

Developing Equality Legislation in Divided Societies: the Case of Bosnia and Herzegovina

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1. Introduction

Bosnia and Herzegovina (BaH) declared independence from the former Yugoslavia in 1991. Unlike other republics of the former Yugoslavia, BaH is a multi-ethnic society² and the referendum and the declaration of independence were not hailed positively by all ethnic groups. The declaration of independence led to four years of war (1991–1995) which impacted negatively on the enjoyment of every recognised human right and freedom guaranteed under international law. The war was brought to an end when the international community stepped in and negotiated the General Framework Agreement for Peace in BaH (also known as the Dayton Agreement).³

The war's legacy has influenced efforts to promote equality and eliminate discrimination and placed such efforts in the context of removing obstacles to reconciliation. Although some progress was made, the social gap between ethnic groups in society has never been larger (excluding the war period).⁴ According to research conducted by the Open Society Fund of BaH, 86% of the country's citizens believe that discrimination is a serious problem in society, with ethnicity and religion being perceived as the most common grounds for discrimination.⁵

This article explores current equality and non-discrimination law in BaH and analy-

ses the extent to which structural obstacles to equality exist in a divided society. It also shows how certain measures which aimed to ensure full equality of groups that were on opposing sides during the war have in fact led to more inequality and discrimination. The article also aims to analyse the adoption of the new Law on the Prohibition of Discrimination, its content and the use of this Law to litigate discrimination cases and its potential to support further equality efforts. It also points to the remaining challenges in the area of equality in Bosnia and Herzegovina and explores how the new anti-discrimination legislation might be used to develop further policies in the area of equality, non-discrimination and inclusion.

2. Constitutional Provisions on Equality and Non-discrimination

The Constitution of BaH is an annex to the 1995 Dayton Agreement. Its intention was to provide a legal structure for the functioning of BaH in the days after the Dayton Agreement was signed. The Constitution has established a limited central state that includes two fairly autonomous entities: the Republika Srpska (RS) and the Federation of BaH (FBaH).⁶ Almost all of the competences of the central government are devolved to the two entities. The state level government, the Council of Ministers of BaH and the leg-

islature, the Parliamentary Assembly of BaH, have a competency over foreign affairs, defence and the monetary system. In all other areas, however, the state bodies play a coordinating function and the entities are autonomously responsible for regulating rights in all areas apart from those that are the prerogatives of central government.

The Constitution has respect for human rights as one of its central pillars. The preamble of the Constitution declares that BaH will be based on respect for human dignity, liberty, equality, peace, justice, tolerance, and reconciliation and that it was inspired by human rights instruments.⁷ The Constitution also proclaims that BaH and both entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms but it does not continue to define the content of human rights that it guarantees. It rather takes a dualistic approach which combines direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR)⁸ and an enumeration of a list of human rights.

This list starts with a reference to Article II/2 and the ECHR but continues to paraphrase the titles of rights in an enumeration of rights found in the text of the ECHR:

“[T]he right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude or to perform forced or compulsory labour, the rights to liberty and security of person, the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings, the right to private and family life, home, and correspondence, freedom of thought, conscience, and reli-

gion, freedom of expression and freedom of peaceful assembly, and freedom of association with others.”⁹ It also paraphrases rights from Protocol I to the ECHR (“the right to property and the right to education”) and Protocol IV (“the right to liberty of movement and residence”).

It is important to note that this list is non exhaustive because it starts with the words “these include” and the full list of rights guaranteed directly by the Constitution of BaH are the rights and freedoms “set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols” which it states “shall apply directly in Bosnia and Herzegovina.”¹⁰

The guardian of the Constitution is the Constitutional Court which also has an appellate role, i.e. individuals can file appeals to it. The Constitutional Court has an appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in BaH.¹¹ This appellate jurisdiction represents a novelty in the system of constitutional law in BaH, and implies the introduction of individual constitutional action, i.e. an opportunity to review legal acts and decisions if they are in violation of the appellant’s rights and freedoms.

The central provision of the Constitution related to non-discrimination is Article II/4. It states:

“The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association

with a national minority, property, birth or other status.”¹²

This provision seems to be largely inspired by Article 14 ECHR. It provides protection from discrimination on “any ground” meaning that, as is the case for Article 14 ECHR, the list then provided is open rather than closed. In defining what is meant by discrimination in Article II/4 and what forms it takes, the BaH Constitutional Court often refers to the jurisprudence of the European Court of Human Rights (ECtHR) in its interpretation of Article 14 ECHR.¹³

However, although it is inspired by Article 14 ECHR, Article II/4 has a wider scope of application. Whilst Article 14 ECHR only provides the right to non-discrimination in relation to the other rights enumerated in the ECHR, Article II/4’s right to non-discrimination relates to the enjoyment of rights and freedoms enumerated both in Article II/3 of the BaH Constitution and the international agreements listed in its Annex I. This has been confirmed by the Constitutional Court in its case law when the Court concluded that “Article II(4) of the Constitution of Bosnia and Herzegovina provides a more extensive protection from discrimination than Article 14 of the European Convention.”¹⁴

The main aim of the Dayton Agreement and the Constitution of BaH annexed to it was to stop the armed conflict and to ensure peace, therefore it has included provisions to ensure that the representatives of the main groups which were on opposing sides during the conflict have a mechanism to influence decision making. This was ensured by reserving seats in the upper house of the Parliamentary Assembly – the House of Peoples, and for the three-member Presidency of BaH for people from certain ethnic backgrounds.

According to the Article IV/1 of the Constitution, the House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs);¹⁵ and the Presidency of BaH shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.¹⁶ This provision which aimed to ensure political equality of Bosniaks, Croats and Serbs has however excluded all those groups which do not belong to these ethnic groups from participation in these bodies.

This provision was challenged before the ECtHR by two citizens of BaH, Mr. Dervo Sejdic (a member of the Roma minority) and Mr. Jakob Finci (a member of the Jewish minority) who claimed that it was discriminatory and breached a number of their rights under the ECHR.¹⁷ The Grand Chamber of the Court agreed that the provisions were discriminatory.¹⁸ However, to date no consensus has been reached to amend the Constitution and the provisions remain in place.¹⁹

3. Equality Law Prior to 2009

Protection from discrimination has been guaranteed by numerous laws in BaH since 1993 and even before, at the time when BaH was a Republic within the Socialist Federative Republic of Yugoslavia. Many pieces of legislation which guarantee certain rights had included a general provision prohibiting discrimination.²⁰ There have been a number of separate pieces of legislation which include provisions aimed at ensuring the equality of particular groups in society, most notably the constituent peoples but also women,²¹ minorities,²² conflict veterans and conflict veteran families, etc.²³

The Law on Gender Equality in BaH adopted in 2003 was the first piece of legislation which not only prohibited discrimination but also defined different forms of discrimination on the grounds of sex/gender and sexual orientation. Its definitions were generally aligned with the Convention on the Elimination of All Forms of Discrimination against Women and provided protection against discrimination in access to any guaranteed rights. The Law provides a non-exhaustive list of rights.²⁴ Article 2 provides that full gender equality shall be guaranteed in all spheres of society, including but not limited to education, economic life, employment and labour, social and health protection, sports, culture, public life and media, regardless of marital and family status.

