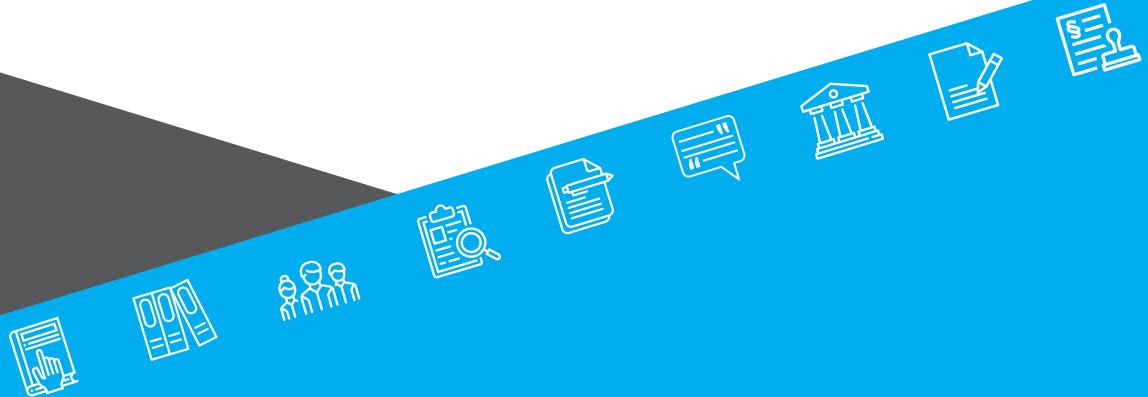


EXECUTIVE SUMMARY

OF THE MONITORING OF THE WORK OF
THE OMBUDSMAN WITH A FOCUS ON
PREVENTION AND PROTECTION AGAINST
DISCRIMINATION

(2010 – 2019)



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Authors: Stojan Mishev and Sanja Jovanovikj-Paneva
Co-author: Dragana Drndarevska
Editor: Manja Velichkovska
Translator: Ana Vasileva
Graphic design: KOMA

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1. Jovanovikj-Paneva, Sanja [автор] 2. Drndarevska, Dragana [автор]

а) Народен правобранител -- Дискриминација -- Спречување и заштита -- Македонија -- 2010-2019 -- Извештаи

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SUMMARY

Protection against discrimination is a core part of all human rights and it guarantees the right to equality for all. The equality of freedoms and rights of all citizens is constitutionally guaranteed, regardless of their gender, gender, race, skin color, national and social background, political and religious affiliation, economic and social standing, etc. The existence of an institutionally independent body such as the Ombudsman, which would be accountable to the legislature whose representatives are the MPs chosen by the people - and who would undoubtedly stand together with the citizens when their human rights are violated by the state administration or any other body with public authority, is of great importance for the overall legal system in any country and for the practical implementation of the prevention and protection against discrimination. The Ombudsman has an explicit obligation to protect the citizens against discrimination, to actively monitor their legal issues related to discrimination, to participate in the resolution of those issues and to take action upon receipt of applications for protection against discrimination, as well as to advocate for the improvement of the legal framework for non-discrimination and for overcoming its deficiencies.

Taking into consideration the enormous responsibility that this institution has, the goal of this

Report from the Monitoring of the Work of the Ombudsman with a Focus on Prevention and Protection against Discrimination (for the period 2010-2019) is to contribute towards the advancing of the efficiency and effectiveness in the work of the Ombudsman, in particular with regards to the prevention and protection against discrimination in the Republic of North Macedonia. The document is based on an overview of various types of data on the fulfillment of this body's legal mandate with regards to the advancing of non-discrimination, and in particular with regards to the individual problems of the vulnerable groups of citizens (LGBTI, people living with disability, people who use drugs, people living with HIV, women, sex workers, Roma people, poor people etc.) who are victims of discrimination by different competent state bodies, public institutions and services.

