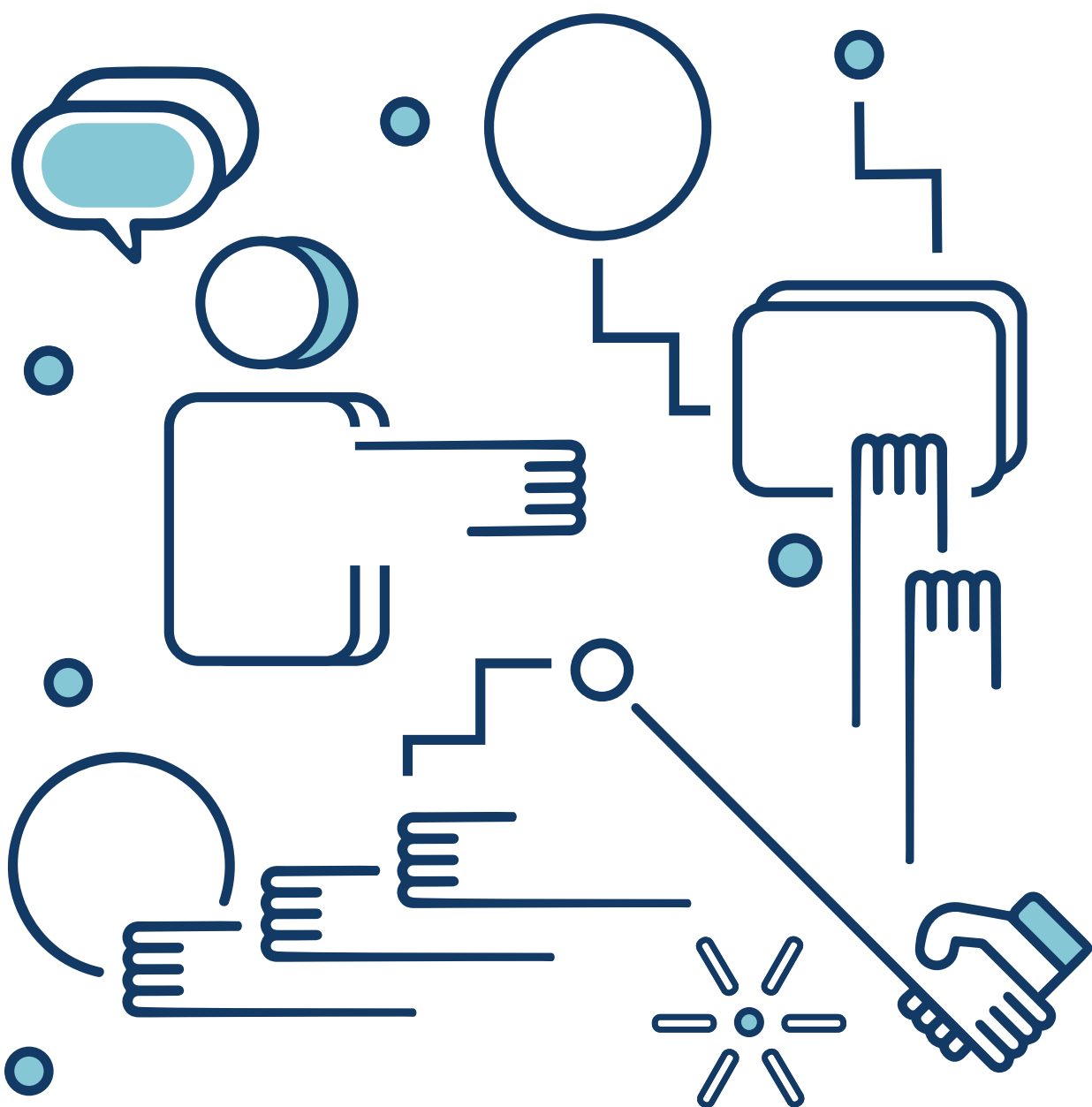


Working Paper

ROLE AND STATUS OF OMBUDSPERSON AND COMMISSIONER FOR THE PROTECTION OF EQUALITY



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This Working Paper was prepared for the conference "Civil Society for Responsible Authority", to be held on February 4th and 5th in Belgrade. Working Paper will provide a basis for participants' dialogue in this area, identification of key problems and the formulation of specific recommendations. Conference conclusions will be used in the preparation of the Final version of this Paper.

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Legal and institutional framework

Without understating the importance of other independent institutions, the citizens are mostly referring to the Ombudsperson and the Commissioner for the Protection of Equality for the purpose of protecting their human rights. On the one hand, this results from the scope of work of these institutions and on the other it stems from the fact that the procedures before these authorities are free-of-charge for the citizens and they are devoid of strict and formal requirements which are by default included in other procedures for exercising the rights' protection. Also, the fact that these authorities are also controlling the work of other state authorities¹ is important for understanding their social and institutional significance in Serbia. Finally, the importance of these institutions is further enhanced by the fact that Serbia is still without a functional system of free legal aid, wherefore many citizens who could seek protection of their rights through courts have no access to justice.

The Ombudsperson has been introduced into the legal system of the Republic of Serbia in 2005, pursuant to the Law on the Ombudsperson,² and the provisions on the Ombudsperson were also included in the 2006 Constitution.³ First Ombudsperson Saša Janković took his office on 24 July 2007,⁴ he was reelected in 2012 and he managed the work of this institution until resigning on 7 February 2017.⁵ Zoran Pašalić, who is the acting Ombudsperson at the time of drafting of this report, was elected on 20 July 2017.⁶ The Constitution of the Republic of Serbia⁷ and the Law on the Ombudsperson stipulate that the Ombudsperson is an independent state authority protecting the rights of citizens and controlling the work of administration authorities. On the other hand, the Commissioner for the Protection of Equality is a

¹ Whereas this issue has been explicitly indicated in the scope of work of the Ombudsperson, in case of the Commissioner for the Protection of Equality there are only indications about the control of compliance with the provisions of the Law on the Prohibition of Discrimination and practical application of antidiscriminatory standards.

² Law on the Ombudsperson, *Official Gazette of RS*, no. 79/05 and 54/07.

³ Constitution of the Republic of Serbia, *Official Gazette of RS*, no. 98/06.

⁴ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2007*, Belgrade, 2008, p.4.

⁵ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2016*, Belgrade, 2017, p.4.

⁶ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2017*, Belgrade, 2018, p. 90.

⁷ See Article 138 of the Constitution of the Republic of Serbia.

more recent authority, set out in the Law on the Prohibition of Discrimination⁸ from 2009. In May 2010, the first elected commissioner was prof. dr Nevena Petrušić, who was at the time dean of the Faculty of Law, University in Niš. After the expiry of her five-year term of office, the National Assembly of the Republic of Serbia elected Brankica Janković to that position and she still performs the function.

The aim of this document is to analyse the position of the Ombudsperson and of the Commissioner for the Protection of Equality in relation to the executive and legislative powers, but also to depict the challenges in the work of these institutions that affect the protection of citizens' rights. Considering that a comprehensive analysis of normative and institutional framework and the attitude of institutions towards independent authorities for human rights protection requires a special research, the solutions presented herein are the most vital ones for the relation between these institutions with the executive and the legislature and for the promotion of the respect for human rights. In this sense, the report prepared by CRTA within the same project can be used as a supplement to this report, considering that certain parts of the former indicate the attitude of the National Assembly and of the Government regarding the independent institutions.

Ensuring the independence of independent authorities for human rights protection

Most standards contained in the key international documents that regulate and promote the standards for ombudsmen and national human rights institutions have been incorporated into the Constitution and the Law on the Ombudsperson.⁹ Ombudsperson's independence has been guaranteed by the Constitution and the Law on the Ombudsperson, however the solutions that may affect the independence and efficiency of the institution are not contained solely in these acts. In accordance with the provisions of the Law on the Prohibition of Discrimination, the Commissioner for the Protection of Equality is an autonomous and specialised state authority which is independent in performing the tasks entrusted to it under the law.

⁸ Law on the Prohibition of Discrimination, Official Gazette of RS, no. 22/09.

⁹ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2015*, pp. 43 and 46. With regard to independence, the Ombudsperson has achieved the highest status with the International Coordinating Committee of National Human Rights Institutions.

Financial independence

Beside the lack of pressure and influence on their work and actions,¹⁰ for the existence of independent authorities for human rights protection it is necessary to ensure financial independence with regard to budget and staff. Judging by the current legal framework, the stated pre-requirements are still not in place. The Ombudsperson indicates the need to strengthen the constitutionally proclaimed independence of the Ombudsperson,¹¹ particularly emphasising the Law amending the Law on the Budget System¹² that stipulates that the Ombudsperson shall be obliged, for every new employment, to request the approval of the National Assembly Committee for Administrative and Budgetary Issues, despite the fact that the Personnel Plan and the budget of the Republic of Serbia have envisaged and ensured the funds for such job. Although it is undeniable that the Ombudsperson is responsible to the Assembly, in a situation where every employment requires prior consent, one begins to wonder whether this solution is rational or it can be interpreted as a form of pressure. Judging by the reports of the Ombudsperson,¹³ the Ombudsperson sees the abovementioned solution as a serious problem to such extent that it represents a threat to independence and effectiveness of the Ombudsperson.