This Law was the first piece of legislation in BaH which has defined both direct and indirect discrimination, as well as other forms of discrimination.²⁵ The Law also prohibits and defines sexual harassment, harassment on the grounds of sex/gender and gender-based violence as criminal acts.²⁶ In addition, it creates a number of positive obligations for other institutions at all levels of government and introduces gender mainstreaming as an approach for policy-making.

Although the proclaimed aim of the Law of Gender Equality in BaH was to guarantee gender equality and to prevent discrimination, the Law did not include any procedural provisions to guide victims of discrimination in seeking effective remedy.²⁷ As a result, the Law has had a limited effect in protecting against discrimination.

Additionally, there have been different views as to how a victim of discrimination could seek remedy. Prior to the adoption of the Law, protection against discrimination was provided only through the Constitutional

Court, which considered cases of alleged violations of Article II/4 of the Constitution of BaH. Because the Constitutional Court of BaH has jurisdiction to hear individual cases in an appellate procedure, individuals, in order to approach it, had to have exhausted all other remedies available in the legal system of BaH. As a rule, individuals had to seek protection from lower courts in civil procedures in which it was unclear whether these courts could even hear a discrimination case. That is why in most of these cases victims asked the courts to find violation of rights other than non-discrimination, and made a discrimination claim only when they approached the Constitutional Court. The Constitutional Court has so far reviewed over 100 cases of discrimination, and found discrimination in a small number of provisions related mainly to employment (e.g. dismissal of pregnant women, persons on sick leave or disabled persons).

4. Reform of Anti-discrimination Law

In 2007, inspired by the Europe-wide Starting Line Group's work to improve anti-discrimination protection,²⁸ a group of over 100 NGOs from BaH conducted country-wide consultations on the content and scope of the future draft law. Following these consultations, an expert group was formed to draft an Anti-Discrimination Act (the NGO Draft Law).²⁹ In late 2007 the group's representatives presented the NGO Draft Law to the Parliamentary Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics. The Joint Committee and the MPs which were members of that Joint Committee at that time declared that it would sponsor the Draft Law. This agreement was an unprecedented case of co-operation between elected members of the Parliamentary Assembly of BaH and NGOs.

However, the Committee was concerned that the NGO Draft Law included obligations of the Council of Ministers (the government composed of ministers of the state level ministries) of BaH and that, in its view, the regular legislative procedure, which requires formal consultation with relevant ministries, had not been followed.³⁰ Although there were no formal obstacles to putting the NGO Draft Law in the legislative procedure, developments were affected by the fact that the ministries which would be responsible for implementing the Law had not been consulted either formally or informally. The Committee referred the NGO Draft Law to the Ministry for Human Rights and Refugees of BaH (MHRR) for further consultations with other relevant institutions. The MHRR is among other things responsible for the promotion and protection of individual and collective human rights and freedoms in BaH. It is also responsible for implementing and coordinating the implementation of laws which regulate certain human rights in BaH. Following this consultation, the Council of Ministers, in its Program of Work for 2008, obliged the MHRR to prepare a draft law on non-discrimination by October 2008. The Council made no reference to the NGO Draft Law.

4.1 The Process of Drafting the Law

In May 2008 the MHRR established an expert working group for the purpose of preparing a draft anti-discrimination law.³¹ The group held its first meeting in June 2008. Before the meeting a comparative analysis which compared ten anti-discrimination acts in Europe and a study on the requirements of BaH according to international standards were conducted. These studies gave the working group an insight into the development of anti-discrimination legislation in other countries of Europe along with the minimal standards any anti-discrimination law would

need to meet. In its first meeting, the working group reviewed the findings and concluded there was a need to start to draft a new piece of legislation which would take into account the NGO Draft Law, but that its content needed to be further elaborated and needed to take into account the unique administrative structure of BaH. It determined that it would ensure an inclusive approach in its draft.³² In July a general public discussion took place in the Parliamentary Assembly of BaH with participation of over 100 representatives of NGOs, the general public and various institutions. The expert working group presented the main aims of the future law and asked the participants to nominate persons to become members of an expert working group which would be responsible for producing the draft. The additional members of the working group included representatives from the Ministry for Labour and Social Welfare, the Ministry of Justice, the OSCE Mission in BaH, the free legal aid NGO Vasa Prava, the trade unions and religious communities.

The new, much wider working group decided that its main approach would be to ensure that the draft was in line with the Race Equality Directive 2000/78/EC,³³ Employment Equal Treatment Directive 2002/73/EC³⁴ and the Recast Directive³⁵ as well as other international legal provisions. Although BaH was not a member of the EU, these directives were the main focus of the working group probably because the EU had included the adoption of legislation to ensure effective protection against discrimination as one of the requirements for the Community Visa Facilitation and Readmission Agreements.³⁶ (This sensitive requirement was a key factor also in the adoption of the draft law by the Parliamentary Assembly.)

The working group faced a number of particular challenges in producing a draft which

met these aims. Since Article II/4 has defined discrimination very widely, the working group had to follow this approach in order to include all obligations enshrined in the international agreements which were annexed to the Constitution or which BaH had ratified.

As the concepts of discrimination on other grounds besides gender (and the forms prohibited in the Law on Gender Equality in BaH) were new to the legal system of BaH, members of the working group also had problems defining the main concepts. The main challenges included deciding on the list of grounds on which discrimination was to be prohibited, the scope of the protection provided by the law and the provisions for the formation and the role of a central institution to combat discrimination.

4.2 The Parliamentary Debate on the Law on the Prohibition of Discrimination

By the end of 2008, having worked through the above challenges, the working group finalised the draft, which it entitled Law on the Prohibition of Discrimination (Draft Law), and submitted it to the Council of Ministers of BaH. On its 74th session held on 19 January 2009 the Council of Ministers decided not to discuss the Draft Law and tasked the Ministry for Human Rights and Refugees to “conduct additional consultations with representatives of the OSCE Mission to BaH, Office of the High Representative, the Institution of the Ombudsman and the governments.”³⁷ This delayed the process of the adoption of the Draft Law by four months. After consultations with these organisations and institutions, the Council of Ministers accepted the Draft Law and introduced it in the Parliamentary Assembly of BaH.³⁸

The parliamentary discussion was largely influenced by debates which were held in the

neighbouring countries, in particular in Serbia and Croatia, which were also considering drafts of anti-discrimination laws at that time. In these countries, the opposition to the anti-discrimination laws was much stronger than it in BaH at the same time. The arguments against the draft anti-discrimination laws in Serbia and Croatia, largely as a result of the media coverage they had received, began to be expressed also in BaH media and the Parliamentary Assembly of BaH.