The key findings in the Report identified shortcomings in several areas of the work of the Ombudsman. With regards to the action taken upon the applications for protection against discrimination, during the ten-year period of monitoring, there was multiple increase in the number of submitted applications for protection against discrimination, while at an annual level, the number of completed cases is lower than the total number of cases that the body acted on, which is particularly noticeable in the period between 2009 and 2014. Neverthe-

less, the last two years have seen an increase in the rate of completed cases upon submission of applications for protection against discrimination and there has been a nearly equal number of completed discrimination-related cases in comparison to the other cases. On the other hand, the rate of the practice of not taking action, or suspending anti-discrimination proceedings is lower compared to the other cases which are under the scope of work of the Ombudsman, which indicates greater efficiency in the cases of discrimination, although their number is lower. Unfortunately, the Ombudsman does not include data on the reasons why a decision was made to suspend or not initiate proceedings in the Annual Reports, which means that it is not possible to obtain more precise information on the ratio of accepted, suspended and rejected cases. Furthermore, there is also no data on the number of cases in which no recommendations or opinions were delivered by the Ombudsman and no explanations for not providing a recommendation in certain cases.

It is necessary to mention that, although the Ombudsman did comply with the set statutory deadlines when taking action, the competent authorities did not comply with his/her recommendations in less than half of the cases and they violated the legal deadline for submission of information to the Ombudsman and for taking action to overcome the discriminatory practices that had been found. 18 cases were noted in which the competent author-

ties did not act upon the requests of this body and 104 cases for which there is a general wording that the Ombudsman did undertake all necessary legal actions, without specifying what exactly was done in the cases of discrimination and whether this includes the eighteen cases that the state institutions took no action on. And in some of the cases where the Ombudsman's recommendations were not complied with, this institution failed to take action to alert about the non-compliance, which indicates that it does not have an adequate practice of monitoring the implementation of the recommendations it issues and does not take additional action in any of the cases where it is necessary. There is an evident lack of information both on the actions taken to overcome the discrimination in cases registered under other grounds, where discrimination has been identified, as well as to systemically address the problem of discrimination and the lack of an adequate methodology for data collection and an overall monitoring system to keep track of all of the activities within the competence of the Ombudsman (including monitoring the actions taken by state bodies that act upon the recommendations). It is necessary for the Ombudsman to be more transparent and accountable through a change in the existing system for data collection that would be publicly available with regards to the grounds and area of discrimination, the gender, age, ethnicity, education, employment status and place of residence of

the persons that have been discriminated against, data on the issued recommendations and the actions taken upon them.

It would be inevitable to mention that despite the fact that the Ombudsman himself stated the need to raise the public awareness of citizens as a key to the protection against discrimination, since 2016, when this body was given the mandate to promote the principle of non-discrimination, there has been no dramatic increase in the activities aimed at raising the public awareness and promoting human rights compared to before. The most frequently undertaken activities by the body for this purpose are through cooperation with the national and international civil society organizations and participation in their campaigns, and usually in the form of support, and not in the form of independent activities to raise the public awareness. The experiences of civil society organizations, on the other hand, clearly indicate that the Ombudsman does not undertake sufficient activities and is not sufficiently visible to the public, and not even to the associations that monitor his work.

The Ombudsman was appointed as a National Preventive Mechanism back in 2008, with the Law on Ratification, and has existed as a special body for prevention of torture and other cruel, inhuman or degrading treatment and punishment in the country ever since. Unfortunately, up until 2016, the Ombuds-

man had not participated in the drafting of the institution's own budget and this limited its work in the area of human rights and freedoms. In fact, the findings show that the institution has long dealt with a lack of financial, human and technical resources to implement its statutory competences in the area of prevention and protection against discrimination, as a consequence of which the Republic of Macedonia was left without a National Preventive Mechanism in 2015.

