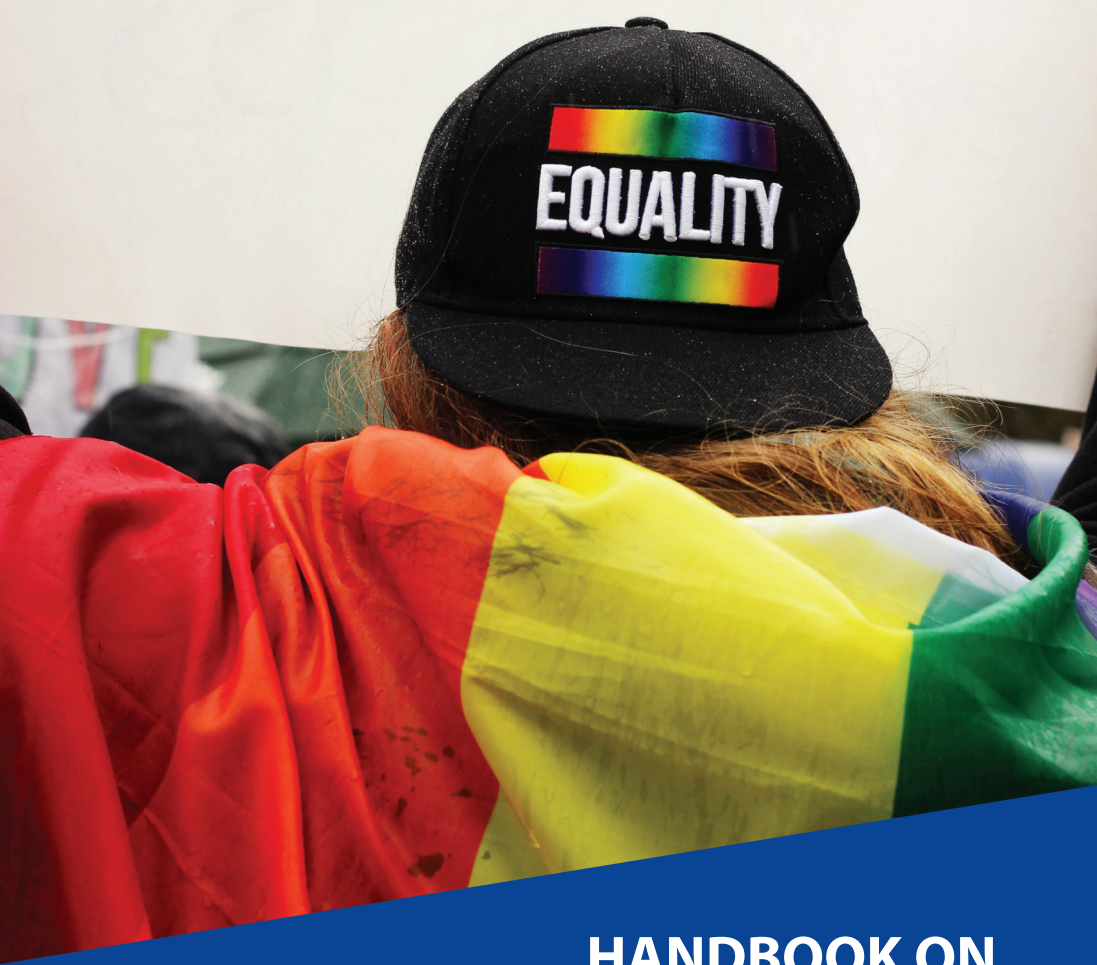

HANDBOOK ON ANTI-DISCRIMINATION LAW

Promotion of diversity and equality in Montenegro

Mirko Đuković

Funded by the European Union and the Council of Europe

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“Promotion of diversity and equality in Montenegro”

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TABLE OF CONTENTS

ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
Charter	EU Charter on Fundamental Rights and Freedoms
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FRA	European Agency for Fundamental Rights
EU	European Union
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Committee against Racism and Intolerance
ESC	European Social Charter
ECSR	European Committee of Social Rights
ICMRW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
MS	Member States
OHCHR	UN Office of the High Commissioner for Human Rights
OSP	Online service providers
OSCE	Organization for Security and Co-operation in Europe
ODIHR	Office for Democratic Institutions and Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
WHO	World Health Organization

HOW TO USE THIS HANDBOOK

This Handbook was prepared under the Council of Europe project: *Promotion of diversity and equality in Montenegro*. This Handbook aims to provide an overview of the key aspects of the anti-discrimination law. The Author of the Handbook was tasked to produce a comprehensive text that would incorporate the latest principles of human rights protection and non-discrimination at International and European level. In doing so, the Author applied a doctrinal and comparative methodological approach. The doctrinal method allowed the Author to describe and analyse in detail the international, European and national legal framework, primary sources of law as well as courts' jurisprudence. The comparative method was a useful tool in making differentiation amongst jurisdictions, drawing attention to the specific details and points of divergence and convergence of the anti-discrimination law protection mechanisms.

In understanding the concept of discrimination, it is of paramount importance to start from concepts such as rule of law and equality. This referred to a more general overview of the international legal standards and treaties that Montenegro is a signatory off. The analysis includes the work of treaty bodies as well as the ILO Tribunal's case law, but it is predominantly focused on the overview of the key aspects of the protection from discrimination in Europe. As it is expected, it relies substantially on the work of the Council of Europe and European Convention on Human Rights, the European Social Charter as well as the EU anti-discrimination legal framework. As a candidate country to the EU, Montenegro has considerably progressed in incorporating the acqui communitaire, thus it was important to incorporate an overview of the evolution of human rights protection in the EU. The readers will have a more comprehensive picture of the anti-discrimination law mechanisms, their development and the expectations from the EU Member States in that respect.