In the Bosnian case, the debate was fuelled by an open letter to the members of the Parliamentary Assembly by the Inter-Religious Council of BaH which stated: “If the law is adopted in both houses of Parliament at the second reading without amendments, it will enable homosexual couples to legally marry and adopt children.”³⁹

However, as already noted, as the implementation of an anti-discrimination law was one of the requirements for the visa-free travel regime with the EU, not a single member of parliament opposed the adoption of the Draft Law. Rather, they opposed certain elements of the draft, in particular relating to the prohibited grounds and the scope. These arguments were heard during the parliamentary debate where amendments were proposed. Few delegates in the House of Peoples opposed including “sexual orientation” as a prohibited ground and advocated for a clear exception in the application of the law to family relations (marriage and adoption of children). One delegate stated that:

“I am on the side of all those who may suffer discrimination because of what they are, and who could not choose what they are. However, I fear that this law might be abused by those groups or individuals who choose what they are.”⁴⁰

Another delegate stated:

“[A]nd these grounds which I do not like, this gender expression, sexual orientation, I say it openly. I do not want it in this law. I do not like it, because I think it’s the ‘other status’, and we can subsume it under ‘other status.’”⁴¹

After the parliamentary debate relating to the Draft Law two sets of amendments were made. The first amendment⁴² sought to delete the following grounds of discrimination: “marital and family status, pregnancy or maternity, age, health status, disability, genetic heritage, sex and gender, sexual orientation or expression”.⁴³ It was obvious that all other grounds were included to camouflage the intent to delete any ground which would relate to sexual orientation or gender identity.

What these delegates and other members of the Parliamentary Assembly of BaH didn’t know was the fact that the ground “sexual orientation” was explicitly a prohibited ground in the BaH legal system since 2003 when the Law on Gender Equality had been adopted and that the criminal codes also covered “sexual orientation” in the offence of “breach of equality of citizens”.⁴⁴ This debate was clearly politically motivated. Needless to say that gender (Law on Gender Equality), disability (labour laws, disability rights specific laws), health status (labour laws, health rights specific laws), pregnancy and maternity (Law on Gender Equality) and age (labour laws, education specific laws) were also already recognised as prohibited grounds for discrimination in the legal system of BaH.

The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, which was tasked to review all of the amendments made to the Draft Law, agreed to delete the following from the

list of protected characteristics: “marital and family status, pregnancy or maternity, age, health status, disability, genetic heritage, gender, sexual orientation or expression”.⁴⁵ Regardless of the reactions of the public, NGOs and the international community, the amendment was adopted in both houses.⁴⁶

The second amendment proposed that the Draft Law should contain an exception so that it does not apply to marriage “as defined by the family codes”⁴⁷ and employment and membership in religious institutions “which is regulated by religious doctrines”. This amendment, along with another paragraph which was added to Article 24, was accepted and became part of the Draft Law. Both of these changes will be discussed below in the analysis of the Draft Law.

However, in the version of the law published in the *Official Gazette*, “sexual orientation” and “sexual expression” were re-introduced into the list of prohibited grounds. To this day, none of the experts who monitored the adoption of the law have been able to learn how this happened; but no one dared to raise the issue for fear of causing a possible revision of the published version.

5. The 2009 Anti-discrimination Law

After many discussions and exhausting parliamentary debate, the Law on the Prohibition of Discrimination was adopted in July 2009 and entered into force in August 2009. Article 1 of the Law stipulates that it “shall provide a framework for implementation of equal rights and opportunities to all persons in BaH and shall define a system of protection from discrimination”. However, only a few of its other provisions relate to this guarantee. In fact the essence of this Law is seen in the very title: this is a law against discrimination and as such establishes a mechanism

for protection against discrimination. This was in line with the aim of the working group who, at the very beginning, had agreed that it would be impossible to draft an overreaching equality law at that time. Thus, the Law is reactive in its aim.

At the same time, the current fragmentation of anti-discrimination protections throughout the legal system of BaH leads to many problems in practice. If we look at this decentralisation approach in the light of the complexity of the legal system, the number of possible problems multiplies. There have already been efforts to ensure that equality provisions throughout the country do exist within certain areas of laws. These related to the Law on Gender Equality, the Law on the Rights of Members of National Minorities, framework laws on education, the Election Law and other pieces of legislation. However, there has been no attempt at harmonisation in relation to the approach to equality in many aspects of life. This is most evident in respect of equality in the exercise of economic and social rights which are decentralised into 14 different legal systems.⁴⁸ This is evident also in provisions which aim to achieve equality, e.g. maternity leave provisions, provisions relating to the rights of persons with disabilities, protection of the rights of workers, etc.

5.1. A Non-exhaustive List of Prohibited Grounds

The working group had a problem defining the list of prohibited grounds. Because the constitutional provision featured an open-ended and non-exhaustive list of prohibited grounds, the discussion concentrated on grounds which should be explicitly prohibited. As explained above, the list of grounds to be covered by the Law was the most sensi-

tive issue during the adoption process. And although some grounds were excluded from the list in Article 2 of the Law, it is significant that the Law prohibits discrimination with reference to a non-exhaustive list of grounds. There are two safeguards to ensure that the list remains open-ended. The list starts with the word “including” and ends with “and every other circumstance” which both aim to ensure that other grounds are not excluded.

This open-ended list is an indication that the drafters of the Law were inspired by other international standards and not only by those found in the EC directives. The list of prohibited grounds was more comprehensive in the Working Group Draft Law but as the ground of sexual orientation was disputed in the legislative process, a number of other grounds were also deleted. The final version of the Law includes the ground of sexual orientation but other grounds are missing, e.g. age, birth and disability. However, because the list is open-ended, in practice it will be possible to cover these grounds, especially since they are defined as prohibited grounds in other pieces of legislation in BaH. Interestingly, the first judgment made in a case of discrimination after the adoption of the Law concerned discrimination of persons with disabilities.⁴⁹ Still it would be preferable for future amendments to the Law to recognise the importance of including other prohibited grounds.

Furthermore, perception of characteristics associated with a prohibited ground is also part of this open-ended list. This Law did not introduce a test as to how to define other “circumstances” or other grounds and it might be difficult to define new grounds in practice. One of the possible solutions would be to point to grounds which are already defined in some other pieces of legislation and/or grounds from international legally bind-

ing documents BaH has ratified. Further, the jurisprudence of the ECtHR on the interpretation of the ECHR could be one of the sources for identifying the protected grounds because, according to the letter of the Constitution, the ECHR applies directly in BaH and has priority over all other law.⁵⁰

5.2. Prohibited Forms of Discrimination

The Law prohibits direct and indirect discrimination, harassment, sexual harassment, mobbing, segregation, instruction to discriminate and incitement to discriminate. The definitions of direct and indirect discrimination generally follow the definitions which can be found in the Declaration of Principles on Equality and include the need to identify an act and the comparator.⁵¹ These definitions relate to acts which have occurred, which presently exist and/or might occur in future.