Even if the approval is granted every time, this solution indicates an insufficient level of independence, since it is necessary for independent institutions to be able to select their employees when they are in need of such persons, according to the workload and the available funds.¹⁴ Although the responsible committee has always provided its approval thus far,¹⁵ the point is that the very need to request such

¹⁰ Article 2, para. 1 of the Law on the Ombudsperson stipulates that no person shall have the right to influence the work and actions of the Ombudsperson.

¹¹ Ombudsperson, *Regular Annual Report for 2016*, Belgrade, 2017, p. 46.

¹² Law on the Budget System, Official Gazette of RS, no. 54/2009, 73/2010, 101/2010, 93/2012, 2/2013, 63/13- corr, and 108/13.

¹³ See, for instance, Regular Annual Report of the Ombudsperson for 2016, 44. It is stated that, despite its declared commitment to strengthening the capacity of the Ombudsperson, the National Assembly in practice gives approvals on basis of the Law amending the Law on the Budget System and on basis of the Law Determining the Maximum Number of Employees in the Public Sector, thus causing a serious concern to the extent that the measures represent a threat to independence and efficiency of the Ombudsperson.

¹⁴ Interview with a representative from the professional and academic community of 20 November 2018.

¹⁵ *Ibid.*

approval indicates certain decline of the level of independence. In this sense, the Law on the Budget System substantially affects the Law on the Ombudsperson and the work of the Ombudsperson, as well as on the institution of the Commissioner for the Protection of Equality, which also needs the approval of the responsible committee for the employment of each new person, although the job has been envisaged by the Personnel Plan.

On the other hand, with regard to the fulfilment of the capacities approved for the work of the Ombudsperson's professional service, one can conclude that the situation is similar. According to the regular annual report of the Ombudsperson, "the fulfilment of categorised jobs is 60%, i.e. 36 employees with permanent contracts"¹⁶, whereas "the dynamics and the workload carried out in the Professional service of the Ombudsperson indicate the need for additional strengthening of the human resource capacities".¹⁷ Finally, Strategy of the Commissioner for the Protection of Equality for the period 2016 – 2020 indicates a need for further strengthening of institutional capacities, which is primarily reflected in the need to fill-in the existing jobs, further development and promotion of standards and procedures.¹⁸

With regard to the selection of personnel, the independence is also limited by the Law on Civil Servants¹⁹. Article 156 stipulates that Personnel Plans in state authorities shall be approved by the ministry responsible for financial issues. As a consequence, the Ombudsperson and the Commissioner for the Protection of Equality need the Personnel Plan to be approved by the Ministry of Finance. Although this mechanism for the control of the number of employees in the public sector refers to all state authorities, in case of independent institutions this solution is not in line with their special status and the need to entrust them with full independence relative to the

¹⁶ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2017*, Belgrade, 2018, p. 20.

¹⁷ *Ibid.*

¹⁸ Strategy of the Commissioner for the Protection of Equality, p. 18, available at <http://ravnopravnost.gov.rs/rs/propisi/akti-poverenika/>

¹⁹ Law on Civil Servants, Official Gazette of RS, no. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014 and 94/2017

executive power.²⁰ Independent institutions should be exempted from the obligation to obtain the approval of the Ministry of Finance for the Personnel Plan.²¹

In December 2018, the Law amending the Law on Civil Servants has been adopted,²² however the adopted solution does not introduce any changes of Article 156, nor does it exempt independent institutions from the obligation to submit Personnel Plans to the Ministry of Finance for approval.

Although it is not a law, the Rulebook on the Internal Organisation and Job Classification in the professional service of the Ombudsperson²³ has a large impact on the work of the institution. It has been noted that the Rulebook on Classification prevents efficient work in case of the changed workload of the Ombudsperson.²⁴

In its common position, the European Union underlined the importance of the existence of independent, professionally competent and well-equipped institutions and encouraged the Government to provide an active and continuous public support to the relevant independent institutions for the protection of human rights.²⁵ As a first recommendation in the part of the common position pertaining to fundamental rights, the European Union emphasised that Serbia needs to amend the Law on the Ombudsperson with a view to enhance its independence and to strengthen its institutional capacity.²⁶ The initiative to amend the law has emerged back in 2008. The need for amendment of the law was detected when the initial conditions were created for the work of the Ombudsperson.²⁷ Although this process has lasted for

²⁰ Sigma, *Monitoring report: The Principles of Public Administration*, Serbia, November 2017, available at <http://www.sigmaxweb.org/publications/Monitoring-Report-2017-Serbia.pdf>, 99.

²¹ *Ibid.*

²² Law on Civil Servants, Official Gazette of RS, no. 95/2018.

²³ New Rulebook on Internal Organisation and Job Classification in the Service of the Ombudsperson entered into force on 19 December 2018 (*Official Gazette of RS*, no. 99/2018). It repealed the Rulebook of 22 October 2014.

²⁴ For more information, please see the chapter of the report "Functioning of independent institutions for human rights protection in practice and results of their work"

²⁵ L. Glušac, "Mesto i uloga Zaštitnika građana (Ombudsmana) u procesu pristupanja Republike Srbije Evropskoj uniji" (Place and role of the Ombudsperson in the process of European Union accession of the Republic of Serbia), *The Yearbook of the Faculty of Political Sciences*, Belgrade, June 2017, 11/17, 53-72, available at http://www.fpn.bg.ac.rs/wp-content/uploads/2017/03/FPN-Godisnjak-17-2017-2-konacna_verzija.pdf, p. 62.

²⁶ *Ibid.*

²⁷ Interviews with representatives of professional and academic community of 21 November 2011.

ten years, the necessary changes are still pending. The Report of the Ombudsperson for 2016 notes that no progress has been marked in the process of adoption of the amendments of the Law, despite the adoption of the law concerned is envisaged by the Action Plan for Chapter 23 as one of the activities that Serbia is obliged to realise in the process of European Union accession, its deadline being second quarter of 2016.²⁸

In December 2017, the starting points have been presented as regard the amendments of the Law on the Ombudsperson. In addition to positive solutions that might bring about certain improvement of the Ombudsperson's status, primarily regarding the submission of opinions on proposals of regulations relevant for citizens' rights protection and addressing the initiatives, some of the proposed solutions might have negative consequences in relation to citizens filing complaints.²⁹ With regard to the manner of election and term of office, the starting points for drafting of the amendments do not contain any significant changes. On the other hand, the amendments of the Law on the Prohibition of Discrimination, although announced, have not been prepared yet and it remains to be seen whether the amendment of this regulation would also change the term of office of the Commissioner for Protection of Equality or the legal intervention would exclusively refer to the forms of discrimination and other related issues.³⁰

It is important to note that the issues that may be very important for the functioning and independence of the institution also occur due to the non-conformity with the legal framework. This is why, at the time of preparation of this report i.e. beginning

²⁸ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2016*, Belgrade, 2017, p. 44.

²⁹ These proposals will be analysed in the part outlining the effects and results of the Ombudsperson's work, whereas the provisions relevant for cooperation with the executive and legislative powers will be presented in the part analysing the relation of the Ombudsperson with other authorities and key challenges during its activities.

³⁰ At its 84th session of 16 November 2018, the Social and Economic Council of the Republic of Serbia enacted a positive opinion on the Draft law amending the Law on the Prohibition of Discrimination. The draft law is still not publicly available, but it is assumed that this supports the expectation that this law would be adopted soon. It is particularly noteworthy that it was underlined during the interview with the representative from the professional service of the Commissioner for the Protection of Equality that she, for instance, did not even know what the current text of the amendments of the Law on the Prohibition of Discrimination looked like, from the interview with a representative from the professional service of the Commissioner for the Protection of Equality of 4 December 2018.

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of December 2018, there is no deputy Ombudsperson, although the law stipulates there should be four of them. Terms of office have expired for all of them, whereas the election procedure has not even been instituted.³¹ This procedure should be initiated by the Ombudsperson by proposing the candidates for his deputies to the Assembly.³²

The manner of election of independent institutions

The manner of election of independent institutions may be vital for ensuring or disintegrating their independence. According to the Law on the Ombudsperson, the Ombudsperson is elected by the Assembly by majority votes of all deputies, at the proposal of the committee for constitutional issues, whereas the Law on the Prohibition of Discrimination stipulates the same rule for the election of the Commissioner for the Protection of Equality. Some time ago, the Belgrade Centre for Human Rights made a statement on the occasion of election of the first Ombudsperson “considering that his powers are not extensive and his decisions are not binding, the election by majority deputies attending the session where election would be made instead of absolute or 2/3 majority, might bring into question his authority before administration authorities”.³³ Although the same applies to the election of the Commissioner for the Protection of Equality, the manner of election of holders of these functions has not changed so far.