With the amendments to the Law on the Ombudsman in 2016, this body was given the opportunity to submit its budget-proposal to the Ministry of Finance, with which it aligns the section in the Budget of RNM allocated to it; to prepare a report in case of disagreement, to participate in the drafting of the proposal at the Government session and to independently dispose with the use, allocation and assignment of the funds. In spite of this, 13% of the Ombudsman's budget in 2017 remained unrealized, which is a long-standing problem that this institution has faced, which stems from the constant delay in hiring adequate staff, resulting in 65 vacancies in 2019, which in turn prevents the institution from functioning at full capacity. The civil society organizations also took note of the questionable recruitment of insufficiently educated and adequately trained staff in the institution. The average length of the term (8 years, with the possibility of re-election)

of the Ombudsman in our country is also disputable, compared to the institutions of this kind in other countries.

On average, the Ombudsman conducts one or two research studies on discrimination per year, but it can be observed that a number of marginalized and vulnerable categories of citizens who are at constant risk are excluded from this activity or are paid less attention. These are: LGBTI people, people living in poverty, people living with HIV, sex workers and others. Although it has an obligation under the National Strategy for Equality and Non-Discrimination, in the period between 2016 and 2020 the Ombudsman did not conduct any analysis of the situation with regards to discrimination based on gender and gender identity.

In addition, the experiences and perspectives of the citizens' associations related to the work of the Ombudsman show that when submitting complaints for protection against discrimination, a large part (8/11) of the civil society organizations are partially satisfied with how the Ombudsman acts, and a small part are not satisfied at all (3/11). The organizations that work with Roma people and other poor and vulnerable groups of citizens have generally expressed partial satisfaction with the cooperation they have established, in contrast to organizations working with the LGBTI community, sex workers, people who use drugs, and women victims of vio-

lence, which are not satisfied with their cooperation with the Ombudsman at all. The reasons for the dissatisfaction are the lack of independence, distrust in the institution, insufficient efficiency, failure to recognize the violation of rights and discrimination, coming up with justifications for the discriminatory actions of institutions, the state bodies' non-compliance with the issued recommendations, lack of substantial improvement and the submission of poor quality and vague opinions to the institutions committing the discrimination. Apart from the positive aspects of the Ombudsman's work - such as: the compliance with the legal deadlines, field visits, conducting inspections, timely submission of opinions and recommendations - the associations also observe that this institution places great trust in the responses of the institutions without delving deeper into the cases, does not apply the shifting of the burden of proof (does not require from the state body that committed the discrimination to prove its innocence and finds that no discrimination has occurred) and is not sufficiently familiar with the international standards for protection of vulnerable groups of citizens. The latter is the cause of greatest concern, especially since all the civil society organizations believe that the body is insufficiently sensitized to work with all the marginalized people in our society. Consequently, the Ombudsman's insufficient inclination to work with certain vulnerable groups of citizens has resulted in delays in the

proceedings for their protection and delays in the effective protection against discrimination. The second factor that contributes to the delays in the proceedings is the inactivity of the Ombudsman in cases when the bodies are late, i.e. they hinder the work of the institution. In such cases, the Ombudsman may inform the higher-instance body, but based on the previously stated, it is clear that this opportunity is seldom used.

Other shortcomings are: the inadequacy of the recommendations for overcoming discrimination issued by the Ombudsman and the institution's inactivity in cases of non-compliance with the recommendations on the part of the state bodies. Therefore, the absence of an adequate system for monitoring of the implementation of the recommendations and opinions of this institution by the competent state authorities is a cause for an even greater concern. As a result of this, from the publicly available data it is not possible to get a clear picture about the number of cases in which the authorities did not act in accordance with the Ombudsman's instructions, or about the subsequent actions taken by him. A practice has been established of completing the procedure for protection against discrimination upon receipt of a notification from the state bodies that they undertake an obligation to take action in future, without any monitoring as to whether the action was really taken, after which a recurrence of the

discrimination committed by the same state bodies and on the same grounds has been observed. Thus, the key problems that arise are: the lack of a mechanism to ensure mandatory implementation of the recommendations and opinions by the state institutions and the lack of a legal possibility to sanction their non-implementation.