The Law does not define, and the list of grounds does not imply a notion of “multiple discrimination”. This could be seen as one of the problematic features of the Law and could cause problems in proving multiple discrimination in litigation efforts.

While the definitions of direct and indirect discrimination resemble those found in the Declaration of Principles on Equality, the definitions of segregation and incitement to discriminate were inspired by the International Convention on the Elimination of All Forms of Racial Discrimination.

“Mobbing”, also defined as a form of discrimination, appears not to be grounded in any of the international documents BaH has signed. It is defined as repetitive workplace harassment which however is not connected to any of the prohibited grounds, and is only aiming at an effect of “harming the dig-

nity of a person, especially when it creates fearful, hostile, degrading, humiliating or offensive environment”.

Acts of discrimination which would fall under the category of violence against women or gender-based violence are also defined as criminal acts in the Law on Gender Equality in BaH.⁵² Sexual harassment, harassment on the ground of sex/gender and domestic violence are punishable by six months to five years of imprisonment. The focus in the recent years was on prevention and prosecution of domestic violence and special laws were adopted which define the roles of other institutions. Around 600 cases of domestic violence are prosecuted yearly in the country but most of the sentences include probation and rarely imprisonment.⁵³ To date, only a few sentences in cases of sexual harassment have been delivered but there has been a gradual increase in the number of cases. One of the most recent judgments included a one year prison sentence for long-term verbal sexual harassment in the workplace. However there are no comprehensive data on the prevalence of sexual harassment or harassment on the ground of sex/gender and there are no statistics on the number of cases.

5.3. The Scope of the Law

The prohibition of discrimination applies to all rights regulated by law. Thus defined, the scope of the Law is wide but is also dependant on the rights which need to already exist in the legal system.⁵⁴ The scope is defined to mirror the general prohibition of discrimination in Protocol No. 12 of the ECHR.⁵⁵

One of the difficulties faced during the drafting process was in defining the scope of the Law. The main difficulty was the fact that BaH has a complex legal and political struc-

ture with various levels of government competent to determine rights and entitled to define access to rights differently, with the result that some rights are guaranteed in one part of the country but not in other parts.⁵⁶ However, the Constitution could be the sole reference for what is meant by “guaranteed rights” under the Law, as it enumerates only a certain number of rights, not the full spectrum. Accordingly, the working group first had discussions to include a list of human rights and freedoms in the very text of the Working Group Draft Law.

This dilemma unfortunately remained unresolved in the Law because in addition to the application of the already mentioned “general prohibition of discrimination” approach, the areas of application of the principle of non-discrimination were also defined. These areas were emphasised in Article 2 in which the grounds were enumerated but they were additionally vaguely defined in Article 6.⁵⁷

5.4. Permitted Unequal Treatment

5.4.1 Justified Discrimination

In an attempt to define the general rule for the justification of different treatment the Law, in the first two paragraphs of Article 5, prescribes a test for when different treatment shall not be considered discriminatory.⁵⁸ To meet this test any “unfavourable distinction or different treatment” needs to be based on “objective and reasonable justification” and needs to “realise a legitimate goal” and there must be “a reasonable relation ratio of proportionality between means used and goals to be achieved”. This justification test can be only applied to behaviour which would usually be considered direct or indirect discrimination, because these forms of discrimination result in different treatment as defined by law.

5.4.2 Exemptions from the Law’s Application

The rest of Article 5 goes on to list exceptions to the principle of equal treatment.⁵⁹ The list of exceptions does not seem to have an inner logic and includes exceptions of employment in religious institutions; positive measures for marginalised groups; genuine occupational requirements; exceptions in the best interest of the child; reasonable accommodation; and exceptions which arise from family law and citizenship. It is not clear how these exceptions were selected, and thus they are problematic as they cannot be examined in a court.

One of the most problematic exemptions relates to rights which arise from family law.⁶⁰ This exception was added during the parliamentary debate and mirrors a similar provision in the Law on the Prevention of Discrimination in Croatia, Article 2 paragraph 10. As noted above, the parliamentary debate in BaH which, combined with the pressure of the Inter-religious Council, led to the adoption of this amendment. Its intention was to deny the application of the principle of non-discrimination to homosexuals in access to rights which arise from family law.⁶¹ It aimed to prevent any litigation under this Law that would challenge the opposite sex clause as a requirement to conclude a marriage, or any discrimination claims in adoption procedures initiated by same sex couples.⁶² While there is no consensus on this issue in Europe, the ECtHR has generated some case law in recent years, e.g. the case of *E.B. v France*,⁶³ which could at some point bring into question the exception related to family law in BaH. In any case, this exception disables the use of the Law in challenging any provisions of family law as discriminatory in the local courts. The Law puts family law provisions above the principle of non-discrimination.

To date, this exception has not been challenged in the courts; it would be important to do this especially where there is case law available which could be relied upon.

6. Enforcement

The Law has established a new anti-discrimination litigation procedure with new rules to accommodate the specific nature of discrimination proceedings. The Law has relied on the existing civil procedure codes in the legal system of BaH and the discrimination litigation procedure follows the general rules established by these codes. There are however some exemptions from the general rule such as those regarding the burden of proof, collective complaints and the use of statistical data which have aimed to accommodate the special nature of discrimination proceedings. These rules apply only for cases of discrimination heard under civil procedure codes and not in the proceeding in front of the Constitutional Court.

According to the Law, any person who believes that they have been discriminated against can file a lawsuit at the closest municipal court. New procedural rules for discrimination cases follow the guidelines in the EU discrimination directives and enable an easier standard of proof in discrimination cases.

According to Article 15(1) of the Law:

“In cases when a person or group of persons provide facts in proceedings under Article 12 of this Law, corroborating allegations that prohibition of discrimination has been violated, the alleged offender shall have a duty to prove that the principle of equal treatment or prohibition of discrimination has not been breached.”

This provision has shifted the burden of proof from the plaintiff to the respondent to prove that discrimination did not take place. This is a novelty in BaH civil proceedings, in which, according to the general rule, the plaintiff needs to provide facts and to prove every segment of the alleged breach and the respondent can remain passive. If the evidence is simply out of reach of the plaintiff, the courts will find no violation. According to Article 15(2) statistical data can be used to shift the burden of proof and according to Article 15(3), in cases of failure of reasonable accommodation, the burden of proof lies with the respondent.

These provisions also establish a judicial protection from discrimination which provides a direct access of victims to protection mechanisms. This contributes to legal certainty and facilitates access to justice.

