persons but also groups.

The law considers discrimination not only an action taken by an individual against another, but also the instruction given to someone to discriminate.⁶⁰ Discrimination is also any revengeful reaction taken as a response to a complaint or proceedings that aim to enforce compliance with the principle of equal treatment.⁶¹ Finally, the law defines segregation as the separation of one or more individuals from others based on any of the grounds, unless that action is objectively justifiable.⁶² It is important to note that according to contemporary legal standards, even if a group has the same access or even better access to services, the fact that it is keeping apart from the others is a form of discrimination.⁶³

The article 4 is clear about the implementation scope. The scope is extremely wide and makes everyone being at the same time “a duty bearer and rights holder.”⁶⁴ The ADL is innovative in the sense that it not only includes any action or inaction which violates the rights of any natural or legal person, but it also lists important rights (employment, education, social protection, fair treatment before courts, etc.), without excluding any other right set forth by applicable laws.⁶⁵

As already mentioned before, the law does not overlook positive action. This point is particularly important when speaking about changing discriminatory behaviours. In a legal point of view, there

⁵⁴ Law No. 2004/3, Article 5.

⁵⁵ Ibid., Article 6 (6.1.).

⁵⁶ Ibid., Article 3 (b).

⁵⁷ De Schutter, Olivier (2005) “Three Models of Equality and European Anti-Discrimination Law”, *Northern Ireland Legal Quarterly*, 57 (1), p. 9.

⁵⁸ Law No. 2004/3, Article 3 (b).

⁵⁹ Ibid., Article 3 (c).

⁶⁰ Ibid., Article 3 (d).

⁶¹ Ibid., Article 3 (e).

⁶² Law No. 2004/3, Article 3 (f).

⁶³ Youth Initiative for Human Rights (2007) “Report Implementation of Anti-Discrimination Law”, Pristina, p. 9.

⁶⁴ Ibid., Pristina, p. 9.

⁶⁵ Law No. 2004/3, Article 4 (n).

is a distinction to be made. Positive action might not create the risk of discrimination against the members of a group, but there are other situations where positive action includes that risk, the so-called affirmative action. For instance, if an employer publicizes job advertisements in a paper which targets members of a specific ethnic community or encourages women or minorities to apply, it cannot be seen as contravening the principle of equal treatment.⁶⁶ In order to enforce the law in the public sphere, the legislator mentions that all the persons exercising a public function when awarding a contract, loan, grant or benefit shall make sure that those parties will comply with the law.⁶⁷

2.2. Chapter II

In terms of procedures and sanctions, the law is clear and gives several possibilities of pursuing a claim. In article 7 (7.6) the law envisages the involvement of associations, organisations or other legal entities in the enforcement of obligations written in it.⁶⁸ This point is particularly important in a society like Kosovo, where the average resident will not have an easy access to justice and civil society organisations are stakeholders in the implementation of the law.

In matters of burden of proof, the law gives the victim or victims a feasible way of proving discrimination. The law prescribes the shifting of the burden in civil cases, once that a *prima facie* case is established, by requiring that it “shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”⁶⁹ Moreover, such evidence can be established through statistical evidence as well.⁷⁰ One more time the law follows the Directive 2000/43/EC on its Article 8 (1) and point 15.⁷¹

Concerning sanctions the ADL establishes compensation for both pecuniary and non-pecuniary damages, through monetary penalties.⁷² An interesting aspect of the law is that it also allows the court to impose positive measures.⁷³ Finally, all monies coming from monetary penalties shall be placed in a fund to facilitate free legal assistance.⁷⁴

2.3. Chapter III

Regarding the promotion for equal treatment the ADL heavily relies on the Ombudsperson Institution in Kosovo.⁷⁵

2.4. Chapter IV

The final chapter of the law establishes its juridical value, as the law supersedes all previous applicable laws of this scope and it cedes to other legal provisions if they are more favourable than the ADL.⁷⁶

Furthermore, the law gives to the Government the possibility of passing by-laws, which aim at bringing

⁶⁶ De Schutter, Olivier (2005) “Three Models of Equality and European Anti-Discrimination Law”, *Northern Ireland Legal Quarterly*, 57 (1), p. 33.

⁶⁷ Law No. 2004/3, Article 6 (6.2).

⁶⁸ *Ibid.*, Article 7 (7.6).

⁶⁹ *Ibid.*, Article 8 (8.1.).

⁷⁰ *Ibid.*, Article 8 (8.2.).

⁷¹ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (Official Journal L 180 of 19 July of 2000, pp. 22-26).

⁷² Law No. 2004/3, Article 9 (9.2.).

⁷³ *Ibid.*, Article 9 (9.3.).

⁷⁴ *Ibid.*, Article 9 (9.4.).

⁷⁵ *Ibid.*, Article 10.

⁷⁶ *Ibid.*, Article 11.

the law into force.⁷⁷ In fact the Government, in accordance with the law, is responsible for conducting a public awareness programme⁷⁸, which has been undertaken through the Prime Minister's Office for Good Governance, Human Rights, Equal opportunities and Gender matters within the Office of Prime Minister (hereinafter OGG).

3. Strong and weak aspects of the implementation process

As mentioned before, the ADL should be considered an advanced and important piece of legislation for Kosovo. Nevertheless, the implementation has not been so successful as one would wish.

The law set up very clear general provisions and follows international and European standards in its general content. However for instance there is no record of the number of public contracts, loans or grants awarded by the public sector that included a document stating its compliance with the ADL, as prescribed on Article 6 (6.2.). Besides that until the present day, there was no establishment of a Centre for Equal Treatment as foreseen by Article 9 (9.5.). Consequently, it would be important to establish the Centre, with a clear mandate, in order not to overlap with the mandate of the Ombudsperson Institution. And any public body should be obliged to act according to the Article 6 (6.2.), namely establishing a way of ensuring that all the awardees of a public contract, loan, grant or other benefit are fully aware of the obligations prescribed in the law.

Due to its legal nature, it is expected that the Ombudsperson Institution will be the body responsible for the promotion of equal treatment in Kosovo.⁷⁹ However, regarding the implementation, it would be important to engage not only the Government as entailed by the law, but also the Assembly of Kosovo. The role of any Assembly in the world is, among many other things, the oversight of the implementation of the laws that it approved. Therefore it is important to enhance the role of the Assembly in overseeing and monitoring the enforcement of a law that, despite its importance, has been rarely evoked.

The Government has particular responsibilities on the implementation of the ADL, mainly through the OGG. Following the Administrative Instruction on Implementation of the Law Against Discrimination, No. 04/2006 (passed by the Government), the OGG is the responsible body for the implementation of the law. The above-mentioned instruction defines practical rules, structural and physical facilities for the implementation of the ADL and promotion of equal treatment for all persons.⁸⁰

But the Government did not circumscribe its action to this instruction, since on 11 October 2005, it adopted the Comprehensive Implementation Action Plan for the Anti-Discrimination Law. The plan is to be followed in the period 2005-2007 and it includes objectives⁸¹, activities, stakeholders, resources and a timeline. The advantage of the plan is that it combines synergies with the inclusion of several

⁷⁷ Law No. 2004/3, Article 12 (12.3.).

⁷⁸ Ibid., Article 13 (13.2.).

⁷⁹ Ibid., Article 10; Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, Chapter 10.

⁸⁰ Office of Good Governance – Office of Prime Minister (2006) *Report (January-June 2006) on activities in the areas of Anti-Discrimination, Anti-Corruption, Anti Trafficking in Human Beings and Human Rights*, Pristina, OGG-OPM, p. 7.