It is particularly important to note that the election of each holder of function of the Ombudsperson and the Commissioner for the Protection for Equality has so far been accompanied by controversies and protests of a part of civil society organisations. A

³¹ Miloš Janković, former deputy Ombudsperson for the protection of rights of persons deprived of liberty, statement on the forum “Nezavisna i regulatorna tela – Zašto moraju da budu nezavisna?” (*Independent and regulatory authorities – why they need to be independent?*), held on 5 December 2018 and organised by the New Economy, Business Info Group, available at <http://big.co.rs/sr/konferencije/forum-nezavisna-i-regulatorna-tela-za%C5%A1to-moraju-da-budu-nezavisna>, 5 December 2018.

³² See Art. 6, para. 4 of the Law on the Ombudsperson.

³³ Belgrade Centre for Human Rights, *Stanje ljudskih prava u Srbiji 2006 (The state of human rights in Serbia 2006)*, pg. 40. As further stated, for similar opinion please see e.g. “Joint Opinion on the Draft Law on the Ombudsperson of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human rights of the Council of Europe, Opinion no. 318/2004, CDL-AD (2004)041, of 6 December 2004. See also the interview with the representatives of the non-government organisations of 23 November 2018.

group of civil society organisations associated in Coalition against Discrimination warned that certain conditions prescribed by the Law on the Prohibition of Discrimination were not respected during the election of the first commissioner in 2010. This group of organisations pointed out that the fact that the retention of the position of full-time professor at the Law Faculty in Niš along with the function of the Commissioner represented a violation of the Law on the Prohibition of Discrimination, which explicitly prohibits that the person elected in this function performs other professional activity.³⁴ The organisations composing the Coalition against Discrimination and the Coalition for Access to Justice also made remarks on the manner of electing the second commissioner in 2015. In the report addressed to the public, the member organisations of these two coalitions indicated that this decision of the committee for constitutional issues proposing to the National Assembly the candidate for the Commissioner and the *curriculum vitae* have not been timely published, wherefore it was impossible to establish whether she fulfilled the prescribed requirements³⁵, and that the procedure of election of the Commissioner for the Protection of Equality “retained its political controversy”.³⁶

Alike during the election of the Commissioner for the Protection of Equality, the same case was with the election of the Ombudsperson. During the election of the first Ombudsperson, Saša Janković, civil society organisations warned that it was “inappropriate in a society striving to be democratic that the (only!) candidate is [...] elected [...] without debate and wider support of professional circles and the public”.³⁷ On the other hand, with reference to the election of Zoran Pašalić as Ombudsperson it is stated that “the candidate proposed by the ruling coalition has been elected, the judge of misdemeanour court in Belgrade who has no experience

³⁴ Coalition against Discrimination, *Request to the Commissioner for the Protection of Equality*, 29 July 2010, available at <http://chris-network.org/2010/07/zahtev-poverenici-za-zastitu-ravnopravnosti/>.

³⁵ Coalition against Discrimination and Coalition for Access to Justice: Release of the civil society organisations with regard to the proposal of the decision on election of the new Commissioner for the Protection of Equality, 29 April 2015, available at <https://cups.rs/2015/04/29/saopstenje-organizacija-civilnog-drustva-u-vezi-sa-predlogom-odluke-o-izboru-nove-poverenice-za-zastitu-ravnopravnosti/>.

³⁶ *Ibid.*

³⁷ Release of a group of non-government organisations relating to the election of candidate for the first Ombudsperson, *Urušenje kredibiliteta institucije zaštitnika građana (Disintegration of credibility of the Ombudsperson institution)*, 4 April 2006, available at <http://www.bgcentar.org.rs/urusenje-kredibiliteta-institucije-zastitnika-gradana/>.

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in the protection of human rights, despite the fact that more than ninety civil society organisations and a number of opposition parties supported another candidate who was deputy Ombudsperson for years and was very well acquainted with the work of this important independent institution”.³⁸

When it comes to independent institutions, the position of such institutions in the society is largely dependent upon the position, reputation and integrity of their leaders and the capacity of the latter to present their work to the public. It is therefore important that such persons are elected through a transparent procedure, which is appropriate for ensuring that the best persons are elected and that an election mechanism is designed so as to make such persons independent from the executive power in the first place. Current legal framework should be enhanced by standards that need to be respected during the election of independent authorities, which can contribute to greater independence and authority of the institution and which primarily implies the necessity of dialogue prior to election, a larger number of candidates and openness of the very process where the civil society organisations could also present their opinions on the candidates.³⁹

Except for the manner of election, what could also contribute to greater independence and quality of work of independent institutions for the protection of human rights is the stipulation of a longer term of office, without the re-election option. According to current solutions, both the Ombudsperson and the Commissioner for the Protection of Equality are elected for a five-year term, whereas the same person may be elected to this function maximum two times in a row. However, the solution envisaging a longer term of office may ensure greater independence and efficiency and also less manoeuvring with a view to increase the chances for re-election. In addition, the proposal for a longer term of office would be a more rational solution for avoiding frequent personnel and other changes within the institutions, which go along with the election of new office-holders and

³⁸ Belgrade Centre for Human Rights, *Stanje ljudskih prava u Srbiji 2017* (The state of human rights in Serbia 2017), pp. 29 - 30.

³⁹ Miloš Janković, former deputy Ombudsperson for the rights of persons deprived of liberty, speech at the forum “*Nezavisna i regulatorna tela – Zašto moraju da budu nezavisna?*” (“*Independent and regulatory authorities – why they need to be independent?*”), 5 December 2018.

which slow down the work of the professional service and reduce its efficiency.⁴⁰ However, this solution would also need to imply strict compliance with the legal requirements for election of holders of functions of independent authorities for the protection of human rights, considering that the election of inadequate candidates or those who do not fulfil the legally-prescribed conditions and yet have a longer term of office, would cause greater damage.⁴¹ With regard to the term of office, it is necessary to prescribe that the term of office would last long enough, if adequately planned, for something to be changed.⁴² This could mean minimum six and maximum nine years.⁴³ In any case, if these changes would be applied, the term of office should last longer than the composition of the Assembly electing the independent authorities.

Functioning of independent institutions for the protection of human rights in practice and the results of their work

The set of responsibilities of the Ombudsperson and the Commissioner for the Protection of Equality, if applied properly, should be quite sufficient for these institutions to be able to make a significant progress in the protection of citizens, prevention of discrimination and improvement of work of public administration. The Ombudsperson controls the respect for the citizens' rights, upon citizens' complaints or at its own initiative,⁴⁴ it can issue special reports, it is authorised to submit proposals to the Constitutional Court for the assessment of constitutionality and legality of general acts,⁴⁵ it is entitled to propose the laws within its competence⁴⁶.

⁴⁰ Interview with representatives of professional and academic community of 22 November 2018.

⁴¹ *Ibid.*

⁴² Interview with representatives of professional and academic community of 20 November 2018.

⁴³ Interviews with representatives of professional and academic community of 20, 21 and 24 November 2018.

⁴⁴ Ombudsperson, upon citizens' complaint or upon own initiative, controls the respect for the rights of citizens, establishes the infringements done by the acts, actions or non-action of the administration authorities, in case of violation of the republic laws, other regulations and general acts, Article 17, para. 1 of the Law on the Ombudsperson. For more detail on the procedure upon complaint, see Art. 24-32 of the Law on the Ombudsperson.

⁴⁵ Article 19 of the Law on the Ombudsperson.

⁴⁶ Article 18, para. 1 of the Law on the Ombudsperson.

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The Ombudsperson also performs the activities of the National Mechanism to Prevent Torture.⁴⁷ On the other hand, the task of the Commissioner for the Protection of Equality is to prevent all types, forms and cases of discrimination, to protect the equality of natural and legal persons in all segments of social relations, to supervise the application of regulations on the prohibition of discrimination, as well as to promote the realisation and protection of equality.⁴⁸

Acting upon complaints

Acting upon complaints is one of the main reasons why these institutions have been established and their primary responsibility. The Ombudsperson has so far addressed more than 10,000 recommendations and most of the recommendations have been implemented.⁴⁹ The stated number of recommendations and relatively high degree of their implementation represent significant success of the institution. However, the question which is imminently imposed is whether acting upon complaints leads to systemic change of practice. Various examples support the assumption that there are no systemic changes through complaints, that irregularities are eliminated and it is acted according to recommendation in individual cases, however the same negative practice is maintained in other similar cases. Although the same regulation is applied and the circumstances are the same, wherefore a general rule for future cases should result from the recommendation, although there is an impression that this is not happening.⁵⁰

The initiatives for amendment of the Law on the Ombudsperson were aimed, among other, to relieve the Ombudsperson of the burden in terms of excessive complaints. There was also an attempt to introduce, through amendments of the Law on the

⁴⁷ The Law amending the Law on ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Official Gazette of RS – International agreements*, no. 7/2011.

⁴⁸ For more detail see <http://ravnopravnost.gov.rs>.

⁴⁹ Business Info Group, “Nezavisna i regulatorna tela moraju da budu nezavisna” (Independent and regulatory authorities must be independent), available at <http://big.co.rs/sr/konferencije/forum-nezavisna-i-regulatorna-tela-za%C5%A1to-moraju-da-budu-nezavisna>, 5 December 2018.