According to the available data, the first litigation under the Law was initiated by the anti-discrimination team of Vasa Prava, an NGO providing free legal aid, and the first judgment which found discrimination resulted in litigation started by this NGO. In total, the Vasa Prava anti-discrimination team has initiated over 20 cases. The USAID Parliamentary Support Program published an assessment on the implementation of the Law, based on the litigation efforts of Vasa Prava, which made recommendations to relevant parliamentary committees.⁶⁴ This assessment concluded that the Law has the potential to ensure protection for victims of discrimination and that the courts are capacitated to hear cases according to the provisions of this Law.⁶⁵ Even more importantly, some cases had a strategic impact and led to the development of new policy responses. One example is the “two school under one roof” case⁶⁶ which led to a new policy being adopted by the Ministry of Education and

Science of the Federation of BaH introducing guidelines for school integration.

The Law has also proved valuable in challenging practices which had commenced prior to its enforcement. The definitions of discrimination in the Law have helped address, for example, the failure to include children with disabilities in primary education, the refusal to hire a qualified professional as a director in a primary school because she was a Catholic nun, and the segregation of children in primary schools based on their ethnicity.

However, overall, the number of discrimination cases litigated to date remains low. One of the reasons might lie in the scarcity of initiatives to promote the protection provided under this Law. A recent survey has shown that although 86% of interviewees perceived discrimination to be a very pressing social problem, only 36% were aware of the existence of the Law and only 25% had any knowledge of the content of the Law.⁶⁷ Furthermore, it appears that many human rights NGOs are not aware of the possible changes litigation of discrimination cases could bring.

7. Institutional Responses to Inequality and Discrimination

Although the Law has put an important emphasis on protection from discrimination, its aim was not only to prosecute offenders but to establish a mechanism to detect patterns of discrimination and to identify proactive responses by the central institution of the Ombudsman, and to a certain extent by the MHRR.

The Law has defined the existing Institution of the Ombudsman for Human Rights of BaH (the Institution) as the Central Institution for the Prevention of Discrimination. The Insti-

tution was established in 2002⁶⁸ according to the Paris Principles⁶⁹ and its mandate includes the activities required by the relevant EU equality directives and proposed by the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 2.⁷⁰

The Human Rights Ombudsman of BaH has, in accordance with the provisions of the Law, the role of the central institution to combat discrimination. It is important to note that the role of the Ombudsman does not include deciding equality and discrimination cases but it includes assisting victims, initiating an investigation and issuing recommendations which are not legally binding.

The Institution was also vested with significant responsibilities in raising awareness on discrimination and combating prejudice and stereotypes. Immediately after the adoption of the Law, the Institution established a department for the elimination of all forms of discrimination. In 2011, the Institution published its first report on the manifestations of discrimination.⁷¹ Its aim was to inform the Council of Ministers of BaH and the Parliamentary Assembly of BaH about the allegations of discrimination the Institution had received since the adoption of the Law and recommend legislative amendments. Its aim was also to inform the public about discrimination and inequality in BaH. The Ombudsman concluded that there is a need for a stronger awareness-raising campaign on the existence of the Law, noting the disparity between the perception of discrimination and the low number of appeals the Institution has received. The Ombudsman also concluded that there is a need to establish a mechanism to harmonise other laws with this Law.

This report has however shown that the Institution mainly deals with cases which

have a potential to be litigated. Thus the Ombudsman plays a role of a mediator rather than a role of the human rights institution which would deal with systemic problems in the area of discrimination. It is also not clear whether the Institution informs the plaintiffs about the judicial proceedings which are available.

A report published in October 2012 by a think-tank called “Analitika” tracked obstacles preventing the efficient fulfilment of the role of the Institution in the protection of individuals from discrimination.⁷² The main obstacles relate to the reactive role the Ombudsman has played to date; therefore the report recommended a proactive approach to the promotion of the Law and its protection mechanisms, and the raising of public awareness of discriminatory practices in the country.

Alongside the Ombudsman, the MHRR has responsibility for monitoring the implementation of this Law as well as managing the central database of discrimination cases. The MHRR was tasked with adopting a Regulation on the methods of collecting data on cases of discrimination, which would define the content and layout of a questionnaire to collect data and regulate other issues related to data collection. At the time of writing, such a Regulation is yet to be issued, although a working group was established in 2010. For this reason, it is almost impossible to assess the implementation of the Law or the changes which it was supposed to bring.

Moreover, the MHRR has failed to play a proactive role in equality and non-discrimination and has not published the annual reports which the Law require it to produce. It has done nothing so far to promote the Law to the public or to professionals. Further, the Ministry has failed to fulfil its role in the de-

velopment of equality and non-discrimination policies.

It seems also that civil society organisations, although they have certainly done more than the MHRR, have not done enough to promote the Law or use it as a tool for advocacy. One of the few developments was the publishing of the Commentary to the Law by the Human Rights Centre of the University of Sarajevo⁷³ which aimed to explain the Law both to professionals and the public. Today, there are some further initiatives focusing on the implementation of the Law, including The Equal Rights Trust’s project “Developing civil society capacity to combat discrimination and inequality in BaH”, and projects of the Open Society Fund in BaH and the Civil Rights Defenders. The OSCE Mission to BaH has distributed, through its field offices, leaflets containing basic information about the Law to NGOs and citizens’ services. Additionally, the Mission trained 150 judges and prosecutors on application of the Law in 2011 and 2012.

In early 2013, based on the set of recommendations made by the USAID,⁷⁴ the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics⁷⁵ has adopted a new approach to monitoring the implementation of the Law and has tasked the MHRR to take more action to promote the Law and even to initiate the adoption of an action plan. The Joint Committee has also declared itself competent to review all new draft law and to determine if there is a need to harmonise it with laws prohibiting discrimination.

8. Quotas and Preferential Treatment

Some important segments of equality remain unaddressed by the current legal regime. These are particularly crucial for BaH

as a country in transition. In some cases, existing laws fail to comply with international standards on when differential treatment may be permissible. Even more worryingly, they have led to discrimination on different grounds. The next section looks at how quotas and preferential treatment have influenced the principle of equality in BaH.

Quotas have been one of the most popular ways in which BaH legislators attempted to achieve equality. There are quotas for access to public service, decision-making positions, the armed forces, the police and the judiciary. Also, a number of laws provide that “preferential treatment” should be applied in access to employment, health, education and access to resources for different parts of the population solely based on their status⁷⁶ rather than their needs. The application of quotas and preferential treatment has, in practice, put individuals who do not belong to these groups in a less favourable position, which might lead to discrimination. The Law on the Prohibition of Discrimination has failed to address the issues created by the omnipresence of quotas in the legal system. The permissible different treatment test is the only new standard the Law has introduced but the implementation of this test on quotas and preferential treatment provisions depends on decision makers at different levels of the government.