⁸¹ Initiating participatory process/coordination mechanism for implementation of Anti-Discrimination Law (ADL) for inclusion of responsible parties and their proper commitment for implementation of ADL; identifying and confirming the commitment and responsibility of suggested institutions to implement and oversee the ADL as well as recommended future steps; identifying responsible agencies from governmental and non-governmental sector for development of comprehensive training module on ADL and providing trainings; consolidating legislation and procedures to address anti discrimination cases as well as clarifying new procedures, if necessary; inclusive delivery of information on application and implementation of ADL.

governmental and non-governmental agencies and international organizations. However, the success of the plan is still to be assessed.

Another important instruction is the Administrative Instruction No. 8/2005 outlining the terms of reference for Human Rights Co-ordinators, which established the Human Rights Unit in each ministry. These Units aim to promote, advance and protect Human Rights⁸² through the application of documents approved by the Government and the Assembly and reporting process over the respect of Human Rights in each ministry.⁸³ One of the responsibilities of these officials is the promotion of the principles prescribed by the ADL. Nevertheless, these Units have shown some problems as the Co-ordinators and their members have no employment contract and they do not have terms of reference for the fields they are in charge of. Moreover, their position is an additional duty for them among many others.⁸⁴ This means that many of these officials have to be accountable to other supervisors, which does not contribute to the autonomy of their work. Fortunately, there is a forthcoming Administrative Instruction that will provide for the institutionalization of the Units, which will contribute to the enhancement of their independence through the clarification of responsibilities and harmonization of salaries and benefits among all ministries.

Despite all the initiatives, the progressive legislation did not have adequate awareness raising efforts and the support to those efforts seems insufficient.⁸⁵ For instance, regarding the protection of minorities, it seems that not only people have been unaware of the law, but also the access to justice is not easy. There is a lack of an effective legal aid system and a massive backlog of cases pending in the courts.⁸⁶ In addition, the number of persons coming from minority communities working in judicial structures is disproportionately low, which makes it difficult to build confidence in judicial structures.⁸⁷

To sum up, there is a long way to go and the Government should not give up bringing all relevant stakeholders on board and addressing several of the problems previously mentioned.

Finally, it is important to underline the constant involvement of the OSCE Mission in Kosovo since the very beginning. As already explained, the OSCE was actively involved in drafting of the law. In 2004, the OSCE was responsible for conducting an important workshop with the participation of representatives of the Government, civil society and international community. The workshop came up with recommendations that should be considered as guidelines to the implementation of the law.⁸⁸ The OSCE supported the draft of the Comprehensive Action Plan as well. It placed Senior

⁸² Administrative Instruction No. 8/2005 over terms of reference for Human Rights Unit, Article 2 (2.2.).

⁸³ Ibid., Article 3.

⁸⁴ Office of Good Governance – Office of Prime Minister (2006) *Report (January-June 2006) on activities in the areas of Anti-Discrimination, Anti-Corruption, Anti Trafficking in Human Beings and Human Rights*, Pristina, OGG-OPM, p. 20.

⁸⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities (2006) *Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo*, Strasbourg, Council of Europe, Article 4; available at www.ian.org.yu/kosovo-info/english/files-index/1st_OP_Kosovo_English.pdf;

⁸⁶ Amnesty International (2006) *Human Rights protection in post-status Kosovo/Kosova: Amnesty International's recommendations relating to talks in the final status of Kosovo/Kosova*, Kosovo/Kosova (Serbia), Amnesty International, Point 8.3.

⁸⁷ Advisory Committee on the Framework Convention for the Protection of National Minorities (2006) *Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo*, Strasbourg, Council of Europe, Article 4; available at www.ian.org.yu/kosovo-info/english/files-index/1st_OP_Kosovo_English.pdf;

⁸⁸ See Fabian, Gregory. "Implementation of the Anti-Discrimination Law in Kosovo: A Plan in Need of Execution", available at <http://www.errc.org/cikk.php?cikk=2459&archiv=1>.

Advisors for Human Rights in each ministry and at the same time trained members of the Human Rights Units. The collaboration went to the extent that in some ministries, complaints were submitted to OSCE's evaluation and opinion. Finally, it supported the Kosovo Judicial Institute in trainings of judges and lawyers. The efforts of the Mission have started to bear fruits but the investment has to be continued within a long-term perspective. The OSCE has always been extremely committed to the implementation of the ADL and it will certainly continue to be so in the future.

4. Conclusion

After the analysis of the law and its implementation process, it is important to conclude by explaining the importance of the ADL in the present situation.

The Article 2 (2.3.) of the Comprehensive Status Proposal, presented by the Special United Nations Envoy Marti Ahtisaari, underlines the following: "Kosovo shall take all necessary measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, cultural, linguistic or religious identity."⁸⁹ The ADL could not be a better instrument to fulfil the above-mentioned obligation. It is clear that the law does not only target the protection of minorities, but has a rather wider scope of implementation. But no one can deny that the ADL is a key instrument in the protection of minorities in Kosovo, which is of utmost importance in the present situation. This is highlighted as one of the three principles in the basis of the ADL that is precisely the principle of good understanding and interethnic tolerance.⁹⁰ Because one should not forget that "as the provision of minority rights in the form of community rights is a crucial factor for the future state of Kosovo, it goes without saying that positive measures (...) are needed in order to make the minorities feel personally secure in Kosovo and also to give them a perspective of economic, social, and cultural security."⁹¹

In my opinion, the ADL can serve as an effective confidence-building measure in this time of transition for Kosovo. The full implementation of the law will facilitate the relations between the different communities and will reinforce a successful peace-building process. It is obvious that "Human Rights Education and Learning is a strong instrument (...) in processes of post-conflict transformation and consolidation" and "strategies of conflict prevention and post-conflict rehabilitation should therefore be built integrally upon strategies of promoting and protecting human rights."⁹² Therefore, the ADL can serve not only as a good piece of legislation but also as an instrument to achieve stability in Kosovo, especially when challenging times are ahead. For this reason, it is imperative to address the problems of its implementation in order to make it accessible to the residents of Kosovo.

⁸⁹ Comprehensive Status Proposal, Article 2 (2.3.), p. 19 (English version).

⁹⁰ Law No. 2004/3, Article 2 (c).

⁹¹ Benedek, Wolfgang (2005) "Final Status of Kosovo: The Role of Human Rights and Minority Rights", in *Chicago-Kent Law Review*, p. 232; available at <http://lawreview.kentlaw.edu/articles/80-1/Benedek%20PDF3.pdf>.

⁹² Human Security Network, Graz Declaration on Principles of Human Rights Education and Human Security (8-10 May 2003), Point 2; available at http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/human_security/declaration.pdf.

An Outline on the Implementation of the Kosovo Anti-Discrimination Law – the Serbian Perspective⁹³

Milica V. Matijević MA⁹⁴

Introduction

On 19 of September 2004, after more than a year of preparatory work, Kosovo has become a society with one of the most advanced anti-discrimination laws in Europe.⁹⁵ The Kosovo Anti-discrimination Law (hereinafter ADL) lays down an open-ended prohibition of all forms of discrimination; it provides legal protection against discriminatory behavior of public bodies as well as of private organizations and individuals; as different from its *ratione materiae* limited European Union models⁹⁶, it prohibits discrimination in access to and enjoyment of *any right* set forth by law in force in Kosovo; it confers special protection to the non-majority communities; it introduces affirmative action measures⁹⁷; and finally, the Kosovo ADL provides a sophisticated system of sanctions for violations of its provisions. But how much of it has stepped out of the stage of a “paper right”⁹⁸ by now?

According to the editors of this publication, this commentary shall serve as an outline of the ‘Serbian perspective’ on the implementation of the ADL. Since talking on behalf of an ethnic community in a society where ethnic discrimination is just one of many identified forms of discrimination can be a difficult task, my intention will rather be to stay within the limits of personal observations on the given topic. An unusually personal tone present throughout the text is there just to remind about the fact that the given remarks are coming from a Serbian-speaking observer and to pardon the author regarding language limitations as well the accuracy of the information this paper is based on.