⁵⁰ Interview with representatives of professional and academic community of 21 November 2018. See also YUCOM – Lawyers’ Committee for Human Rights and Belgrade Centre for Human Rights, *Ombudsperson – Recommendations in practice*, Belgrade, 2013, available at [http://www.brrln.org/uploads/documents/74/OMBUDSMAN%20-%20YUCOM%20\[Srb\].pdf](http://www.brrln.org/uploads/documents/74/OMBUDSMAN%20-%20YUCOM%20[Srb].pdf), pp. 51 and 63.

Ombudsperson, the obligation for all authorities to establish a system for receiving and reviewing the complaints within the existing resources. The system would be easily accessible and free-of-charge for the citizens and its functioning would reflect the Ombudsperson's practice. The application of this novelty would ensure the quickest and most efficient reaction to majority of citizens' complaints – at their origin, whereas the republic Ombudsperson would deal with the indeed problematic cases. "Otherwise, the professional service of the Ombudsperson would have to be at least a hundred times larger in order to be able to quickly and fully, throughout the territory of the Republic, examine each individual statement of the citizens with regard to irregularities and illegalities to the detriment of their rights."^{51 52}

The overload with complaints can cause less efficient acting upon them, which would certainly affect the citizens' estimate whether their addressing the Ombudsperson can help them eliminate the irregularities in the authorities' work. Representatives of civil society organisations pointed at the examples of complaints the procedures whereon have not been finalised even after several years. "In one case, it took eight months for the Ombudsperson to inform us that the procedure has been instituted, and the procedure has never been finalised although the complaint dates back in 2011. With regard to another proceedings from the same year, it was only five months later that we received the notice that the procedure before the Ombudsperson had been instituted. We requested most urgent action and indicated that the procedure on the complaint had lasted for five years, that the applicant had chronic condition and that the procedure was of existential importance for him. At that time, the procedure before the Ombudsperson had already lasted for two and a half years and its finalisation is still pending."^{53 54} On the other hand, there are examples where the procedures have been finalised, but the applicants deem that

⁵¹ Public hearing on the topic: Role of the Ombudsperson and the Commissioner for Information of Public Importance and Personal Data Protection in the protection and promotion of human rights and considering the need to improve legal framework, Informator, Statement of Saša Janković, Ombudsperson, 18 March 2013.

⁵² These changes never occurred. In 2012, the Proposal for the law amending the Law on the Ombudsperson was submitted to the Assembly for adoption, but following the election of the new government it was withdrawn from the procedure.

⁵³ Interview with representatives of civil society organisations of 21 November 2018.

⁵⁴ Researchers are also in possession of case files where the notice of the Ombudsperson about the institution of procedure upon complaint had been received more than eight months after the complaint had been filed, whereas the procedure was not finalised for more than two years.

they have not been finalised in a proper manner. “For instance, it took three years to get the act of the Ombudsperson where he found that there was no infringement of good governance principle, although only the procedure upon complaint lasted for a year and a half in this case. However, there were also good recommendations with a wider significance. One of them referred to the woman who gave birth without the ID card and health card. This was a good recommendation, both comprehensive and detailed and it covered the issue, so that we could use it when similar cases happened to our beneficiaries.”⁵⁵ Bearing this in mind, it is clear that the solution which would impose time limit for the duration of procedure before the Commissioner for the Protection of Equality⁵⁶ is a solution that would provide the citizens with more efficient protection of their rights, and it would thus prevent them from months-long waiting solely for the institution of procedure upon their complaint. On the other hand, this issue is closely connected with the internal organisation of work in these institutions, as well as with their capacities and the filled-in jobs classification.⁵⁷

The impact of the Rulebook on Job Classification and Internal Organisation on the efficiency of the Ombudsperson becomes more evident here. “For an individual who files a complaint, a year is too long. However, the number of complaints that can be processed by the persons working on complaints during one day, one month and one week is also limited. The considerations about independence and efficiency are connected”.⁵⁸ The very Rulebook on the Job Classification would have to be more flexible and revised at times, upon the request of the Ombudsperson or according to pre-defined rules, so that it would represent a technical issue depending on the scope of work.⁵⁹

It is proved in practice that the procedures upon complaints filed to the Ombudsperson can last immensely. This is why it is questionable whether the acting of the Ombudsperson could or should be limited by certain deadlines. This question

⁵⁵ Interview with representatives of civil society organisations of 21 November 2018. For more information, see the recommendation of the Ombudsperson no. 416 of 9 January 2015, available at https://www.ombudsman.rs/attachments/3645_preporuka%20KBC%20Zemun.doc.

⁵⁵ Art. 39 of the Law on Prohibition of Discrimination.

⁵⁶ Art. 39 of the Law on Prohibition of Discrimination.

⁵⁷ Interview with representative of professional and academic community of 21 November 2018.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

can also be of importance for considering the Ombudsperson's independence because, hypothetically, the Ombudsperson could avoid the acting on sensitive issues by failing to state the opinion thereon in a reasonable time period.

From the aspect of applicants, the sole advantage of Ombudsperson not being bound by time limits is the fact that he can comprehensively establish the state of facts. "What is negative is the fact that we complain about the unreasonably long procedures before another authority, and then we wait for equal or longer period for the Ombudsperson to act upon our complaint. The citizens would have more benefit if there were certain deadlines. They could anticipate quicker protection".⁶⁰

⁶¹ The interlocutors of our researchers during the preparation of this report also stated that "a general rule might be introduced with regard to the deadline exceptions, when it is established that new authorities need to be consulted. There were cases which were finalised after two years, which cannot be justified by the need for comprehensiveness. Can you imagine what two years mean for the person whose rights have been violated?"⁶²

However, the introduction of deadlines in a situation where there is no sufficient organisational, financial and human resource support could hardly lead to positive changes in the Ombudsperson's acting. Deadlines would not be respected, which might trigger other issues which would imply the unacceptable interference with the work of the Ombudsperson. If there was a flexible system where the increase of complaints would lead to the Ombudsperson being able to engage a number of part-time personnel in accordance with the workload and without excessive formalities, it would be possible to set a deadline for acting upon complaints. With regard to the deadline for the Commissioner for the Protection of Equality to act upon complaints, the fact is that this authority is less burdened with the number of complaints, its mandate is narrower since it only deals with discrimination issues and not all issues referring to the control of legality and regularity of work of public administration authorities, wherefore the complaints represent a less burden for the work of this institution.

One of the unfavourable solutions in the starting points for preparation of the Draft law amending the Law on the Ombudsperson refers to the suspension of procedures

⁶⁰ Interview with representatives of civil society organisations of 21 November 2018.

⁶¹ Interview with representatives of civil society organisations of 21 November 2018.

⁶² Interview with representative of professional community of 24 November 2018.

upon citizens' complaints. It is envisaged that, even without the deposition of the citizen who filed complaint, the Ombudsperson would suspend the procedure of control when they estimate that the authority subject to control upon the complaint had eliminated the deficiencies. Nevertheless, such solution seems to be contradictory to the purpose of the institution and it would be more appropriate if the citizens, whose protection is the purpose of procedures, would state their opinion whether they are satisfied or they require the adoption of an act that would establish whether there was any deficiency in the work of the administrative authority concerned. The establishment whether an authority acted unlawfully or if good governance principle was infringed can also have a preventive function and it can diminish the chances for reoccurrence of such omission. The establishment of the omission might contribute to the change of practice of the authority concerned, instead of individual elimination of shortcomings after complaining to the Ombudsperson.

Special reports, initiatives for amendments of regulations and for assessment of constitutionality and legality

From the aspect of the need for protection of specific vulnerable groups, special reports and initiatives for legal amendments of the Ombudsperson and the Commissioner for the Protection of Equality can be of particular importance. This is the very segment where the Ombudsperson may have achieved most significant results or at least prepared grounds for other activities that led to such results.

One of these activities was the research regarding the monitoring of the Strategy for the improvement of the status of Roma from 2009 to 2015, which demonstrated that only two of all of the envisaged measures made sense and it resulted in a special report on the implementation of the Strategy.⁶³ Another example of special reports is the recent Report of the Ombudsperson on the reproductive health of Roma women from April 2017⁶⁴, which probably contains more specific information about

⁶³ Ombudsperson, Report on the implementation of the Strategy for improvement of the position of Roma with recommendations, available at http://www.fpn.bg.ac.rs/wp-content/uploads/2017/03/FPN-Godisnjak-17-2017-2-konacna_verzija.pdf.