The Dayton Agreement, which included the Constitution of BaH as one of its annexes, has introduced mechanisms aimed at ensuring parity between the parties to the armed conflict, along ethnic lines.⁷⁷ Hence, elements of the consocial power-sharing theory⁷⁸ can be identified in the BaH political system.

Power-sharing and parity mechanisms are found across the political system of the country including in particular the election

to the presidency and the legislature and appointments to the executive. The main policy mechanism applied to achieve power-sharing and parity is ethnic quotas or quotas for the “constituent peoples” (Bosniaks, Croats and Serbs) whereas all other groups remain outside these arrangements. Ethnic groups which are recognised as constituent peoples also vary in demographics and the parity applied can be considered to be “overrepresentation as an additional guarantee of protection”⁷⁹, or “disproportionality in favour of minorities”.⁸⁰

As noted above, the Grand Chamber of the ECtHR found provisions introducing quotas for the election of the members of the Presidency of BaH and the House of Peoples of the Parliamentary Assembly of BaH discriminatory.⁸¹ The Court agreed that there are no requirements under the Convention to abandon totally the power-sharing mechanisms peculiar to BaH, but that there are other mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of other communities. Although the ECtHR judgment was published in December 2009, there has been no agreement yet on how to tailor future power-sharing mechanisms so that they are compliant with the judgment. It appears at this moment that political parties are more inclined to establish a system which would aim for parity but which would not simply exclude the “non-constituents”, without breaching any provisions of the ECHR.

In January 2013, the amendments of the Constitution of the Canton of Sarajevo (one of 10 cantons in the BaH entity Federation of Bosnia and Herzegovina) were welcomed as a step towards the implementation of the decision of the ECtHR. These amendments have established a caucus of “others” along with caucuses of “constituent peoples” in the Can-

tonal Assembly. The groups of “others” are now able to elect one of three deputy-presidents of the Cantonal Assembly of the Canton of Sarajevo. This decision has the potential to enable the “others” to influence decision making of the Cantonal Assembly of Sarajevo – a significant achievement in so far as this Assembly is competent to adopt cantonal laws, budgets, and policies and to appoint the members of the Cantonal Government.

Quotas are applied not only as a parity policy instrument to ensure power-sharing but also in a number of different areas which are not necessarily elements of democratic systems. The number of such provisions in different laws is hard to estimate but they can be found in most laws governing appointments and employment. In respect to appointments, parity is usually achieved through quotas or preferential treatment and in respect to employment it is usually sought through preferential treatment alone.

The appointment of a member to the Institution of the Ombudsman for Human Rights can be considered as an example of power-sharing which is not a part of the consociational democracy model or theory:

“[T]he Ombudsman shall be appointed from the ranks of the three constituent peoples (Bosniaks, Serbs and Croats), which does not preclude the possibility of appointing an Ombudsman from the ranks of ‘others.’”⁸²

Although this provision does not automatically exclude the “non-constituents”, three Ombudsmen currently in office were appointed as members of one of three constituent peoples. Ombudsmen are not in charge of different departments, there is no hierarchy between them and they also need to co-sign all decisions made by the Institution. The Institution is nominally independent,

but this power-sharing arrangement nonetheless forces parity of groups in a human rights institution, with the effect of excluding “non-constituents”.

Laws which regulate the employment of civil servants could be seen as an example of how preferential treatment was introduced in a system of employment which is otherwise based on candidates’ qualifications. All these laws contain provisions that relate to the national structure of civil servants, such that the structure of civil servants “shall generally reflect the national structure” of the population in accordance with the most recent census. None of these laws have regulated how this provision would be applied, which has opened a wide space for discretion and different interpretation. Only one law which regulates the employment in a local community⁸³ provides a test when preference can be allowed. In a case where two candidates have achieved equal scores, preference can be given to the candidate of the under-represented constituent people. This test could be considered to be aligned with the reasoning of the European Court of Justice (ECJ) in the cases of *Kalanke*⁸⁴, *Marschall*⁸⁵ and *Abrahamsson*.⁸⁶ Any other preferential treatment could be considered discriminatory.

The common agreement on the legitimate aim for these exceptions is that they have attempted to ensure equal participation of constituent peoples and achieve a multiethnic civil service; otherwise the Ombudsmen could hardly find quotas to be proportionate, in particular because they exclude all “non-constituents”.

Unfortunately, similar provisions can be found in other laws, governing, for example, access to employment for families of soldiers who died during the war, access to employment for war veterans and access to educa-

tion for children of soldiers who died during the war, which do not contain any safeguards to ensure that these provisions were used only to achieve equality and that they do not adversely discriminate.

All of these provisions could be challenged at least in private law suits according to the Law but there seems to be no real political will to evaluate the success and the justification for some of these provisions in order to ensure equality for all. The Law on the Prohibition of Discrimination test for justification of different treatment could be used to evaluate these policies, but so far this has not been discussed or considered. Nor have these provisions been tested in litigation. The same problem exists in respect of quotas in other power-sharing mechanisms which follow the same logic of the provisions already found to be discriminatory by the ECtHR.

Equality of all persons and groups in a legal system is an important goal for every society. The experience of BaH shows how hard it is to regulate equality through quotas and preferential treatment, in particular if policy makers, when focusing on group rights, fail to recognise the needs of other minority groups.

9. Conclusions

The Law on the Prohibition of Discrimination has opened a new chapter in the area of equality and non-discrimination in BaH. It has subsumed all of the standards which were developed over the years in comparative law and could be seen as a beacon in the legal system of BaH when it comes to future legislative developments.

One lesson from the law-drafting process is that without a strong conditionality imposed by the European Union to regulate the area

of equality and non-discrimination this Law would not have met international standards. Notably, even under the pressure of international organisations and the public, parliamentarians tried to narrow the power and scope of the Law as much as possible. Similarly, as expected, there has been strong resistance to the mainstreaming of equality and non-discrimination in other areas of law.

The Law on the Prohibition of Discrimination has proved to be useful for litigation. Although the number of cases is still low, they have brought the issue of discrimination to the attention of policy makers and led to the development of new policies to address inequalities. More importantly, these first cases have shown the enormous potential of litigation of discrimination cases.

There are many provisions in the legal system of BaH which aim to ensure equality but there seems to be no coordination or consistency between them. As seen in some of the examples in the area of power-sharing, this uncoordinated approach has led to discrimination against certain groups, and BaH is one of the countries in which the Constitution still openly discriminates against minorities.

Much more is needed to achieve equality and to eradicate discrimination. The current approach seems to be more reactive than proactive. There are no institutional initiatives which would assess equality and the prevalence of discriminatory practices in the country and no data is collected and published on cases of discrimination.