Some basic remarks

It is hard to start analyzing the implementation of such advanced legal text as the text of the ADL in the present-day Kosovo. The law contains a set of legal norms designed to protect an individual against very sophisticated forms of discrimination. At the same point in time, instances of direct discrimination are occurring habitually before our eyes questioning the very meaning of the academic discussions of this kind. Let me elaborate on this:

⁹³ This paper is a summary of an analysis recently published by the Youth Initiative for Human Rights (YIHR) as part of a broader study on the implementation of the Anti-discrimination Law in Kosovo. See: Youth Initiative for Human Rights. 2007. “Report Implementation of Anti-Discrimination Law”, Pristina.

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⁹⁵ Anti-discrimination Law No. 2004/32 promulgated by UNMIK Regulation No. 2004/32 On the Promulgation of the Anti-discrimination Law, of 20 August 2004.

⁹⁶ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L303 of 2 December 2000).

⁹⁷ Although the provisions on the positive action measures of the ADL are highly advanced and written in accordance with the highest EU standards, the legislator has omitted to regulate the principle of reasonable accommodation in case of disablement discrimination.

⁹⁸ The expression is taken over from the Minority Rights Group International report on minority rights in Kosovo where this expression is employed in order to depict a situation where “[m]inorities are being offered at best a series of paper rights, without any effective means of enforcement”. In: Clive Baldwin, *Minority Rights in Kosovo under International Rule*, Minority Rights Group International, London, 2006, p. 25.

Being a human rights lawyer, I get excited every time I go through the provisions of this excellent law, that much I get discouraged by reading or trying to read the very bylaw by which the ADL is supposed to be implemented. The spelling and terminological errors found in the Serbian versions of the Administrative Instruction No. 04/2006 On Implementation of the Anti-Discrimination Law (hereinafter Instruction)⁹⁹ are so numerous that, eventually, they make pointless any attempt to grasp the meaning of this text.¹⁰⁰ The same is true for the newly enacted Administrative Instruction No. 04/2007 On Human Rights Units in the Kosovo Government that is supposed to serve as a step further towards the implementation of the ADL.

Whether it is about lack of resources or about gross negligence for provisions regulating the use of official languages in Kosovo¹⁰¹, the fact is that this omission not only discriminates against but also seriously affects the right of a non-Albanian speaking individual in Kosovo to learn about his or her rights and duties under this legal system. Here, I should remind that according to the standards established in the case law of the European Court of Human Rights, in order to be lawful, a legal act must be of an *adequate quality*, which foremost means that it must be *accessible* and *foreseeable*¹⁰².

Implementation and application of the ADL

The lack of lawfulness of the Administrative Instruction No. 04/2006 indicates that despite complex and time-consuming preparations, today, almost three years after its enactment, the process of implementation of the ADL is still almost at the beginning. There are three sets of arguments I will use in order to demonstrate this statement. Firstly, there is a confusion regarding the bodies that are tasked or otherwise involved in the implementation of the law. Secondly, the thorough legal protection afforded by the provisions of this law to the victims of discrimination has not been followed by adequate enforcement mechanisms. Thirdly, the strategies for combating indirect discrimination and ensuring fair community representation in Kosovo as a general rule lack clear statistical basis often ending as a highly ineffective tool.

⁹⁹ Administrative Instruction No. 04/2006 On Implementation of the Anti-Discrimination Law of 25 May 2006. Since at the time of the endorsement of the Instruction, the English language version had the same legal validity as the Albanian and Serbian versions, the analysis will compare all three language versions of the Instruction in order to learn about its content.

¹⁰⁰ Not only that the given Instruction contains vast numbers of typing and grammatical errors, but there is also a considerable disparity between the different language versions of the text of the Instructions. For a more in-depth illustration of this, please check: Youth Initiative for Human Rights. 2007. "Report Implementation of Anti-Discrimination Law", Pristina. This is, however, not the first time that the legal 'destiny' of the ADL is confronted with this kind of problems. For instance, the ADL would have been adopted much earlier if, prior to the first voting in February 2004, it had not been rejected by the Serbian Assembly Members because of distorted Serbian translation. See in: Sabovic, S., Steinle, U., '*Lost in Translation*' or *How to Make Three Languages Speak One Legislative Voice*, OSCE Assembly Support Initiative Newsletter, Special edition, No. 15, Pristina, February, 2005.

¹⁰¹ Kosovo Assembly Law No. 02/L-37 on the Use of Languages promulgated by UNMIK Regulation No. 2006/51 On the Promulgation of the Law on the Use of Languages of 20 October 2006.

¹⁰² See for instance, *the Sunday Times v United Kingdom* ([1979-80] 2 EHRR 245, 26 April 1979) or the cases including the quality of domestic remedies such as *Akdivar and Others v. Turkey* (judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1210, § 67), *Andronicou and Constantinou v. Cyprus* (judgment of 9 October 1997, Reports 1997-VI, pp. 2094-95, § 159), *Assanidze v. Georgia*, (71503/01 [2004] ECHR 140 (8 April 2004), § 127), etc.

a) Bodies for the implementation of the ADL

Despite the fact that the ADL belongs to the group of laws which demand considerable institutional infrastructure for becoming *de facto* applicable, there is an apparent lack of clarity as to which body or bodies are in charge of its implementation.

Much of this situation can be assigned to the vague provisions of the last two chapters of the ADL itself. In Chapter III, under the title “*Bodies for the Promotion of Equal Treatment* (italic added)”, the legislator only refers to one body – to the Ombudsperson Institution in Kosovo. Actually, this Chapter just confirms the role of the Ombudsperson Institution as a body authorized “to receive and investigate complaints concerning violations of rights based on discrimination” in accordance with Chapter 10 of the Constitutional Framework for Provisional Self-Government¹⁰³ and UNMIK Regulation 2000/38¹⁰⁴. However, careful reading of the previous Chapter (Article 9(5)) of the ADL, discerns one more body to be established by this Law – the Centre for Equal Treatment:

“All monies collected pursuant to paragraph 9.2 b, should be administrated by an administrative or juridical body pending the establishment of the Centre for Equal Treatment.”

Yet, this body is neither further regulated in any subsequent provision of the ADL nor in the Administrative Instruction on the Implementation of ADL, which could lead to the conclusion that the provision referring to the Centre for Equal Treatment is just a result of an omission that has occurred in the drafting phase. Namely, the Centre for Equal Treatment as the main body in charge of implementing the ADL has been a solution proposed in the last draft of the ADL that, after criticism expressed by, among others, the Ombudsperson in Kosovo, has been cast off the final version of the Law.¹⁰⁵

Although long awaited, the Administrative Instruction on the Implementation of the ADL of May 2006 did not solve this problem in a comprehensive or tangible manner. Even though, according to Article 1, “[t]he objective of this Administrative Instruction is to set the practical rules, structural and physical facilities to apply the Law Against Discrimination [...]”¹⁰⁶ the Instruction does not fulfill this self-imposed goal. Namely, the only provision in the Instruction that touches upon this subject-matter is the provision of Article 6 that obliges the Office for Good Governance “to prepare, publish and to multiply” information on the institutions and bodies responsible to receive, adjudicate or otherwise react on the submissions indicating violation of the ADL. However, Article 6 does not specify itself any of those bodies or procedures. Then again, although the Instruction has been issued almost year ago, until present day the author of this paper did not succeed in identifying any act issued by the Office for Good Governance for the fulfillment of this aim.

Furthermore, it is not clear why the institutional base for the implementation and application of this law did not incorporate already existing instruments for mediation and conciliation established at

¹⁰³ UNMIK Regulation No. 2001/9 On the Constitutional Framework for Provisional Self-Government in Kosovo, of 15 May 2001.

¹⁰⁴ UNMIK Regulation No. 2000/38 On the Establishment of the Ombudsperson Institution in Kosovo of 30 June 2000 as amended by UNMIK Regulation No. 2003/7 of 14 April 2003.