⁶⁴ Ombudsperson, Special report of the Ombudsperson on reproductive health of the Roma women with recommendations, Belgrade, April 2017, available at <https://www.ombudsman.rs/attachments/article/5536/Poseban%20izvestaj%20ZG%20Rep%20zdravlje%20Romkinja%2011.pdf>.

the discrimination against Roma women than the report of the Commissioner for the Protection of Equality for the same year, therefore it is vital for this highly vulnerable group of women. The status of women was also addressed by the Ombudsperson in the report “Participation of women at decision-making positions, status and activities of local mechanisms for gender equality in local self-government units in Serbia”.⁶⁵ The Ombudsperson also prepared a special report on trainings relating to protection of women against violence.⁶⁶ With reference to 14 cases of murdered women, the Ombudsperson carried out control procedures and, in as many as 12 cases, it established shortcomings in the work of responsible authorities and services. For the purpose of better protection of women against violence, the Ombudsperson issued 45 systemic recommendations for responsible services’ acting in cases of violence against women.⁶⁷ Possibility of initiating proceedings before the Constitutional Court for the assessment of constitutionality or legality of general acts was used by the Ombudsperson for the purpose of promoting gender equality, in the proposal for the assessment of constitutionality of provisions of the Law on establishing the maximum number of employees in public sector, filed together with the Commissioner for the Protection of Legality, indicating that such measures affected women to a great extent.⁶⁸

On the other hand, the analysis of special reports prepared by the Commissioner for the Protection of Equality⁶⁹ showed that a different approach was assumed in regard

⁶⁵ The report is available at https://ombudsman.rs/attachments/article/5901/Zastitnik%20gradjan_srpski.pdf.

⁶⁶ Special report of the Ombudsperson for acquiring and promoting knowledge and competences for prevention, suppression and protection of women against family violence and violence in partner relations, February 2016, available at <https://ombudsman.rs/attachments/article/4613/Poseban%20izve%C5%A1taj%20za%C5%A1titnika%20gra%C4%91ana%20o%20obukama%20SRPSKI.pdf>.

⁶⁷ The established and the recommendations available at <https://www.ombudsman.rs/index.php/2012-02-07-14-03-33/4833-2016-07-28-08-59-32>.

⁶⁸ Proposal for the assessment of constitutionality available at https://www.ombudsman.rs/attachments/4347_predlog%20za%20ocenu%20ustavnosti.pdf. The detailed overview of measures taken for the purpose of promoting gender equality, see the submission of the Ombudsperson to the Committee on the Elimination of Discrimination against Women, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SRB/INT_CEDAW_IFL_SRB_31493_E.pdf.

⁶⁹ There are four special reports – on accessibility of buildings of public authorities to persons with disability, from 2013; on discrimination against persons with disability in Serbia, 2013;

to special reports of this independent authority for protection of human rights compared to the special reports of the Ombudsperson. While the Ombudsperson's reports mostly deal with the issues insufficiently explored or somewhat specific within a wider corpus of law, the special reports of the Commissioner for the Protection of Equality, except for one report, dealt with discrimination against special categories of population.⁷⁰

The Ombudsperson's engagement in the issue of legally invisible persons can probably be considered as one of the best examples of potential that the preparation of special reports, and initiatives for the amendments of regulations have.

Activities of the Ombudsperson relating to resolution of the issue of legally invisible persons and inhabitants of informal settlements – examples of good practice

For the inadequate legal framework with regard to entry into registries, thousands of persons, mostly those of Roma nationality, could not be entered in registries, wherefore they were deprived of access to almost all fundamental human rights. The procedures of subsequent registration of such persons were without the outlook of success, time-consuming and essentially contrary to the principles of good governance. After a series of complaints filed on behalf of legally invisible persons and information of the non-government organisations about their problems, the Ombudsperson released a special research on their status. It was followed by a series of other activities of the Ombudsperson aimed at resolving this problem, starting with mediation with international organisations, public administration and non-government organisations, via participation in drafting the proposal for the amendment of relevant legislation, through to public hearing which resulted in the initiative to amend the Law on Non-Contentious Procedure. The amendments of this law stipulate a special, simplified procedure for establishing the time and place of birth, which refers to the legally invisible persons who did not manage to perform registration under the then-valid regulations and administrative procedure.⁷¹ Only

special reports on discrimination against children, November 2013; report on the discrimination against women, 2015.

⁷⁰ It remains to be seen whether the election of the new Commissioner would change the approach to preparation and topics addressed in special reports of this authority, considering that the latest special report was prepared in 2015.

⁷¹ The Law amending the Law on Non-Contentious Procedure, *Official Gazette of RS*, no. 85/2012.

during the first year of application of the law, the time and place of birth was established for 150 persons who had not been able to register prior to that. The Ombudsman's activities relating to the solution of their problem continued after that as well, through trainings for implementation of the newly-adopted regulations.

The Ombudsperson also influenced the changes of the text of the Draft Law on Permanent and Temporary Residence of Citizens, which were aimed at enabling the persons living in informal settlements and without any legal basis for residence to register their residence as a prerequisite for exercising the guaranteed human rights. After the adoption of the Law on Permanent and Temporary Residence, the Ombudsperson continued to monitor the implementation of the law and to insist on adoption or amendment of by-laws necessary for application of new solutions pertaining to persons without legal bases for residence.

Activities of the Ombudsperson for resolution of problems of the legally invisible persons and persons without legal bases for residence represented a complex process which significantly promoted the access to rights for the group of extremely vulnerable people, who had no identity and who were at risk of statelessness.⁷² These are the activities that should be promoted by the Ombudsperson.

Relation of the Ombudsperson and the Commissioner for the Protection of Equality with other institutions

Relation of the Ombudsperson and the Commissioner for the Protection of Equality with the National Assembly

The Ombudsperson and the Commissioner for the Protection of Equality are mostly connected with the National Assembly, which elects and dissolves them and to which they are responsible for their work. These independent institutions submit regular annual reports to the Assembly,⁷³ and they can also submit special reports.⁷⁴ The

⁷² Interview with representative of professional and academic community of 21 November 2018.

⁷³ Ombudsperson submits to the Assembly regular annual report indicating the information about the activities carried out in the previous year, the information about the observed shortcomings in the work of public administration, as well as proposals for the improvement of citizens' status with regard to government authorities. See Article 33, para. 1-2 of the Law on the Ombudsperson.

⁷⁴ See Article 33, para. 3 of the Law on the Ombudsperson.

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Ombudsperson can also propose the laws from its competence and submit the initiative for amending or supplementing the laws or other regulations and general acts of relevance for the protection and enforcement of citizens' rights. The Commissioner for the Protection of Equality monitors the implementation of laws and other regulations for the purpose of implementing and promoting the protection against discrimination and issues opinions on provisions of draft laws and other regulations pertaining to the prohibition of discrimination.

The attitude to these reports and legislative initiatives of the Ombudsperson and the Commissioner for the Protection of Equality is one of the indicators for the status of these authorities and the attitude of legislative and executive powers towards the problems faced by the citizens in exercising their rights. The reports of these independent authorities have not been considered in plenum for several years now.⁷⁵

The relation between the Assembly and the independent control authorities is one of the regular topics of the Stabilisation and Association Committee. Special attention is paid to the review of the annual reports of the Ombudsperson in the Assembly and it is concluded that this procedure is characterised by extreme inconsistency and frequent infringements of positive regulations, notably of the Law on the Ombudsperson and the Rules of Procedure of the National Assembly.⁷⁶

According to the interlocutors of the researchers during the preparation of this report, "the reports are discussed only within the committee, which is not good. This has culminated during the second mandate of Saša Janković"⁷⁷ and escalated to confrontation.⁷⁸ It is obvious that during the last two years of the term of office of Saša Janković the relation between the Assembly and the Ombudsperson was burdened by political relations and it was not based on the purposes wherefore the

⁷⁵ Ombudsperson, Regular Annual Report of the Ombudsperson for 2017, 4 and 95.

⁷⁶ L. Glušac, Mesto i uloga Zaštitnika građana (Ombudsmana) u procesu pristupanja Republike Srbije Evropskoj uniji (Place and role of the Ombudsperson in the process of European Union accession of the Republic of Serbia), , The Yearbook of the Faculty of Political Sciences, Belgrade, June 2017, 11/17, 53-72, available at http://www.fpn.bg.ac.rs/wp-content/uploads/2017/03/FPN-Godisnjak-17-2017-2-konacna_verzija.pdf, p. 60.

⁷⁷ Interview with representative of professional and academic community of 21 November 2018.

⁷⁸ Interview with representatives of civil society organisations of 21 November 2018.

Ombudsperson and the Assembly were elected⁷⁹. At the same time, underneath this layer clearly visible during the peak crisis, this authority underlined in its public appearances that the relation with the institutions whose legality and work adequacy were subject to the control of the Ombudsperson was neither bad nor inefficient.⁸⁰

The fact that the National Assembly is not considering in plenum the reports dealing with the problems that the citizens are faced with, regardless of who indicates such problems, sends a clear message to the citizens that their problems are not too important. Considering that these problems are underlined by the authority in charge of them, it becomes quite clear that there are problems in the work of the National Assembly and its relation with the independent state authorities.⁸¹

Consideration of the Ombudsperson's report could contribute to timely detection of problems faced by the citizens and to timely find solutions for them. Without such consideration, "the report will not be read, it will not be even for a day in the focus of 250 the deputies who might get a good idea for changing some piece of legislation. (...) We may miss the opportunity to eliminate a problem while it is still at the level of 10 complaints per year, instead we will strive to resolve it when it reaches 200,000 complaints".⁸²

There is a similar situation with special reports. On the Human Rights Day in 2013, the Ombudsperson submitted to the National Assembly the Special Report on the implementation of the Strategy for improvement of the position of Roma.⁸³ The National Assembly never stated its position thereon, nor has it discussed it.