When it comes to providing assistance and protection to victims of discrimination, the Ombudsman provides legal counsel and does referrals to the competent institutions, but does not offer any greater help and support than that, especially not to the socially marginalized people. Thereby, the general conclusion is that the Ombudsman adequately undertakes the legally prescribed obligations from a formal and legal aspect, but in practice there is a lack of effective protection of the people who are discriminated against and lack of prevention to stop those cases of discrimination from recurring in future.

Finally, one positive aspect is that the Ombudsman initiated proceedings to determine the violation of rights and for protection against discrimination upon receipt of all the applications submitted by associations. In nearly all applications, the Ombudsman timely informed the associations about the initiated proceedings, within 15 days from the receipt of their application. Hence, when we talk about a delay in the proceedings, it is mainly due

to state bodies' non-compliance with the statutory deadlines i.e. the legal deadline that is set for them to inform the Ombudsman. In this regard, the large number of proceedings upon a submitted application for protection against discrimination that have been completed within a period that is longer than 90 days, are a cause of concern, mainly due to the above-stated reason. In none of the cases submitted by the associations is there any information that the Ombudsman had reacted to a higher-instance body after being obstructed in his work or that he approved a new deadline for submission of information. Regarding the type of decisions, the Ombudsman's notifications do not always explicitly state whether discrimination was found, although he does notify about the completed proceedings and the actions undertaken by him/her, as well as those undertaken by the state bodies that were accused of discrimination.





CONCLUSIONS

The Ombudsman initiates proceedings upon receipt of an application for protection against discrimination and, in general, completes them on time. The positive aspects of the Ombudsman's work are the willingness to initiate proceedings in cases of discrimination, the compliance with legal deadlines, the inspections conducted in certain cases, as well as the overall compliance with the statutory provisions on taking action upon submitted application.

However, the critical and most serious problem in the work of the Ombudsman is the absence of results from his/her work that would lead to advancing equality and to preventing and protecting the citizens against discrimination. Hence, it can be concluded that the institution fulfills its constitutional mandate only partially and does not have sufficient capacities to fulfill its statutory competences. Unless the institution takes an adequate position in order to be able to continuously and effectively improve the situation with human rights and non-discrimination in the country, in cooperation with all the other stakeholders, we would not be able to talk about successful and effective prevention and protection against discrimination by the Ombudsman.

The reasons for this situation are numerous, and they originate from the legal and institutional framework, but also from the human resources in

the institution. The effectiveness in the overcoming of discrimination is significantly impaired due to the competent state bodies' non-compliance with the statutory deadlines and their non-implementation of the Ombudsman's recommendations and opinions. This practice is a result of the legally non-binding nature of the Ombudsman's recommendations and opinions, on the one hand, but also of the inaction he/she shows after the non-implementation of his recommendations and the delay in the response from the institutions, on the other hand. This leads to extended and recurrent discrimination against vulnerable groups of citizens perpetrated by the competent authorities who do not change their actions, and also encourages the discriminators and creates an environment of impunity for the arbitrary and biased actions.

This problem is compounded by the inadequacy of the recommendations and opinions. Although not binding, the anti-discrimination measures recommended by the Ombudsman must be proportionate, effective and have a deterrent effect. The violations of human rights and discrimination are serious violations of the law, so the institution must treat them proportionately in order to improve the effectiveness of its work and to establish itself as a protector and promoter of citizens' rights. When giving its recommendation, the Ombudsman must also

stipulate a deadline for its implementation, carry out inspection over the implementation, and in case it is not being implemented, there should be an opportunity to initiate a misdemeanor procedure. Informing a higher-instance authority or the Government and the Assembly should also be used more frequently, but those measures are not sufficiently effective to ensure that a particular recommendation would be implemented.