¹⁰⁵ Namely, the Ombudsperson in Kosovo had rightly pointed out that “[g]ranting this Centre competences that duplicate those of the Ombudsperson Institution would not be very beneficial to the common aim of promoting the protection of human rights in Kosovo”. See further on this at: www.ombudspersonkosovo.org

¹⁰⁶ Another serious deficiency of the Instruction is that it includes an incomplete and modified quotation of the prohibited grounds of discrimination contained in Article 2(a) of the Anti-discrimination Law, thus distorting the very basic rule of the law it is supposed to implement.

the local level – Mediation and Community Officers regulated already in 2000 in UNMIK Regulation 2000/45.¹⁰⁷ This would not only provide the inhabitants of the communities belonging to the same ethnic, religious or linguistic minorities with an easier accessible mechanism to lodge possible complaints but could also strengthen these committees whose functioning is, according to the latest survey, seriously flawed by the number of obstacles.¹⁰⁸ This could prove to be even more useful knowing that there is no direct link between the newly established Human Rights Units within the Kosovo Government Ministries and the municipal-level bodies.¹⁰⁹

b) Application of the ADL

Although, in accordance with the modern legal trends, the ADL significantly mitigates the position of a victim of discrimination intending to undertake a legal action by shifting the burden of proof, there are almost no cases of invoking its provisions before the courts in Kosovo.¹¹⁰ While it is true that application of such a revolutionary legal solution has proved to be a time-consuming process even for the societies with far more stable legal systems, certain deficiencies of the legal system in Kosovo impose additional constraints on the application of the law. Besides the critical situation of the Kosovo judiciary suffering from a huge backlog of cases¹¹¹, lack of an adequate legal aid system and of a thoroughly developed public information and advocacy campaign is yet another side of this problem.

Free Legal Assistance

The uniqueness of the ADL is the provision laid down in Chapter II regulating the system of sanctions. In Article 9(4) the legislator prescribes that all monies collected through the imposition of fines “shall be placed in a fund which will be established for the purpose of supplying free legal assistance” to those whose rights have been violated. As the given provision until present day remained just a “paper right”, manifest lack of legal assistance can be seen in the same time both as a root and as a consequence of non-implementation of the ADL.

Public awareness campaigns

The application of the ADL is further impaired by a general lack of expertise on anti-discrimination practices among the civil servants and lack of awareness on the scope of the protection afforded by

¹⁰⁷ Section 23 of UNMIK Regulation 2000/45 On Self-government of Municipalities in Kosovo, of 11 August 2000 and UNMIK Administrative Instructions (AI) 2003/002 On procedural Guidelines for Municipal Communities Committees of 15 September 2003 and AI 2005/001 On Procedural Guidelines for Municipal Mediation Committees of 13 April 2005.

¹⁰⁸ Survey jointly conducted by the OSCE Mission in Kosovo and UNMIK Office of Communities, Returns and Minority Affairs (OCRM) on the functioning of the Communities and Mediation Committees. See in: United Nations Interim Administration in Kosovo, *Report Submitted to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999*, February 2006, p. 49.

¹⁰⁹ The only provision of Administrative Instruction No. 04/2007 On Human Rights Units in the Kosovo Government that refers to the local-level bodies is Article 12(2) where it is stipulated that “[t]he OPM/AOGG coordinates the HRUs communication with relevant local and international agencies addressing human rights issues and which with the consent of the government are engaged in the cooperation or in professional assistance for human rights projects.”

¹¹⁰ Different from civil cases where each claimant is supposed to bear the burden of proving the facts that he or she presents while demonstrating the own claim, in recent years a specific rule on “shifting the burden of proof” has been introduced for discrimination cases before the EU courts and UN treaty bodies. In accordance with the given trends, in Article 8 the ADL as well shifts the burden of proof in discrimination cases.

¹¹¹ See more on this in: OSCE Mission in Kosovo - Legal System Monitoring Section, *Kosovo First Review of the Civil Justice System*, June, 2006.

this law among the inhabitants of Kosovo *en general*. The future public information campaigns on the rights guaranteed by the ADL must go much beyond simply producing and disseminating brochures, leaflets and posters. For this, a stronger focus on developing the capacity of civil society in Kosovo to promote the anti-discrimination practices shall be among the priorities. This even more so since “[a]ssociations, organizations or other legal entities may institute or support legal actions on behalf of a claimant or claimants, with their consent”¹¹², thus having an additionally important role in the application of the law.

c) Equality as a result – anti-discrimination strategies in Kosovo

Positive action measures

Equality is not only equal treatment of equal but also unequal treatment of unequal in proportion to people’s inequality.¹¹³ Application of the principle of equality, as the main principle of the ADL, does not only entail negative obligations such as the duty to refrain from discriminatory behavior. Prohibition of indirect discrimination, which focuses at the equality as a result, also places positive obligations on both private and public agents. Thus, in the second paragraph of Article 6 the legislator envisages a specially designed positive action measure where:

“All persons exercising a public function shall ensure that those parties to whom they award a public contract, loan, grant or other benefit, will execute a document which states that they will act in compliance with this Law and will respect and promote a non-discrimination policy, as they carry out their obligations related to such a public contract, loan, grant, or other benefit”¹¹⁴

This provision is particularly important if read in conjunction with Article 3(b) (prohibition of indirect discrimination)¹¹⁵ and Article 4(a) of the ADL (prohibition of discrimination in access to employment)¹¹⁶. Although poverty and high unemployment rate affect most of the population of Kosovo, “minority communities and especially vulnerable groups are affected in a disproportionate way”¹¹⁷. Hence, the given provision, if applied, could decrease the level of indirect discrimination in the field of employment.

¹¹² Article 7(6) of the ADL.

¹¹³ This principle is expressed in the very first provisions of the ADL (Art. 1) that says: “The purpose of this Law is prevention and combating discrimination, promotion of effective equality and putting into effect the principle of equal treatment of the citizens of Kosovo under the rule of Law.”

¹¹⁴ Furthermore, in order to reinforce this provision, in the last paragraph of the same article, the ADL provides that the same body that has awarded public contract, loan, grant or other benefit shall declare it null and void if provisions of previous paragraph are violated.

¹¹⁵ Article 3(b) of the ADL reads as follows: “Indirect discrimination shall be taken to have occurred where an apparently neutral provision, criterion or practice would put persons, on the basis of one or more grounds such as those stated in Article 2(a), at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

¹¹⁶ Article 4(a) of the ADL reads as follows: “This Law shall apply to all natural and legal persons as regards both the public and private sectors, including public bodies, in relation to any action or inaction which violates the right or rights of any natural or legal person or persons, to: (a) conditions for access to employment, self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.”

¹¹⁷ Annex to the Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council - A comprehensive review of the situation in Kosovo (so called ‘Kai Eide Report’), p. 11.

In spite of this, there is indication that until the present day there has not been any case where the declaration of this kind has followed the awarding of a public contract, loan, grant or other benefit. This, regardless of which institution or body has been in charge of applying the given provision - a provisional institution of self-governance or an international institutions exercising quasi-state functions in Kosovo.

Fair community representation strategies and lack of data

As a symbolic extension of prohibition of indirect discrimination, the “principle of fair representation of all persons and all the members of communities to employment in the frame of public bodies” has become one of the three main principles the ADL is based on.¹¹⁸ However, there are two major obstacles to operationalising this principle. Firstly, “assessing the extent of discrimination towards women, children, minorities, persons with disabilities and other vulnerable groups at both central and local level is difficult to perform due to the lack of data”.¹¹⁹ Secondly, without reliable data it is hard to think about any efficient strategy for combating *de facto* inequalities existing in the society of Kosovo. Unfortunately, this has been already proved in the case of 2002 Strategy for Establishing Proportional Community Representation.¹²⁰ As it has been recognized by UNMIK as its principal initiator, not one element of it has been implemented to the present date.¹²¹ As Kai Eide notes in A Comprehensive Review of the Situation in Kosovo, the recruitment of minorities “has too often been seen as a question of filling a quota than providing meaningful participation”.¹²²

The statistical data is important as well in the light of the provision contained in Article 8(2) where the legislator prescribes that “a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence”.