Instead of being one of the key protectors of the institution of Ombudsperson and an ally in protection and promotion of human rights, the actions of the Assembly

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Interview with representative of professional and academic community of 21 November 2018.

⁸² Interview with representative of professional and academic community of 21 November 2018.

⁸³ Ombudsperson, *Regular Annual Report of the Ombudsperson for 2013*, Belgrade, 2014, p. 53.

hamper the work of the Ombudsperson at times.⁸⁴ In the regular annual report of the Ombudsperson for 2015, it was noted that the generally good cooperation with the Security Services Control Committee of the National Assembly was impeded in January 2015 when the session scheduled for checking the statements on irregularities in the work of Military Security Agency turned into a campaign against the Ombudsperson due to his efforts to investigate the statements on irregularities in the work of the Agency.⁸⁵ The Committee against Torture expressed its concern for the attempt of the Security Services Control Committee to deny the Ombudsperson's competence for acting upon complaints in cases where criminal proceedings have been instituted.⁸⁶

During the analysis of the relation between the Assembly and independent institutions, it is also useful to reflect on the debate in the National Assembly on regular annual reports of independent institutions for 2013 and 2014, when the Commissioner for the Protection of Equality, Ombudsperson and Commissioner for Information of Public Importance and Personal Data Protection left the session because the chairman did not allow the Commissioner for Information of Public Importance and Personal Data Protection to take the floor.⁸⁷ The Assembly issued a formal apology after the representatives of independent institutions had left the session as a sign of protest, and the session was resumed the next day, in the presence of representatives of independent institutions.⁸⁸ In addition, the speaker of the Assembly neither suspended nor penalised inappropriate behaviour and insults addressed by some deputies to the Ombudsperson and the Commissioner for the Protection of Equality.⁸⁹

An important power of the Ombudsperson and of the Commissioner for the Protection of Equality are the right to propose laws from their competence and the

⁸⁴ L. Glusac, Assessing the relationship between parliament and ombudsperson: evidence from Serbia (2007-2016), *The International Journal of Human Rights*, 30 August 2018, available at: <https://www.tandfonline.com/doi/abs/10.1080/13642987.2018.1513400>.

⁸⁵ Ombudsperson, Regular Annual Report of the Ombudsperson for 2015, p. 15-17 and p. 270.

⁸⁶ *Ibid*, 17.

⁸⁷ T. Tepavac, *Independent authorities and National Assembly of the Republic of Serbia: substantive or symbolic cooperation?*, European Movement in Serbia, Research forum, no. 2/2015, October 2015, available at http://arhiva.emins.org/uploads/useruploads/forum-it/06aPB-Nezavisna_tela.pdf, p. 6.

⁸⁸ *Ibid*, remark no. 10.

⁸⁹ *Ibid*, p. 6.

possibility to submit initiatives to the Government and the Assembly for amendments or supplements to regulations and general acts. A good example for these activities is the initiative for supplementing the Law on Non-Contentious Procedure, which resulted in the amendment of the Law and stipulation of the procedure for establishing the time and place of birth for legally invisible persons who could not be entered into the registries.

With regard to this power, it is important to underline the statistics pertaining to legislative and other initiatives addressed by the Ombudsperson to competent authorities. The statistical information from the website of the Ombudsperson indicate that 246 legal and other initiatives have been submitted since the establishment of this institution.⁹⁰ This number includes the situations where the Ombudsperson submitted the amendments to the relevant committee of the National Assembly or submits the amendments directly to the National Assembly. In addition, this number also includes the situation where the Ombudsperson proposed the adoption of law to the National Assembly, as well as initiatives for adoption of amendment of other regulations which are submitted to the National Assembly, Government or line ministries. Finally, this number also covers the proposals to the Constitutional Court for assessment of constitutionality and legality of general legal acts.

It is further reported that legal and other initiatives of the Ombudsperson have been accepted 55 times so far. This number includes both the accepted amendments to regulations in legislative procedure and the accepted initiatives for adoption or amendment of regulations, and proposals to the Constitutional Court for assessment of constitutionality and legality of general legal acts. So far, 55 such initiatives have been accepted, whereas 152 initiatives have been rejected and 39 legal and other initiatives are still in the procedure.

On the other hand, the Commissioner for the Protection of Equality has somewhat different powers in this regard. Namely, Art. 33, item 7 of the Law on Prohibition of Discrimination stipulates that the Commissioner for the Protection of Equality shall be authorised to monitor the implementation of laws and other regulations, institute the adoption of amendment of regulations for implementation and promotion of protection against discrimination and to provide opinions on provisions of draft laws and other draft regulations that pertain to the prohibition of discrimination. Bearing

⁹⁰ Ombudsperson, Statistics, available at: <https://ombudsman.rs/index.php/2013-01-14-14-36-04>

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in mind its powers, the Commissioner for the Protection of Equality used this right from its competence more rarely. In addition, most cases referred to the opinions on provisions of draft laws or working versions of regulations in plan for adoption. Considering that the statistical summaries of application of these powers of the Commissioner for the Protection of Equality changed over the years in the reports on work of this institution, it is not easy to establish the exact number of initiatives for legal regulation of certain issues, opinions on working versions of regulations, opinions on draft laws or initiatives for assessment of constitutionality of general acts submitted by this independent authority for the protection of human rights.

With regard to the proposal of laws and other regulations from their competence, there is an impression that it is necessary to further strengthen the competences of the Ombudsperson and the Commissioner for the Protection of Equality, as well as to improve communication with other bodies authorised to adopt regulations. This was also underlined in the interview with the representative of professional service of the Commissioner for the Protection of Equality, who stated that this authority sometimes provided its proposals or opinions which are not accepted and added that it is necessary to further enhance this cooperation.⁹¹ This leads to the adoption of laws which are not in conformity with the human rights standards, and to subsequent problems in their implementation, due to failure to accept the proposals of independent authorities. The most recent case was the adoption of the Law on Financial Support for Families with Children⁹², the adoption whereof was accompanied by numerous protests and submission of several initiatives for the assessment of constitutionality of certain provisions of this law. Due to the failure to accept the proposals issued by the Commissioner for the Protection of Equality during performance of its authorities, the adoption of the law was followed by the submission of proposal for the assessment of constitutionality of certain provisions of this law.⁹³ Quite certainly, this regulation would not even be adopted with faulty and discriminatory provisions if the opinion of the Commissioner on the proposed

⁹¹ Interview with representative of professional service of the Commissioner for the Protection of Equality of 4 December 2018.

⁹² Law on Financial Support for Families with Children, *Official Gazette of RS* no. 113/2017 and 50/2018.

⁹³ Initiative for amendment of the Law on Financial Support for Families with Children and Proposal for the assessment of constitutionality and legality of the Law on Financial Support for Families with Children, available at <http://ravnopravnost.gov.rs/rs/misljenja-i-preporuke-lat/page/4/>.

legal text was accepted. The consequences are such that the provisions currently applied have been contested before the Constitutional Court and their application infringes the guarantees for non-discrimination and respect for human rights guaranteed by the Constitution and ratified international treaties. Another problem is the fact that certain authorised proposers do not even submit for opinion the regulations that are subject to prior opinion of the Commissioner for the Protection of Equality. It is underlined in the Report on the work of the Commissioner for 2016 that the Law on Prevention of Domestic Violence has not been submitted to this authority for opinion.⁹⁴ Although the very Commissioner issued recommendations that this law needs to be amended, this regulation was not submitted for her opinion. Finally, it is relevant to note that there are no information as to the outcome of procedures where the opinion of the Commissioner for the Protection of Equality was issued and, in this sense, data collection should be improved, as well as further analysis of results of work of this independent authority regarding this issue.

Relation of the Ombudsperson and the Commissioner for the Protection of Equality with the executive authorities

Communication of the Ombudsperson with the executive authorities is primarily realised through procedures of control of legality and proper work of public administration authorities. On the other hand, according to its competences, the Commissioner for the Protection of Equality also acts upon complaints referring to discrimination by natural and legal persons and, in this sense, the main communication of this institutions with executive authorities is not necessarily connected with the procedures upon complaints.

Albeit rarely, certain authorities in the control procedure carried out by the Ombudsperson fail to comply with their legally prescribed obligation to cooperate, they avoid it and hamper the control procedure in different ways.⁹⁵ The main function of the Ombudsperson – to control legality and proper work of public administration authorities – cannot be achieved if a public administration authority

⁹⁴ Interview with representative from professional service of the Commissioner for the Protection of Equality of 4 December 2018.