One of the possible initiatives would be the adoption of an overall equality and non-discrimination action plan which would address the current challenges and establish a strategic and coordinated approach. There are already some good initiatives in

this regard such as the Gender Action Plan of Bosnia and Herzegovina⁸⁷ and the Action Plans which aim to address the problems faced by the Roma,⁸⁸ which have adopted a proactive approach, but an overarching strategic document is still missing. Without such a document, different initiative might remain uncoordinated and equality and non-discrimination would not be

mainstreamed. It will therefore be interesting to monitor the follow-up to the Conclusions made by the Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics relating to the harmonisation of laws with the Law on the Prohibition of Discrimination and the adoption of an anti-discrimination action plan.

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2 In the absence of an official census, according to some estimates, main ethnic groups living in Bosnia and Herzegovina are Bosniaks (48%), Serbs (37.1%), Croats (14.3%) and others 0.6%, including Jews, Roma and Albanians. Source: Central Intelligence Agency, *The World Factbook*, 17 January 2013.

3 *The General Framework Agreement for Peace in Bosnia and Herzegovina*, available at: http://www.ohr.int/dpa/default.asp?content_id=379.

4 UNDP in BaH, *Social Inclusion in Bosnia and Herzegovina*, Human Development Report, UNDP 2007.

5 Open Society Fund Bosnia and Herzegovina, *Report on the Public Perception and Experience with Discrimination*, 2012.

6 Although there is no definition of what "entity" means, in practice the entities are the two regional governments which are also composed of other sub-levels of local self-government – cantons and municipalities in FBaH and municipalities in RS.

7 The Preamble explicitly refers to the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

8 Constitution of BaH, Article II/2, which states: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

9 *Ibid.*, Article II/3.

10 *Ibid.*, Article II/2.

11 *Ibid.* and Constitutional Court of BaH, Appellant Sulejman Tihic, U 4/04, Para 110 et seq.

12 Annex I lists the following documents: 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of Conflict, and the 1977 Geneva Protocols I-II thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework

Convention for the Protection of National Minorities.

13 See, for example, Case AP-1093/07 the Constitutional Court referring to the *Belgium linguistic case*, 23 July 1968, Series A, No. 6 (1979-1980).

14 Constitutional Court of BaH, Appellant Sejfidin Tokic, U 44/01 -1, Para 45.

15 See above, note 8, Article IV/1.

16 *Ibid.*, Article V: Presidency.

17 *Sejdić and Finci v Bosnia and Herzegovina*, ECHR, Applications Nos 27996/06 and 34836/06. The claimants alleged that the provisions violated their rights under Articles 3, 13 and 14 ECHR, Article 3 of Protocol No. 1 to the ECHR and Article 1 of Protocol No. 12 to the ECHR.

18 *Ibid.*, Grand Chamber Decision of 22 December 2009.

19 Law in place as at 9 January 2013.

20 These could be found in labour laws, criminal codes, public broadcasting laws, etc.

21 Law on Gender Equality in Bosnia and Herzegovina, *Official Gazette of BaH*, No. 16/03 and 102/09.

22 Law on the Rights of National Minorities, *Official Gazette of BaH*, No. 12/03.

23 Law on the Rights of Veterans and their Families in the Federation of BaH, *Official Gazette of BaH*, No. 33/04 and 56/05.

24 Unified text of the Law on Gender Equality in Bosnia and Herzegovina, Articles 10-21.

25 *Ibid.*, Article 4.

26 *Ibid.*, Article 29: "A person who, on grounds of sex, commits violence, harassment or sexual harassment that endanger someone's wellbeing, mental health or bodily integrity shall be punished with a fine or imprisonment for a term of six months to five years."

27 Article 19 of the Law mentions judicial protection but it is unclear what procedures would apply.

28 The Starting Line Group was a coalition of more than 400 non-governmental actors, from across the European Union, advocating for the adoption of EU directives in the field of non-discrimination.

29 The Draft Law is available in local languages at: http://www.bh-hchr.org/Saopstenja/Nacrt_zakona.pdf.

30 Draft laws are usually developed by the Council of Ministers and proposed to the Parliamentary Assembly and in most cases ministries of the Council of Ministers are designated to monitor the implementation of laws.

31 The expert working group included members from the Ministry only and the author provided advisory and technical support to the group.

32 The working group decided to entitle the Law "Law on the Prohibition of Discrimination".

33 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

34 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

35 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

36 This requirement was part of the "Visa Liberalisation with Bosnia and Herzegovina Roadmap" put forward by the EU to the BaH authorities in order to allow visa free travel regime for BaH citizens.

37 Council of Ministers, Minutes from the 74th session held on 19 January 2009.

38 Council of Ministers of BaH, 82nd Session held on 1 April 2009.

39 Balkan Insight, "Bosnia's Religions Unite Against Gay Marriages", 3 June 2009.

40 House of Peoples, Transcript of the 30th Session, 15 June 2009, delegate Mr Bozo Rajic, p. 20.

41 *Ibid.*, delegate Ms Alma Colo, p. 21.

42 Made by the party “Croatian Democratic Community”.

43 Amendments proposed by the members of the Croatian Democratic Party of BaH (HDZ BaH) to the House of Representatives, The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics and the Constitutional Committee of the House of Representatives of the Parliamentary Assembly of BaH, 10 June 2009.

44 E.g. the Criminal Code of BaH, Article 145, began in these words: “Who on the ground of differences in race, skin colour, national or ethnic background, religion, political or other belief, sex, sexual orientation, language, education or social status or social origins, denies or restricts the civil rights as provided by the Constitution of Bosnia and Herzegovina, ratified international agreement, law of Bosnia and Herzegovina, some other regulation of Bosnia and Herzegovina or general act of Bosnia and Herzegovina or, whoever on the ground of these differences or background or other status grants unjustified privileges or does unjustified favours to individuals..”

45 The Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, Minutes, 26th Session held on 6 July 2009.

46 House of Representatives, Minutes from the 33rd and 57th sessions of the House of Peoples.

47 Article 5 of the Draft Law, probably referring to the entity laws: Family Law of Federation of BaH and the Family Law of RS.

48 Bosnia and Herzegovina has an extremely decentralised legal system and 14 legislatures are competent to regulate certain rights.

49 The case in question concerned a failure by a primary school in Mostar to include a child with intellectual impairments into regular classes, although all medical examinations showed that this would have a positive impact on his development.

50 See above, note 8.

51 The Declaration of Principles on Equality, although not a source of international law, reflects a moral and professional consensus on sets of standards in the area of equality and non-discrimination among human rights and equality experts. See The Equal Rights Trust, *Declaration of Principles on Equality*, London 2008.

52 See above, note 24, Article 29.

53 Fourth and Fifth Periodic CEDAW Reports of Bosnia and Herzegovina, May 2011.

54 Law on the Prohibition of Discrimination, Article 2, which defines the scope of discrimination: “with a purpose or effect to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life”.