Conclusion

Kosovo is a society still deeply divided along ethnic lines. The author of this paper hence believes that there will be no successful confrontation with the discriminatory practices without carefully developed and patiently realized Kosovo-wide reconciliation programmes.¹²³ The reconciliation is the founding concept of the anti-discrimination policies inbuilt in the ADL as “[g]ood understanding principle and interethnic tolerance of the inhabitants of Kosovo” are among its basic principles.¹²⁴

¹¹⁸ Article 2(b) of ADL.

¹¹⁹ United Nations Interim Administration in Kosovo, *Report Submitted to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999*, February 2006, p. 41.

¹²⁰ *Ibidem*, pp. 43 – 44.

¹²¹ *Ibidem*.

¹²² Annex to the Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council - A comprehensive review of the situation in Kosovo (so called ‘Kai Eide Report’), p. 10.

¹²³ See for instance the findings of research on impact of peace-building activities in Kosovo conducted by the CDA-Collaborative Learning Projects. CDA-Collaborative Learning Projects, *What Difference has Peacebuilding Made? A Study of the Effectiveness of Peacebuilding in Preventing Violence: Lessons Learned from the March 2004 Riots in Kosovo*, Cambridge, MA, 2006.

¹²⁴ Article 2(c) of the ADL.

Recommendations:

1. **Combating language discrimination** – The Provisional Institutions of Self-governance in Kosovo (PISG) shall ensure as a matter of urgency adequate facilities for timely and quality translation of all public documents in Serbian language at all levels.
2. **Empowering the Ombudsperson Institution in Kosovo** – Since a prominent role in applying the provisions of the ADL has been assigned to the Ombudsperson Institution in Kosovo and since this institution is well established among members of all Kosovo communities, the capacities of this institution shall be further enhanced, in particular through strengthening its human resources.
3. **Public Awareness Campaign** – The Provisional Institutions of Self-governance with the assistance of the international organizations in Kosovo shall design and realize in a systematic manner an intensive ADL public awareness campaign. The target group of the ADL public awareness campaign shall be the Kosovo population *en general* with the special focus on a) members of particularly vulnerable communities, b) members of Kosovo Civil Service at all levels, c) student population, d) representatives of the civil society in Kosovo.
4. **Strengthening civil society** – A special effort of the representatives of the international donor community in Kosovo shall be directed at expanding and further strengthening the capacities of NGOs in Kosovo advocating anti-discrimination and equality-driven practices.
5. **Data-collection and data-management** – The Provisional Institutions of Self Government (PISG) and the international organizations present in Kosovo shall invest further efforts in collecting and establishing accurate and reliable databases on different facets of discriminatory practices in Kosovo.
6. **Reconciliation programs** – The Provisional Institutions of Self Government and the international organizations present in Kosovo shall invest much greater efforts in developing and realizing a Kosovo-wide reconciliation strategy.

EXECUTIVE SUMMARY

The “Roundtable on the Implementation of the Law on Anti-Discrimination” took place on 18 April 2007, as organised by the OSCE Mission in Kosovo (OMiK). The objective of the roundtable was to serve as a forum for dialogue on implementation of the Anti-Discrimination Law (ADL) and to increase awareness of its implementation among different stakeholders.

Mr. Hilmi Jashari emphasized that the role of the Ombudsperson Institution in Kosovo (OIK) is complementary to the implementation of the ADL by the court. The OIK serves as mediator between the public authorities and citizens, and its procedures are both less formal and faster than a court hearing, with the services being provided free of charge. Moreover, the OIK can open *ex officio* investigations if it has information from different sources that a violation may have occurred. Mr. Jashari pointed out that awareness within Kosovo society of the principle of discrimination and the fight against it is still poor.

Mr. Habit Hajredini pointed out that the priority of the Office of Good Governance in the Office of the Prime Minister (OGG/OPM) was to increase the capacities of senior officials at the central level, as well as the capacities of the senior municipal officials who either have an influence on, or play an essential role in reducing cases of discrimination during the exercise of their legal obligations. The OGG/OPM launched the ADL Public Information Campaign in order to raise awareness of the ADL and of the rights it guarantees. The campaign included the distribution of materials, posters and brochures in five languages, in all Kosovo institutions in central and local divisions. The first round of the ADL campaign had been concluded successfully and the OGG/OPM is in the process of organising the second round of the campaign.

Dr. Melissa Stone stated that in Kosovo, the ADL essentially redefines identity. Only few years ago, there had been different definitions of ethnicity, nationality and birth status in Kosovo. Depending upon the combination of these factors, people with different identities had different privileges and benefits. Dr. Stone described new scientific information about the intersections between cultural and genetic identity and how this would require us to question our earlier constructions of identity. She was confident that the questions arising from the implementation of the ADL will lead to a deepening of public discourse about how we are different from each other, and how we are the same, deserving the same human rights.

Mr. Lavdim Krasniqi pointed out that the aim of the Kosovo Judicial Institute (KJI) is to increase the professionalism of judges and prosecutors by improving efficiency and quality of their work. Since its creation, KJI has trained judges and prosecutors and it publishes monthly bulletins and different materials in all three official languages. KJI has already prepared and scheduled trainings (June and October 2007) for judges and prosecutors for implementing the ADL. Mr. Krasniqi emphasised that there is a lack of budget for the KJI, and this presents a barrier to the continuation of KJI activities relating to the implementation of the ADL.

Ms. Polina Roussinova spoke about what human rights NGOs can concretely do for implementation of the ADL and shared the following actions/steps that have shown to be successful in Bulgaria in this regard: *Strategic litigation cases* (bringing strategic cases which illustrate structural or widespread problems affecting a multitude of individuals across society); *client-oriented litigation cases* (that are focused only on the client through legal aid, self-initiation of cases without permission of the victim, or on behalf of the victim); *research and monitor* discrimination practices (undertake public reporting, lobbying and advocacy through the media, and give trainings on the ADL).

Ms. Arjeta Rexhaj pointed out that much remains to be done in order to implement the ADL. Ms. Rexhaj stated that women in Kosovo are almost excluded from the decision-making process, and their rights are violated not only by public institutions, but also at home. The Training and Research Centre (TRC) has played a significant role in human rights education and awareness-raising, through organizing trainings, lectures, conferences, roundtables, and debates on human rights. Ms. Rexhaj recommended that civil society should be engaged in the process of drafting legislation and also needs to become more significantly involved in awareness-raising.

Mr. Nenad Rikalo stated that it is now the time to start building partnerships with government institutions in order to create possibilities for the successful implementation of the ADL. There are four segments where civil society can actively play a role in the implementation of the ADL: *Information* (it is evident that there is a lack of information among the population in Kosovo about the ADL), *Promotion* (there are different ways in which civil society can promote the ADL and all its positive aspects), *Presentation* (civil society and government institutions need to present what can and should be done) and *Pressure* (civil society can undertake different activities in order to increase the pressure on government institutions, e.g. debates, roundtables, and media exposure).

Mr. Osman Osmani emphasised that the position of children from the Roma, Ashkali and Egyptian (RAE) community is the most difficult. Children of RAE communities are generally out of school, tending instead to beg on the streets and be exposed to hard labour. He stated further that there are many efforts from the PISG and different local and international organisations aimed at improving and assisting in the living conditions of the RAE community and children in particular, but that the situation remains difficult. Mr. Osmani expressed the readiness of his community to co-operate in improving the implementation of the ADL.