⁹⁵ Public hearing on the topic: Role of the Ombudsperson and Commissioner for Information of Public Importance and Personal Data Protection in the protection and promotion of human rights and consideration of the need to promote legal framework, Informator, statement of Saša Janković, Ombudsperson, 18 March 2013, *op.cit.*

has the possibility to hamper the control procedure and if the Ombudsperson has no mechanism to establish the fact relevant for establishing the deficiencies.⁹⁶

Although the situations where the controlled authorities explicitly deny cooperation or fail to respond to the acts of the Ombudsperson are rare, there are other forms of action or non-action which complicate the control procedure, such as delays in submission of written statement, failure to respond to one or several questions, intended wrong interpretation of questions posed by the Ombudsperson or failure of representatives of public administration authorities to attend the scheduled meeting with representatives of the Ombudsperson.⁹⁷

It happens sometimes that the authorities and institutions subject to control by the Ombudsperson do not even have basic information about the Ombudsperson, its competences and powers.⁹⁸ In certain cases, the representatives of the authorities whose work is subject to Ombudsperson's control do not make a difference between the competences of the Ombudsperson and other independent authorities.⁹⁹ Although these cases are not the usual attitude of authorities towards the Ombudsperson, they illustrate the difficulties that may occur during control procedures and why it might be necessary to amend the legal framework so as to specify the obligation of cooperation with the Ombudsperson. The proposal for the law amending the Law on the Ombudsperson, which was submitted at the beginning of 2012 to the Assembly for adoption and subsequently withdrawn from the procedure, stipulated penalties for failure to fulfil the obligations prescribed by the Law on the Ombudsperson.¹⁰⁰

⁹⁶ *Ibid.*

⁹⁷ D. Petković, V. Milošević, Kontrola rada organa uprave od Zaštitnika građana Republike Srbije – problemski pristup, (Control of the work of administrative authorities by the Ombudsperson of the Republic of Serbia – problem approach), Zbornik radova (Papers) of the Faculty of Law in Novi Sad, 2017, vol. 51, no. 3-1, 839-862, available at <https://scindeks-clanci.ceon.rs/data/pdf/0550-2179/2017/0550-21791701839P.pdf#search=%22Kontrola%20Uprave%22>, p. 850.

⁹⁸ See e.g. recommendation of the Ombudsperson no. 416 of 9 January 2015, available at https://www.ombudsman.rs/attachments/3645_preporuka%20KBC%20Zemun.doc.

⁹⁹ See YUCOM – Lawyers' Committee for Human Rights and Belgrade Centre for Human Rights, *Ombudsperson – Recommendations in practice, op.cit.*, p. 64.

¹⁰⁰ Public hearing on the topic: Role of the Ombudsperson and Commissioner for Information of Public Importance and Personal Data Protection in the protection and promotion of human rights and consideration of the need to promote legal framework, Informator, statement of

The information on the degree of acting upon the Ombudsperson's recommendations indicate that they are realised to a great extent,¹⁰¹ although there are certain exceptions. For example, the regular annual report of the Ombudsperson for 2015 states that none of the 11 recommendations addressed to the Military Security Agency have been enforced, and it was also indicated that the largest percentage of non-enforced recommendations compared to the number of recommendations addressed to different authorities pertains to security services.¹⁰² Although administrative authorities largely accept the recommendations of the Ombudsperson, there is no adequate surveillance mechanism for the enforcement of such recommendations, wherefore it remains unclear whether the high percentage of acceptance of recommendations is accompanied by adequate implementation i.e. whether they are conducive to the change in practice of the authorities.¹⁰³ The Conclusion of the National Assembly adopted with reference to consideration of the annual report of the Ombudsperson for 2013¹⁰⁴ stipulate the obligation for the Government to report to the National Assembly once in six months about the enforcement of Ombudsperson's recommendations. However, the regular annual reports of the Ombudsperson for 2014¹⁰⁵, 2015¹⁰⁶ and 2016¹⁰⁷ state that, as to the knowledge of the Ombudsperson, the Government never acted upon the Conclusion. With regard to acting upon the recommendations of the Ombudsperson, one of the problems lies in the avoidance of competence and referral of responsibility to other institutions.¹⁰⁸ Cooperation between the Ombudsperson and the public administration authorities can also be hindered by the lack of contact

Saša Janković, Ombudsperson, 18 March 2013, *op.cit.* see chapter VIIIa of then-proposal for the law.

¹⁰¹ See e.g. Sigma, *Monitoring report: The Principles of Public Administration, Serbia*, *op.cit.*, p. 99. For instance, in 2017 there were 90.98% accepted recommendations. Ombudsperson, *Regular annual report of the Ombudsperson for 2017*, Belgrade, 2018, p. 20.

¹⁰² Ombudsperson, *Regular annual report of the Ombudsperson for 2015*, Belgrade, 2016, pp. 16 and 36.

¹⁰³ Sigma, *Monitoring report: The Principles of Public Administration, Serbia*, *op.cit.*, p. 99.

¹⁰⁴ Official Gazette of RS, no. 60/2014.

¹⁰⁵ Ombudsperson, *Regular annual report of the Ombudsperson for 2014*, Belgrade, 2015, p. 224.

¹⁰⁶ Ombudsperson, *Regular annual report of the Ombudsperson for 2015*, Belgrade, 2016, p. 269.

¹⁰⁷ Ombudsperson, *Regular annual report of the Ombudsperson for 2016*, Belgrade 2017, p. 317.

¹⁰⁸ Interview with representative of institutions of 20 December 2018.

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persons in the authorities in charge of communication with the Ombudsperson and monitoring the enforcement of recommendations addressed to the authority concerned.¹⁰⁹ The estimate of the enforcement of recommendations issued by the Commissioner for the Protection of Equality is between 85 and 92-93%.¹¹⁰

Apart from the communication relating to complaints, there should be proactive relation between the Ombudsperson, Commissioner for the Protection of Equality and public administration authorities oriented towards capacity building, improvement of the work of administration and introduction of new procedures that simplify citizens' access to rights. The Ombudsperson had such initiatives towards the executive authorities and the initiatives were effective. An example is the Memorandum of understanding¹¹¹ concluded for the purpose of resolving the issue of persons without documents between the Ombudsperson, Ministry of Public Administration and Local Self-government and the UN High Commissioner for Refugees (UNHCR). The aim of this Memorandum was to ensure the access to personal documents to as many persons as possible. Based on this agreement, a technical group was established, involving other executive authorities: the Ministry of Interior, Ministry of Health, City administration of Belgrade. All these authorities worked together, they organised workshops and seminars, trainings for judges, registrars and other staff conducting the procedures relevant for the access to personal documents.¹¹²

It is obvious that the recommendations that complicate citizens' access to rights can be eliminated, not only by action upon complaints, but also through cooperation with the executive authorities. The positive examples of cooperation with the executive authorities also include continuous trainings for implementation of anti-discrimination regulations, which are organised for the employees of the Ministry of Interior, labour inspectors or with local self-government units.¹¹³

¹⁰⁹ See YUCOM – Lawyers' Committee for Human Rights and Belgrade Centre for Human Rights, *Ombudsperson – Recommendations in practice, op.cit.*, p. 66.

¹¹⁰ Interview with representative from professional service of the Commissioner for the Protection of Equality of 4 December 2018.

¹¹¹ See e.g. Ombudsperson, *Regular annual report for 2012*, Belgrade, 2013, p. 50.

¹¹² Interviews with representatives of civil society organisations of 21 November 2018.

¹¹³ Interview with representative of professional service of the Commissioner for the Protection of Equality of 4 December 2018.

Significant delays of the executive authorities in adoption of regulations, recommendations and proposals of independent authorities, as well as in implementation of the Assembly conclusions adopted on basis of their recommendations represent another obstacle that hampers the efficiency of independent authorities.¹¹⁴ The cause of delay lies in a wider system context i.e. in power concentration exclusively in the hands of the executive.¹¹⁵

Mutual cooperation between independent authorities for the protection of human rights

Mutual cooperation between the independent authorities for human rights protection can bring additional benefits and significantly improve the protection and exercise of human rights of the citizens. Independent institutions (Ombudsperson, Commissioner for Information of Public Importance and Personal Data Protection, Commissioner for the Protection of Equality etc.) mutually cooperate for promotion and exercising of rights whose protection they were established for, while in procedures upon complaints referring to violation of such rights the Ombudsperson only acts after the citizens have previously exhausted the possibility to address an independent specialised authority.¹¹⁶ Exceptionally, the Ombudsperson shall be authorised to institute the procedure before the citizens have addressed a specialised independent institution if it is estimated that there is a special circumstance envisaged by the Law on the Ombudsperson, such as threat from irreparable damage or if the complaint refers to violation of good governance principle, particularly unfair treatment of applicant by administrative authority, untimely acting or other violations of the code of ethics of the administration staff.¹¹⁷

An example of cooperation between the independent institutions in promotion and protection of rights is the proposal for the assessment of constitutionality of Article 20 of the Law on the Manner of Determining the Maximum Number of Employees in the Public Sector, which was jointly submitted by the Ombudsperson and the Commissioner for the Protection of Equality to the Constitutional Court because the

¹¹⁴ T. Tepavac, *Independent authorities and National Assembly of the Republic of Serbia: substantive or symbolic cooperation?*, op.cit, p. 4.

¹¹⁵ *Ibid.*

¹¹⁶ Ombudsperson, *Regular annual report of the Ombudsperson for 2017*, Belgrade, 2018, pp. 92-93.