55 *Ibid.*, Article 1 – General prohibition of discrimination: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

56 A recent Constitutional Court of BaH decision (case U 12/09) found discrimination in respect of differential access to parental leave pay for women from different parts of BaH employed in state institutions, contrary to the Convention on the Elimination of All Forms of Discrimination against Women and the Law on Gender Equality in BaH. This case concerned a new piece of legislation which regulated the right to maternity leave with pay for civil servants employed at state-level institutions which resulted in different treatment for women, depending on the entity in which they resided.

57 See above, note 54, Article 6: “...in all spheres, especially: employment, membership in professional organisations, education, training, housing, health, social protection, goods and services designated for the public, and public places together with performing economic activities and public services.”

58 *Ibid.*, Article 5: “Legal measures and actions shall not be considered discriminatory when reduced to unfavourable distinction or different treatment if they are based on objective and reasonable justification. Following measures shall not be considered discriminatory if they realise a legitimate goal and if there is a reasonable relation ratio of proportionality between means used and goals to be achieved...”

59 *Ibid.*, Para 2:

“a) They come out of implementation or adoption of temporary special measures designed to prevent or compensate damages that persons suffer and on grounds given in Article 2, especially members of vulnerable groups, such as persons with disabilities, members of national minorities, women, pregnant women, children,

youth, elderly and other socially excluded persons, civilian victims of war, victims in criminal proceedings, displaced persons, refugees and asylum seekers; i.e. to enable their full participation in all spheres of life;

- b) They are based on features related to grounds given in Article 2 of this Law, when in limited circumstances, due to the nature of concrete professional activities or context in which these are conducted, such features represent a genuine and determining requirement in terms of choice of occupation. This exception shall be a subject to occasional examinations;
- c) They are based on distinction, exclusion or preference in relation to employment as a staff member of an institution that is made in compliance with doctrines, basic presumptions, dogmas, beliefs or learning of actual confessions or religions, ensuring that every distinction, exclusion or preference is made consciously in order not to hurt religious feelings of members of that confession or religion;
- d) They define maximum age as the most appropriate for terminating a working relationship and determine age as a condition for retirement;
- e) They are based on citizenship in a way prescribed by law;
- f) They are based on the realisation of reasonable accommodation aiming to ensure the principle of equal treatment in relation to persons with disabilities. Employers shall, based on needs in a concrete case, take appropriate measures, in order to enable a person with disability to access, participate or to be promoted, e.g. to participate in training, if such measures do not represent an unreasonable burden for the employer;
- g) Putting in a less favourable position while defining rights and obligations in the family provided by law, especially in order to protect the rights and interests of children, which has to be justified with legitimate purpose, protection of public morals, along with favouring marriage in accordance with provisions of family law.
- h) When establishing an employment relationship, membership, or taking actions that are in compliance with preaching or operating of registered churches and religious communities in BaH, or other public or private organisations working in accordance with the Constitution and laws, if demanded by religious doctrines, beliefs or goals.”

60 *Ibid.*, Para 2(g).

61 In particular the right to marry, right to adopt and right to inherit.

62 In BaH family law, marriage and cohabitation are defined as a “union between a woman and a man”. Similarly, a child can be adopted only by married couples and couples which cohabit, and a single parent (regardless of their sexual orientation) can only obtain custody over a child (incomplete adoption).

63 *E.B. v France* [2008] ECHR 43546/02, 22 January 2008.

64 Kadribašić, A., *Assessment of the Implementation of the Law on the Prohibition of Discrimination in Bosnia and Herzegovina*, USAID Parliamentary Support Program, 2012.

65 The courts’ capacity improved when the judicial academies included a two-day module on the Law on a yearly basis.

66 This case concerned two schools operating in the same building. One school was attended by ethnic Croats and the other by ethnic Bosniak children. The court found that the schools’ policies to separate children by having them attend different classes as well as manipulating school breaks so as to make it impossible for ethnically different children to ever meet constituted ethnic segregation and ordered the schools to change this practice.

67 See above, note 5.

68 Law on the Ombudsman for Human Rights of Bosnia and Herzegovina, *Official Gazette of BaH*, Nos. 19/02 and 32/06.

69 General Assembly of the United Nations, *Principles relating to the Status of National Institutions (The Paris Principles)*, Resolution 48/134 of 20 December 1993.

70 European Commission against Racism and Intolerance, *General policy recommendation No. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level*, adopted on 13 June 1997.

71 Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina, *Report on the manifestations of discrimination*, February 2011.

72 Hanusić, A., *The Ombudsman in the System of Protection against Discrimination in BiH: Situation analysis and characteristic problems*, Analitika, Sarajevo, 2012.

- 73 Vehabović, F., Kadribašić, A. and Izmirlija, M., *Commentary to the Law on the Prohibition of Discrimination*, Human Rights Centre of the University of Sarajevo, 2010.
- 74 See above, note 64.
- 75 Joint Committee on Human Rights, Rights of Children, Youth, Immigration, Refugees, Asylum and Ethics, Minutes of the 19th Session held on the 17 January 2013.
- 76 For example, war veterans and members of their families, the unemployed, members of constituent peoples, etc.
- 77 See Preamble to the Constitution of BaH which contains the phrase: “Bosniaks, Croats, and Serbs, as constituent peoples (along with others), and citizens of Bosnia and Herzegovina”.
- 78 A model form of democracy, developed by the Swedish political scientist Arend Lijphart (b. 1936), according to which many nations can coexist peacefully under one state. It is also known as “consociationalism”. Note, however, that “consociationalism” was never recognised as the official model of democracy in Bosnia and Herzegovina.
- 79 Theodor, H., Antoine, M., Hinrich, R. (eds.), *La société de concordance, approche comparative*, Actes du Symposium organisé par le Goethe-Institut sur “La régulation démocratique des conflits dans les sociétés plures”, Beyrouth, Libr. orientale, 1986, pp. 23-24.
- 80 Arendt, L. “Consociational democracy: The examples of Belgium and the Netherlands”, in Theodor, H., Antoine, M., Hinrich (eds.), above note 79, p. 40.
- 81 See above, note 17.
- 82 See above, note 68, Article 8.
- 83 Law on the Civil Service in the administrative bodies of Brcko District, Article 26.
- 84 *Kalanke v Freie Hansestadt Bremen*, ECJ, C-450/93 [1995] ECR I-305.
- 85 *Marschall v Land Nordrhein-Westfalen*, ECJ, C-409/95 [1997] ECR I-636.
- 86 *Abrahamsson v Fogelqvist*, ECJ, C-407/98 [2000] ECR I-5539.
- 87 Council of Ministers of BaH, *Gender Action Plan of Bosnia and Herzegovina*, 2006.
- 88 Council of Ministers of BaH, *Action Plan for Roma*, 2008.