Opportunities/Recommendations:

- *The Government of Kosovo and other relevant stakeholders need to prioritise the issue of implementation of the ADL;*
- *Establishment of clear policies and programs to implement the ADL;*
- *Continuation of public awareness-raising campaigns;*
- *More trainings for judges and lawyers on the ADL;*
- *Enhancement of the co-operation between relevant stakeholders, mainly between governmental institutions and civil society;*
- *Involvement of private sector in the efforts of promotion of the ADL;*
- *Increase involvement of NGOs in the implementation of the ADL with strategic litigation, client-oriented litigation cases and research and monitor of discrimination cases;*
- *More debates, roundtables and media exposure on the ADL issue;*
- *Further involvement of civil society in the legislative process;*
- *Increase the awareness of the ADL in academic circles.*

Implementing the Law on Anti-Discrimination

Report on the Roundtable on 18 April 2007, Prishtinë/Priština

By Remzije Istrefi¹²⁵

1. Introduction

The “Roundtable on the Implementation of the Law on Anti-Discrimination” took place on 18 April 2007, and was organised by the Central Assembly Unit within the Department of Good Governance and Democratic Institutions of the OSCE Mission in Kosovo (OMiK). The objective of the roundtable was to offer a forum for broadening the dialogue on implementation of the Anti-Discrimination Law (ADL), and to increase awareness of its implementation among different stakeholders: Members of the Assembly of Kosovo, representatives of the Government, Ombudsperson’s Office, NGOs, academia, UNMIK and OSCE. The first panel discussed the topic “The Importance of the Anti-Discrimination Law for the Future of Kosovo”, whilst the second panel discussed “The Role of Civil Society in the Implementation of the Anti-Discrimination Law”. The main discussion topics were the rights under the law, problems with the implementation of the ADL, and the role of public institutions and civil society in the implementation process.

2. Opening remarks

Ambassador Werner Wnendt, Head of the OSCE Mission in Kosovo

Ambassador Werner Wnendt, in his opening address, raised the importance of the existence and implementation of the ADL in Kosovo. He stated that the ADL that was adopted by the Assembly of Kosovo is one of the most progressive anti-discrimination laws in Europe, and that the government institutions need to increase their efforts to ensure that the requirements under the ADL are effectively put into practice.

The Ambassador added that the efforts of the Government and the Assembly should be recognised for the steps they have taken towards creating a more fair and equal Kosovo; The ADL has strengthened the anti-discrimination principles applicable in Kosovo, by conforming them with international and European standards. The ADL promotes uniformity in the adjudication of a variety of forms of discrimination, including discrimination in employment and in access to essential services. In addition, it provides effective judicial and administrative remedies for victims of any form of discrimination in both the public and private sectors.

Ambassador Wnendt pointed out that the ADL and its implementation is of crucial importance bearing in mind the current challenges that Kosovo faces. Effective implementation of the ADL can contribute toward the accomplishment of the obligations prescribed by Article 2(2.3) of the Comprehensive Status Proposal, presented by the United Nations Special Envoy for Kosovo Marti Ahtisaari. The implementation of the ADL also represents a further harmonisation of the internal legislation with international and European standards.

He emphasised that the Law on Anti-Discrimination is one of the good examples of fruitful co-operation between the Kosovo institutions and international organizations. Through representatives of the Department of Human Rights and Rule of Law, the OSCE had assisted with drafting the law, and also actively supported the implementation of the law. In December 2004, the OSCE had conducted a workshop with representatives of the government, civil society and the international community. The result of the workshop was a set of recommendations that have been considered as guidelines

¹²⁵ Remzije Istrefi is a National Associate Advisor of the Good Governance Unit within the Department of Good Governance and Democratic Institutions of the OSCE Mission in Kosovo.

for the implementation of the ADL. Also, in 2005, the OSCE had supported the drafting of the Anti-Discrimination Law Comprehensive Implementation Action Plan and with the establishment of the Human Rights Units in each ministry, the OSCE has placed senior advisers in those Human Rights Units. Along with these initiatives, the OSCE supported the Kosovo Judicial Institute in training judges and lawyers.

Ambassador Wnendt concluded by stating that the Mission is fully aware of the ADL's vital importance in Kosovo, and therefore renewed his promise to fully support the Kosovo institutions in the difficult process of implementation of ADL.

3. Panel I: The importance of the Anti-discrimination Law for the future of Kosovo

In this session, the role of the Ombudsperson Institution in the implementation of the ADL was discussed as well as steps taken by the Office of the Prime Minister towards the implementation of the law. The session also included a historical and anthropologic retrospective of the concept of genetic identity and spoke about the impact of the ADL in the construction of identity in Kosovo. Finally, there was a review of the contribution of the Kosovo Judicial Institute's work on the ADL implementation.

Mr. Hilmi Jashari, Acting Ombudsperson in Kosovo

In his presentation Mr. Jashari spoke about the importance of diversity and non-discrimination as fundamental elements of a modern society. He pointed out that the Kosovo ADL is a necessary step toward the creation of a legal framework for combating discrimination in all spheres of public life, and towards suppressing the phenomenon of unequal treatment of individuals.

Mr. Jashari emphasized that the role of the Ombudsperson Institution in Kosovo (OIK) is complementary to the implementation of the ADL by the court. The OIK's role as a mechanism for the protection against discrimination has advantages when compared with the court procedure. The Ombudsperson Institution serves as mediator between the public authorities and citizens, and its procedures are both less formal and faster than a court hearing, with the services being provided free of charge. Another advantage is that the OIK can open *ex officio* investigations if it has information from different sources that a violation may have occurred. The OIK has the right, according to its jurisdiction, to give advice and recommendations to the public authorities, but cannot enforce their implementation.

Mr. Jashari informed the participants that the OIK took action and investigated allegations of discriminatory practices by public authorities and published reports on discrimination on matters such as gender, age, and employment. The so-called "Non-Discrimination Team" (NDT) had been created within the Investigations Department of the OIK in March 2004. The lawyers working for this team, while working on other complaints filed with the OIK, have a special focus on cases involving all forms of discrimination, apart from those involving gender discrimination, which are dealt with by a separate Gender Equality Unit within the Investigations Department. The OIK's Deputy Director of Investigations co-ordinates the team, along with the other special teams in the Investigations Department. According to Mr. Jashari, the NDT tries, to the largest extent possible, to co-ordinate efforts with public authorities in resolving such complaints, but unfortunately, the response has not always been positive.

In his conclusion, Mr. Jashari pointed out that awareness within Kosovo society of the principle of discrimination and the fight against it is still poor. All reports on the human rights situation in Kosovo, particularly those concerning so-called 'vulnerable' groups of people such as minority communities, persons with disabilities, women, children etc., talk about the marginalization of these categories of people, thereby confirming the presence of discriminatory practices in all spheres of public life. In Mr.

Jashari's view, it is for this reason that the promulgation of Kosovo's ADL in 2004 was so important as a key measure in combating all forms of discrimination.

Mr. Habit Hajredini, Head of the Office for Good Governance, Office of the Prime Minister (OGG/OPM)

In his presentation, Mr. Hajredini discussed the importance of the ADL's promulgation and pointed out that the Government of Kosovo, by virtue of Article 12 (12.3) of the ADL, is in the process of adopting secondary legislation to ensure its implementation. The Government of Kosovo adopted in 2005 the Comprehensive Action Plan for the implementation of the ADL. Additionally, it adopted the Administrative Instruction No. 04/2006, which provides for the creation of the institutional mechanisms for implementation of the ADL and the establishment of Desk Offices (offices for complaints and requests). These offices are established within central and local institutions and create the possibility for citizens to have direct contact with the Kosovo institutions and make complaints where necessary.

Mr. Hajredini further mentioned that the legislation in Kosovo includes all the main human rights standards, but that their implementation had shown to be difficult. Therefore, more activities and increased engagement would be required to implement all human rights standards, including the principle of non-discrimination, at both the central and local levels.