¹¹⁷ *Ibid.* See also Art. 25, para. 5 of the Law on the Ombudsperson.

contested provision put the women working in public sector in an unequal position.¹¹⁸ Only a couple of days after the submission of their joint proposal, the Constitutional Court enacted a temporary measure which suspended the application of the contested provision.¹¹⁹ There was also efficient cooperation between the Ombudsperson and the Commissioner for Information of Public Importance and Personal Data Protection, however the outgoing Commissioner Rodoljub Šabić did not want to continue the cooperation after the participation of the new Ombudsperson in irregular election of one of the members of the Anti-Corruption Agency Council.¹²⁰

Key challenges

Promotion of legislative framework on the Ombudsperson and Commissioner for the Protection of Equality aims, among other, to ensure their independence from the executive authorities and for more efficient and better cooperation with the authorities that they control.

¹¹⁸ Proposal for the assessment of constitutionality available at <http://ravnopravnost.gov.rs/rs/predlog-za-ocenu-ustavnosti-zakona-o-nacinu-odredivanja-maksimalnog-broja-zaposlenih-u-javnom-sektoru/>.

¹¹⁹ Paragraf, Law Determining the Maximum Number of Employees in the Public Sector: Ministry of Public Administration and Local Self-government will propose to the Government of RS that the final decision of the Constitutional Court is not to be awaited but that Article 20 of the Law suspended by the CC should be amended, available at <https://www.paragraf.rs/dnevne-vesti/201015/201015-vest11.html>.

¹²⁰ Vreme, Interview: Rodoljub Šabić, Serbia is deep in corruption, no. 1454, 15 November 2018, available at <https://www.vreme.com/cms/view.php?id=1641146>. Namely, the Law on Anti-corruption Agency stipulates that the National Assembly shall elect a member of the Board of the Anti-corruption Agency at the proposal of the Ombudsperson and the Commissioner for Information of Public Importance. The proposal for the candidate shall be joint, i.e. reached through joint agreement between the Ombudsperson and the Commissioner. However, Ombudsperson Zoran Pašalić withdrew consent to the proposal jointly submitted by former ombudsperson Saša Janković and commissioner for information of public importance and he subsequently independently proposed his candidate. For more detail, see e.g. Danas, Conflict between ombudsperson Pašalić and commissioner Šabić, 12 June 2018, available at <https://www.danas.rs/drustvo/sukob-ombudsmana-pasalica-i-poverenika-sabica/>. See also the Institute for European Affairs, EU debate: Who protects citizens' rights?, speech of former Commissioner for Information of Public Importance Rodoljub Šabić, available at <https://www.youtube.com/watch?v=oiBiBLsHfLQ&feature=youtu.be>.

The proposal of the law amending the Law on the Ombudsperson, which was submitted to the Assembly for adoption at the beginning of 2012, stipulated that the Government may not suspend, delay or restrict the execution of budget of the Ombudsperson without the consent of the latter.¹²¹ This proposal was aimed at concretizing the constitutionally prescribed independence of the Ombudsperson with regard to budget execution, which is one of the key aspects of independence from executive power.¹²² This proposal was withdrawn from the procedure and returned to the Government. At the public hearing of 18 March 2013, then-Ministry of Justice and Public Administration stated that the new text of the law amending the Law on the Ombudsperson was in preparation and that it was expected that the draft law “would soon be in the procedure envisaged by the Government Rules of Procedure”. More than five years later and ten years after the first initiatives referring to the amendments of the Law on Ombudsperson, this regulation has not changed.

The law proposal from 2012 and the starting points for the development of the Draft law amending the Law stipulate the Government obligation to assume a position with regard to initiatives for amendment of regulations instituted by the Ombudsperson, and to decide on the initiative and submit its decision to the Ombudsperson no later than 60 days after the submission of the initiative. This would be a useful solution that would certainly contribute to a more active role of the Ombudsperson with regard to initiatives for amendment of regulations.

However, if the process of amendment of the Law on the Ombudsperson was finally completed, the amendments of this law would not suffice for ensuring the prerequisites for independence of this institution. The same applies to the announced amendments of the Law on the Prohibition of Discrimination. It has already been underlined that the factors that obstruct the performance of functions of these authorities are also to be found in other regulations such as the Law on the Budget System and the Law on Civil Servants. Greater independence of institutions would also be ensured by the possibility for individual proposals of their respective

¹²¹ Public hearing at the topic: Role of the Ombudsperson and Commissioner for Information of Public Importance and Personal Data Protection on protection and promotion of human rights and consideration of the need to promote legal framework, Informator, statement of Saša Janković, Ombudsperson, 18 March 2013, *op.cit.*

¹²² *Ibid.*

budgets to the National Assembly, without the possibility for intervention by the Government or line ministry in the procedure of budget preparation and proposal.¹²³

Limited employment possibilities and salaries of employees equalised with the civil servants salaries severely hamper the work of the institutions which consequently have no possibility to engage the best experts in human rights. There is no streamlining of quality personnel towards public institutions, which complicates the strengthening of internal capacities of the Ombudsperson.¹²⁴ The capacity development of the Ombudsperson requires the increase in salaries of its employees, to the extent which would enable the retention of exceptional personnel.¹²⁵ This problem is also one of the key obstacles for smooth functioning of the institution of Commissioner for the Protection of Equality, along with the previously stated problem of unfilled and yet categorised jobs. It is underlined that the professional service of the Commissioner trains many staff members, prepares them and provides them with additional knowledge and skills through seminars and other special forms of education and they subsequently leave the professional service due to low salaries and opt for more competitive jobs.¹²⁶ This outflow of qualified staff represents a great loss for the institution and it can only be resolved by finding a way to provide more adequate compensation for the work and skills of the employees in independent authorities for protection of human rights.

The work of professional services acting upon complaints would have to be differently organised because the number of executive staff working on complaints is too small. "They process the cases, receive clients, perform control, attend meetings and conferences, and submit materials for reports, which is an immense workload and their salaries correspond to those in public administration. If you are

¹²³ For more detail, see e.g. D. Petković, V. Milošević, "Različita shvatanja položaja i nadležnosti Zaštitnika građana Republike Srbije", *Žurnal za kriminalistiku i pravo* ("Different perceptions of status and competences of the Ombudsperson of the Republic of Serbia", *Journal for Criminalistics and Law*), Belgrade, 2018, 15-35, available at http://www.kpu.edu.rs/cms/data/akademija/nbp/nbp_2018_1.pdf, p. 17.

¹²⁴ Interview with representative of professional and academic community of 21 November 2018.

¹²⁵ Interview with representative of the institutions of 20 November 2018.

¹²⁶ Interview with representative of the institutions of 4 December 2018.

to control the work of public administration, then your salary should be at least 20% higher than theirs, because you improve their operation”.¹²⁷

It is stated in the annual report of the Ombudsperson for 2015 that an intensive media campaign was ongoing that year against the Ombudsperson, which also involved the top state functionaries.¹²⁸ The fact is that the campaign was held and it indicates the difficulties that the independent institutions may face if they open socially valuable issues which may endanger the executive, whether directly or indirectly.¹²⁹ Media lynch of independent institutions should not exist in regulated systems.¹³⁰ “If an independent authority acts unlawfully, it should be accountable for that and there is a way and manner for acting on this; their presence in the tabloids and distortion of their credibility must not be ignored by the entire state”.¹³¹ Representatives of the civil society condemned the attacks on the Ombudsperson institution, which threatened to jeopardise the institutional integrity, and they took an active part in defending its credibility and legitimacy.¹³² The interviewees also underlined that “the fact that the Ombudsperson was not replaced at the time demonstrates that the institution authority has nevertheless been established, but this can easily fall into oblivion if the promotion of institutional reputation is not continued”.¹³³

The examples of good practice which were present during the previous work of the Ombudsperson and the Commissioner for the Protection of Equality indicate that these institutions have a great potential to improve the degree of respect for human rights. “Current Ombudsperson could use that potential as well. If he did not want to expose personally, it can be done through cooperation, by engaging the forces

¹²⁷ Interviews with representatives of professional and academic community of 21 November 2018.

¹²⁸ Ombudsperson, *Regular annual report of the Ombudsperson for 2015*, Belgrade, 2016.

¹²⁹ See for e.g. Helsinki Committee for Human Rights, Helsinki bulletin, no. 114, April 2015, available at <https://www.helsinki.org.rs/serbian/doc/HB-Br114.pdf>.

¹³⁰ Interview with representative of professional and academic community of 20 November 2018.

¹³¹ *Ibid.*

¹³² T. Tepavac, *Independent authorities and National Assembly of the Republic of Serbia: substantive or symbolic cooperation?*, op. cit., p. 6.

¹³³ Interview with representative of professional and academic community of 21 November 2018.

willing to be exposed and with sufficient expertise.”¹³⁴ Institution’s openness for cooperation with the academic community or representatives of civil society organisations could significantly contribute to the improvement of its work, whereas the support from European institutions in the process of further institutional strengthening can also play a significant role in improvement of the situation in this field.

¹³⁴ *Ibid.*