The accountability and transparency of the institution are also an important challenge. In spite of the obligation to keep statistical data on the grounds and areas of discrimination, to conduct research and to monitor the situation so that the rights can be advanced, the Ombudsman does not fulfill this obligation. Even according to the Ombudsman's own findings, the real number of cases of discrimination is actually much higher than the number of applications submitted on these grounds, taking into consideration the fact that in many of the cases for protection of the constitutional and legal rights which are registered under other grounds, it is evident that discrimination has also occurred. Despite being aware of this problem, the institution does not take measures to change and improve its data collection methodology. The Ombudsman must provide adequate and accurate data about its work, enable insight into the cases with personal data protection, provide disaggregated data on the suspended and rejected complaints along with the reasons behind

the decision, publish the short biographies of its employees and inform the public about its work on a more regular basis through press-releases, conferences and other public events.

The poor human capacities of the institution arise from the problems with its independence, but also from the knowledge and skills of the Ombudsman, his/her deputies and the other employees of the institution. It is necessary and it is a prerequisite for fulfilling the mandate of this institution to hire professional staff, who have experience in the protection of human rights and staff who are not affiliated with any political party. The lack of political will to build an independent and professional institution should be overcome with legal guarantees and the so-called watchdogs of its independence and competence. It is necessary to review the procedure and criteria for the election of the Ombudsman and his deputies, in order to ensure and guarantee a transparent, inclusive procedure in which the best experts in human rights would be appointed at these important positions. The legal phrasing "a graduate of law who has more than nine years of experience in legal matters and whose activity in the area of protection of civil rights is proven and enjoys a reputation", leaves the possibility for any graduate of law to be appointed as an Ombudsman, because there is no objective criterion by which it can be determined whether a candidate is proven and enjoys a reputation. The procedure for election of the Ombudsman

in Parliament does not envisage the participation of associations, media, trade unions, researchers, nor the obligation to publish the short biographies and names of the registered candidates, which opens a broad space for manipulation among the political parties in Parliament. An additional problem is the length of the term and the requirement for all deputies to be graduates of law, which is also not in line with the international standards.

The lack of finances, and human and technical resources for the implementation of the legal competences in the field of prevention and protection of discrimination, raises the issue of advancing the financial independence of the institution and fulfilling the country's obligation to provide sufficient funds for realization of all competences, based on objective criteria. The Ombudsman must not depend on the Ministry of Finance to undertake the employments in the institution, because this would lead to obstruction of its work by the state administration.

The Ombudsman's competencies should be extended towards the possibility of undertaking the role of an intervenor in court proceedings and independently initiating proceedings before the courts and other institutions. The Ombudsman does initiate proceedings at his/her own initiative, but their number is low compared to the total number of cases. Of

all the proceedings initiated at his/her own initiative, the number of proceedings for non-discrimination and equitable representation is insignificant and ranges from one to two proceedings per year. The Ombudsman should regularly use the opportunity to initiate proceedings ex officio, to make proposals for amendments to the legal framework and to act as amicus curiae (friend of the court), despite the current state of incidental use of these instruments.

The insufficient cooperation with the citizens' associations and their dissatisfaction with this co-operation is another important challenge, despite the Ombudsman's legal obligation to cooperate with them. The alliance with associations, international organizations, trade unions and all other bodies working to advance the human rights is an international standard that this institution does not comply with to a sufficient extent.

The promotion of human rights and non-discrimination through campaigns and educational activities is another weak spot in the work of the Ombudsman. Most of these activities are initiated and implemented together with international organizations and domestic associations, which is a positive development, but the institution must take the initiative to implement such activities on its own, as an essential part of its mandate. The activities of the

Ombudsman should be implemented continuously, developmentally and in a planned manner, through the drafting and implementation of strategic documents that are currently lacking.





RECOMMENDATIONS

A general recommendation for a reform of the institution may be drawn from the Report of the Monitoring of the Work of the Ombudsman, above all with regards to the institution's legal and institutional framework, as well as with regards to establishing new practices based on the role of the Ombudsman and the international standards for the national human rights institutions. After more than a decade-long existence, the institution is facing serious shortcomings in providing successful and effective protection of human rights, including prevention and protection against discrimination.