Mr. Hajredini pointed out that the OGG/OPM has undertaken a number of activities at both central and local level in order to improve the process of the legislation's implementation, and in order to decrease and eventually eliminate cases of discrimination. The priority of the OGG/OPM was to increase the capacities of senior officials at the central level, as well as the capacities of the senior municipal officials who either have an influence on, or play an essential role in, establishing policies in the field of human rights. This especially would count for policies in creating equal opportunities, ensuring the protection of and respect for human rights, and reducing cases of discrimination during the exercise of their legal obligations.

Mr. Hajredini went on to say that immediately after the ADL's promulgation, the OGG/OPM had launched the ADL Public Information Campaign on Promotion with the motto "All different, all equal before the Law" in order to raise awareness of the ADL and of the rights it guarantees. All information transmitted during the campaign was in five languages; Albanian, Serbian, Bosnian, Turkish and Roma. In addition, OGG had created a working group with representation from OGG, OSCE, Office of High Commissioner for Human Rights (OHCHR), Department of Justice, Office for Communities, Return and Minority Issues, and the Council for Protection of Human Rights and Freedoms, which was mandated to draft the Comprehensive Action Plan for Implementation of the ADL. The draft plan had been put up for public discussion in September 2005 and had been adopted subsequently. The Action Plan aims to prevent and fight all forms of discrimination, to increase effective equality and realise equal treatment for all citizens of Kosovo. The Action Plan also contains objectives, outlines the parameters of activities, the timeline and actors necessary for achieving these objectives, as well as the approximate budget proposed by the Kosovo Consolidated Budget and potential donors. The awareness-raising campaign, which had been conducted by the Department of Central Administration (Ministry of Public Services), included the distribution of materials, posters and brochures in five languages. These materials had been distributed in all Kosovo institutions in central and local divisions and Directorates in Ministries and Municipalities.

Dr. Melissa Stone DGGDI, Good Governance Unit Co-ordinator, OSCE Mission in Kosovo

In her presentation Dr. Stone further elaborated the importance of the ADL. In particular, she addressed the issue of *how* the ADL is important. Dr. Stone stated that discrimination is a life and death issue, not only in Kosovo, but across the world. Over the past century, wars based on divisions between people

have caused more injury and premature death than malaria, tuberculosis and HIV/AIDS combined. It would be easy to see how these divisions between peoples that often lead to war were based on constructions of identity.

Dr. Stone went on to say that in Kosovo, the ADL essentially redefines identity. According to the Article 2 of the ADL, the “principle of equal treatment shall mean that there shall be no direct or indirect discrimination against any person or persons based on ...ethnic origin, nationality...birth or any other status”. If one looked deeper, ethnic origin would mean the cultural heritage of a person, and perhaps his or her genetic ancestry; while nationality often would mean the connection to geography, a particular place or nation state.

Dr. Stone continued by pointing to the fact that nevertheless, only eight or so years ago, there had been different definitions of ethnicity, nationality and birth status in Kosovo. Depending upon the combination of these factors, people with different identities had different privileges and benefits. Further, it had been common for a child in Kosovo to automatically inherit the ethnicity of his or her father. This meant that until the ADL was introduced, it was culturally acceptable in Kosovo for children to deny an entire half of their identity, to denounce their maternal genetic composition. While ignoring half of one's identity may have been politically convenient for the preservation of the fantasy of ethnic purity, it was far from accurate for defining anyone's genetic identity.

Dr. Stone mentioned that the new science reinforces the need to review the biological basis and human perceptions of the intersections between ethnicity or cultural heritage; and nationality which relates a person to a specific place. The recently completed Human Genome Project had shown that the first humans originated in Africa, somewhere around what looks like Ghana about 150,000 years ago, and shown a mass migration to the Middle East about 75,000 years ago. Subsequent migrations had occurred 50,000 years ago from the Middle East to Europe and Asia. Later, about 20,000 years ago, the mass migration from Asia to the Americas had occurred.

Dr. Stone stated that this was all to say that new scientific information about the intersections between cultural and genetic identity would require us to question our earlier constructions of identity. For example, maybe some people would say today that they are Kosovo Albanian. But what was their genetic heritage before that? Were they Illyrian 3,000 years ago? What about before that? Who were they?

Dr. Stone added that she hopes that in the process of implementation of the ADL more questions than answers will be raised. The questions are important, as they in her view will lead to a deepening of public discourse and the opening of a new vision, about how we are different from each other, and how we are the same. According to Dr. Stone, it is the questions, not the definitive answers, that lead down the road of realisation about how every person, as they are of the same origin as everyone else, deserves the same human rights.

Dr. Stone announced that for the purpose of creating an open space for the progression of this public discussion about identity, the OGG/OPM, along with the ministries, the OSCE and many other international and local actors would be co-sponsoring an Anti-Discrimination Law Public Information Campaign this year as a continuation of the campaign that was started two years ago.

Mr. Lavdim Krasniqi, Acting Director of the Kosovo Judicial Institute (KJI)

Mr. Krasniqi spoke about the role of the KJI as an independent professional body and training institution within the judicial system of Kosovo. He pointed out that the main mandate of the KJI is the training of judges and prosecutors in the application of international human rights standards, civil and criminal fields, minor offences, ethics and the training of lay judges. The aim of the KJI is to

increase the professionalism of judges and prosecutors by improving efficiency and quality of their work. The types of trainings offered at the KJI take the form of seminars, workshops, trial simulations and conferences. Since its creation, KJI has trained 4,792 judges and 983 prosecutors. In addition, KJI publishes monthly bulletins and different materials in all three official languages. KJI has already prepared and scheduled trainings for judges and prosecutors for implementing the ADL. KJI plans to deliver these trainings on June and October 2007.

In conclusion Mr. Krasniqi emphasised that there is a lack of budget for the KJI, and this presents a barrier to the continuation of KJI activities relating to the implementation of the ADL.

Discussion

Following the presentation of the panellists, participants actively engaged in a discussion that focused on the following points: the importance of the ADL's promulgation and implementation, the steps undertaken by the Government of Kosovo since its promulgation, the reasons why the ADL is not being implemented and the current obstacles to achieving this as well as the steps needed to be taken by the relevant stakeholders in order to achieve its implementation. The participants showed a lot of interest in obtaining more information about the awareness-raising campaign regarding the ADL's implementation, as well as clarification how the OIK has been handling the current cases. The participants agreed that, in general, there is a lack of information in Kosovo society about the existence of the ADL and that the rule of law needs to function effectively, and as such, the Government of Kosovo needs to establish better mechanisms for implementing the ADL. Moreover, judges and prosecutors in the courts are not informed about the existence of the law and its application. Many of the participants pointed out that the discrimination is present in both, the private and public sectors (e.g. difficult working conditions for youth). Some MPs mentioned that the rights contained within the ADL are foreseen for all Kosovans, and therefore positive discrimination of certain communities contravenes effective implementation of the ADL. But in the end everyone stressed that in order to implement the ADL, all the relevant stakeholders need to be fully committed.

4. Panel II: The Role of Civil Society in the implementation of the Anti-Discrimination Law

The session on the role of civil society in the implementation of the ADL explored best practices of the implementation of a similar law in Bulgaria, and perspectives on possible discrimination in Kosovo from a gender perspective. A representative of the Kosovo-Serb community advocated government policy measures for a more effective implementation of the law, while a RAE representative initiated a discussion from the perspective of non-Serbian minority communities.

Ms. Polina Roussinova, Legal Consultant for the Bulgarian Helsinki Committee

In her presentation, Ms. Roussinova discussed the role of the NGO's in implementing the ADL and shared her experience and best practices from Bulgaria. Ms. Roussinova spoke about what human rights NGOs can concretely do for the implementation of the ADL, what action to take, what the practical measures to ensure implementation of the ADL are, and shared the following actions/steps that have shown to be successful in Bulgaria in this regard.

Strategic litigation: bringing strategic cases which illustrate structural or widespread problems affecting a multitude of individuals across society. These cases go beyond the immediate situation and individual, and can serve as important and efficient instruments facilitating social change with long-term effects, a change in public attitudes, and a change in government practice. These strategic cases can be 'discovered' by NGOs through a variety of channels, such as open offices or help lines, NGO field visits, from trade unions and other relevant situations. NGOs can bring **client-oriented litigation** cases that are focused only on the client and his or her situation. The importance of this

action is that these cases can serve as reference points for similar cases in the future cases. Ms. Roussinova also explained that NGOs can get involved in strategic litigation through legal aid (representation on behalf of the victim by the NGO), self-initiation of cases without permission of the victim (*actio popularis*), and through *Amicus Curiae* (on behalf of the victim, or a class action). NGOs can **research and monitor** discrimination practices, undertake public reporting, lobbying and advocacy through the media, and give trainings on the ADL. The role of the media in anti-discrimination cases is very specific; the media should try and cover the whole process of the case from its initial phase to its completion in order to provoke public awareness and debate. In anti-discrimination cases, it is not the probability of success that is of the wider importance; rather it is the debate that it initiates, which facilitates potential social change. Though these cases may not be successful locally, the opportunity to bring them at the international level, such as before the European Court of Human Rights, may still exist.

In conclusion, Ms. Roussinova informed the participants that the Bulgarian Helsinki Committee produces an annual report, which is distributed to various institutions, both governmental and non-governmental. Ms. Roussinova wished every success to Kosovo society and hoped that the Bulgarian experience will serve as a useful tool in the process of ADL implementation.

Ms. Arjeta Rexhaj, Executive Director of the Gender Training and Research Centre and Member of the Kosovo Women's Network

Ms. Rexhaj emphasised that while the ADL is a very important piece of legislation much remains to be done in order to implement it. The implementation of the ADL depends on co-operation between PISG, UNMIK, civil society and the private sector. Kosovo does not only need to produce laws, it needs to implement them too. Civil society, in particular women's groups, are particularly interested in the implementation of the ADL.

Ms. Rexhaj stated that as a result of their vulnerable situation, women in Kosovo are discriminated against in every area of life. Women in Kosovo are almost excluded from the decision-making process, and their rights are violated not only by public institutions, but also at home. Domestic violence still remains an issue of concern. The promulgation of the ADL is therefore seen as a positive step in improving the position of women, as it provides for affirmative action in regard to compensation for the damages of the victims of discrimination, such as handicapped persons, women and minorities. The relevant stakeholders in Kosovo therefore need to actively engage in the creation of the mechanisms needed to ensure successful implementation of the ADL.

Ms. Rexhaj added that the Training and Research Centre has played a very significant role in human rights education and awareness-raising through organizing trainings, lectures, conferences, roundtables and debates on human rights. In her conclusion, Ms. Rexhaj recommended that civil society should be engaged in the process of drafting legislation and also needs to become more significantly involved in awareness-raising.

Mr. Nenad Rikalo, Executive Director of the NGO "Future"

Mr. Rikalo stated that he had been sceptical about the development of a roundtable where the issue of ADL would be discussed. As an issue, anti-discrimination is politicised in Kosovo. As a representative and activist of civil society within the Kosovo-Serb community, he pointed out that civil society is located and operates in a different dimension than politics, and the capacity and values of citizens should therefore be expressed and promoted by civil society. These values, in particular the principle of anti-discrimination, should be respected and promoted through constructive relations between civil society and government institutions.

According to Mr. Rikalo, there are two main approaches that need to be taken by civil society; the

more critical approach and the creation of partnerships with government institutions. It is evident that there is now a stereotype of civil society as a constant critic, but it is now the time to start building partnerships with government institutions in order to create possibilities for the successful implementation of the ADL. There are four ways in which civil society can actively play a role in the ADL's implementation:

- *Information:* it is evident that there is a lack of information among the population in Kosovo about the ADL, and civil society can therefore play a very active role in this regard;
- *Promotion:* there are many different ways in which civil society can promote the ADL and all its positive aspects;
- *Presentation:* civil society and government institutions need to present what can, and should be done; and
- *Pressure:* civil society can undertake different activities in order to increase the pressure on government institutions. Such activities could include debates, roundtables, and media exposure.

In his conclusion, Mr. Rikalo stated that he understands that implementation of the ADL is not an easy undertaking, but rather requires a lot of effort from all the relevant actors.

Mr. Osman Osmani, Member of the FORUM network and Executive Director of the NGO 'Iniciativa 6'

Mr. Osmani spoke about the difficult position of the children in Kosovo. However, he emphasised that the position of children from the Roma, Ashkali and Egyptian (RAE) community is the most difficult. Children of RAE communities are generally out of school, tending instead to beg on the streets and be exposed to hard labour. He pointed out that whilst he does not wish for the issue of RAE children to become politicised, the situation of the RAE community is the most difficult. He stated further that there are many efforts from the PISG and different local and international organisations aimed at improving and assisting in the living conditions of the RAE community and children in particular, but that the situation remains difficult. In his conclusion, Mr. Osmani greeted the organisers of the roundtable and expressed the readiness of his community to co-operate in improving the implementation of the ADL.

Discussion

The panellists' presentations raised a significant level of interest among the participants; the Bulgarian experience was particularly appreciated and was recommended by participants as being suitable for Kosovo as well. Many participants underlined once again the lack of knowledge of the ADL within Kosovo society. The representatives of the NGO community argued that Government authorities should take responsibility for the failure to inform the public, whilst representatives of the OGG/OPM stated that the awareness-raising campaign on ADL has been in operation since May 2004. The information brochures regarding the ADL were published and distributed in the five spoken languages in Kosovo: Albanian, Serbian, Roma, Bosnian and Turkish.

The discussion on civil society's participation in the process of drafting the law also raised a high level of debate. There were criticisms from the NGOs present regarding a lack of substantive and real involvement, while representatives of the Government of Kosovo argued that NGOs are regularly invited to participate and their comments are taken into account.

All agreed that the implementation of laws in general, and in particular implementation of the ADL, faces several difficulties. However, despite the fact that the process of ADL implementation is slow it has started to take shape. Once again, the participants underlined that the Government institutions and civil society need to continue the process of informing Kosovo society about the existence of the ADL.

FIGHTING DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION

Center for Social Emancipation

www.qesh.org

Qendra për Emancipim Shoqëror (Centre for Social Emancipation) QESh was founded in April 2005, with the goal of promoting the human rights of lesbian, gay, bisexual, and transgender (LGBT). Since then, different project activities have mainly been developed, with the aim of creating a safe, tolerant and gay-friendly environment for the LGBT community of Kosovo and raising the awareness of the general population about the rights of LGBT individuals. The message that QESh has been trying to send since its beginning is that everybody is equal no matter of their differences.

QESh consider the Antidiscrimination Law as a very inclusive and protective law, which defends the rights of all human being including the LGBT community: Article 2(a) of the Anti-Discrimination Law, mentions explicitly sexual orientation as a potential ground for discrimination, thus including sexual minorities in the principle of equal treatment.

Despite the progressive legal framework, though, it has to be noticed that sexual minorities still face discrimination and stigma in the Kosovar society, and are often victims of hate crimes.

Hate crimes against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished, because sexual minorities often fail to report violence against them. They fear their sexual orientation will be made public, making them or their families' targets for further violence. They fear that their complaints will not be taken seriously or that such complaints will be used as reprisals against them. For good reason, they lack trust in the authorities who are obliged to protect them.

As hate crimes and discrimination against LGBT people are happening regularly in Kosovo, QESh strives for a sound and correct application of the Antidiscrimination Law, so that human rights violations based on sexual orientation and gender identity receive the condemnation they demand.

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