Recommendations to advance the legal framework:

- The Ministry of Justice to organize an inclusive process to amend the Law on the Ombudsman, in which the recommendations of civil society organizations, the international organizations and the international standards for the national human rights institutions would be accepted;
- The Parliament to adopt constitutional changes to shorten the term of the Ombudsman to a maximum of 7 to 8 years, without the possibility for re-election, as well as introduce a constitutional guarantee for the independence of the institution;
- The criteria for election of the Ombudsman and his/her deputies to be strictly stipulated in the Law, and to leave space for a possibility for candidates from other social sciences backgrounds to be elected for these offices;
- To stipulate a transparent and inclusive procedure in the Law on Election of the Ombudsman and his/her deputies, with the involvement all the interested and relevant parties, public announcement and discussion of the contenders, direct participation of CSOs in the selection and provision of deadlines for implementation of all parts of the election procedure;
- To ensure financial independence of the institution by setting an appropriate budget based on objective criteria in accordance with the competences, and to establish a statutory limit on the authority of the Ministry of Finance to intervene in the budget proposed by the Ombudsman, only in explicitly listed cases according to objective criteria;
- To stipulate a legal possibility to initiate a misdemeanor procedure in cases when the state administration bodies do not act upon the Ombudsman's recommendations and/or do not

- respond to the requests for information and/or otherwise obstruct his work;
- To provide a legal possibility for the Ombudsman to act as an intervenor in court proceedings and to independently initiate court proceedings and proceedings before other bodies; and
 - To provide a statutory obligation to shift the burden of proof in the proceedings before the Ombudsman in cases of discrimination and cases related to labor.

Recommendations to advance the practices of the Ombudsman:

- The Ombudsman to improve the transparency in the employments in the institution and to strengthen the employment criteria by introducing terms for specific working experience in the area that the vacancy announcement is for, and also to envisage affirmative measures for employment of people from the marginalized communities;
- At least once a month, the Ombudsman to inform the public about the different areas of his/her work and to hold regular press conferences, expert conferences and similar activities;
- The Ombudsman to regularly react publicly to issues related to human rights violations and discrimination, and to initiate proceedings at his/ her own initiative whenever he/she has relevant information;
- The Ombudsman to adopt a new methodology for data collection from the cases he/she is working on. The data from the applications for discrimination to be disaggregated by grounds and areas of discrimination, the applications the proceedings for which have been suspended to be presented separately from the applications that no proceedings have been initiated on, and the report to contain detailed explanations of the decisions made during the processing of the applications;
- The Ombudsman to provide insight into the work on applications while upholding personal data protection;
- The Ombudsman to adopt internal policies for equality and protection against discrimination and harassment in the workplace;
- The Ombudsman should regularly, at least once a year, do research into the various areas and grounds for discrimination, and also conduct

- campaigns for equality and non-discrimination at least once a year;
- The Ombudsman to adopt a strategic plan and similar strategic documents for implementation of the activities and for development of the institution;
 - The Ombudsman to notify the higher-instance body and the Government whenever his/her work is obstructed by delays, non-submission of information or non-implementation of recommendations;
 - The Ombudsman to adopt an internal policy for cooperation with civil society organisations and to appoint adequate staff in charge of informing and cooperating with the civil society;
 - The Ombudsman to adopt and implement a plan for education and further qualification of his/her staff through continuous training in accordance with the needs and trends in human rights law;
 - The Ombudsman to strengthen the capacity of the institution to work with marginalized groups of citizens such as LGBTI, sex workers, people living with HIV, people who use drugs, people with disabilities, women victims of gender-based violence and others, and to sensitize his/her employees about the needs and the violations of the rights occurring in these communities;
 - The Ombudsman to fully undertake the activities to advance equality in different areas, envisaged as his/her obligations in accordance with the national policies for equality and non-discrimination;
 - The Ombudsman to regularly submit reports on the situation with equality and non-discrimination to the international and regional human rights mechanisms; and
 - The Ombudsman to provide full accessibility of the institution's premises to the persons with disabilities, along with the information he/she prints and publishes on the institution's website.