This Handbook is designed to assist not only legal practitioners, but also civil servants who are involved in issues of human rights protection in

Montenegro. It is intended to be clear, and easy to navigate for all those interested in understanding anti-discrimination law and equality principle. It is suitable for lawyers, judges, prosecutors, social workers, students and any civil servant, as well as non-governmental activists with or without a legal education. The Handbook can be seen as a first-aid kit for all of those who are dealing with the issue of discrimination in their daily work. It offers definitions, key issues and challenges, as well as the most prominent case law that addresses very particular situations arising in the domain of non-discrimination. The language of the Handbook should be unambiguous, informative and explanatory.

The Handbook is divided into six chapters that are organized and planned so that the reader can easily navigate through their content. Each chapter offers a short introduction as well as key points and, in the case of the first chapter, mock examples and situations, to allow the reader to ponder on more specific issues.

The first chapter offers an introduction to the non-discrimination principle, types of discrimination, including more recent updates and developments in the prohibition of hate speech and hate crime. It provides the context and background of discrimination categories both at normative and case law level.

The second chapter introduces international and European legal frameworks, the work of treaty bodies and the scope of the protection from discrimination.

The third chapter is dedicated to the national normative framework that is aligned with the international standards and obligations that arise from the treaties Montenegro is a party to. In addition, it provides a few selected national court cases.

In the fourth chapter, the Handbook outlines the national protection mechanisms and the tasks as well as competences of selected stakeholders in ensuring the rule of law, equality and non-discrimination.

The fifth chapter analyses various discrimination grounds, such as race, religion, political or any other opinion, gender, social origin, etc. It does so by offering summaries and key points of the most notable or relevant cases before ECtHR, ECSR and CJEU.

And finally, the sixth chapter is dedicated to good practices and case studies with recommendations on the roles and duties of different stakeholders as well as the means in the prevention and fight against discrimination.

Author

In Budapest,
December 2020

CHAPTER ONE – INTRODUCTION: UNDERSTANDING THE CONCEPT OF DISCRIMINATION

International human rights law is grounded in the International Bill of Human Rights which consists of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (1976). The international legal human rights framework is complemented by three regional human rights treaties: the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (ACHPR). All the mentioned Instruments prohibit discrimination and reinforce equality before the law. Thus, it is often so that the principle of non-discrimination is complemented with the principle of equality. The principle of non-discrimination is at the core of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

Montenegro signed and ratified several international treaties and most notably the Council of Europe (CoE) European Convention on Human Rights (ECHR) and it is bound by the decisions of the European Court of Human Rights (ECtHR). The Constitution of Montenegro in its preamble enshrines the value of equality of all citizens and further on in its substantive part (Article 1) it defines the State of Montenegro as a state based on the principle of the rule of law. All forms of discrimination are prohibited in Article 8 and Article 9 gives supremacy to ratified and published international agreements to national legal order. Montenegro is a party to a number of international[1] and regional human rights treaties.[2]

1 treaty Bodies Treaties' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=116&Lang=EN> accessed 24 August 2020.

2 'Council of Europe Treaty List Status' (Treaty Office) <https://www.coe.int/en/web/conventions/full-list> accessed 24 August 2020.

What is discrimination and why it should be prohibited?

Discrimination means treating someone differently and unfairly due to a specific characteristic that a person possesses. It is any treatment that puts someone in a different position because of grounds such as his/her origin, sex, "race", sexuality, gender, age, disability, language, religion or belief, etc. Besides treating someone worse than others because of that protected characteristic, discrimination occurs even when those that are not in the same position are treated as if they were. This Handbook will elaborate further on the different types of discrimination.

The principles of non-discrimination and equality are at the foundation of the rule of law principle. The concept of the rule of law was coined by an English law professor, Albert Venn Dicey in the 19th century. Amongst other conditions, for him, the rule of law cannot exist without equality. [3]Today, this concept is enshrined in international treaties, regional conventions and constitutions, as a universal value without which respect for human rights in a democratic society would be impossible. Dicey's view of the rule of law is a core CoE value and principle.[4] Equality cannot remain just a constitutional prerogative but it must provide for equal treatment, thus the principle of non-discrimination requires the prohibition of unjustified unequal treatment by the law and such prohibition should apply to public and private institutions as well as to natural or legal persons.[5] This means that there cannot be rule of law if the principles of equality and non-discrimination are not respected.

Article 14 of the ECHR provides the right not to be discriminated only in relation to the enjoyment of another right or freedom set forth in the Convention.[6] The ECtHR in many judgments has reiterated the ancillary nature of Article 14.[7]

3 Tom Bingham, The Rule of Law (Penguin 2011) 6.

4 'Rule of Law Check List' 32 <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 19 August 2020.

5 'ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination' para 7 <https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae> accessed 19 August 2020.

6 'Guide on Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention' 4 <https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf> accessed 19 August 2020.

7 See more in ECtHR: Molla Sali v. Greece [GC], 2018, § 123; Carson and Others v. the United

The ECHR Protocol No. 12, which has been ratified by Montenegro, provides for a general prohibition of discrimination by removing the ancillary nature of Article 14 and providing that no-one shall be discriminated against on any ground by any public authority.

According to the General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI), the national laws of the CoE member states should clearly define and prohibit direct and indirect discrimination. This Recommendation offers a definition of direct and indirect racial discrimination in paragraph 1 b) and c).

Also, it specifies the expression "differential treatment" as including "any distinction, exclusion, restriction, preference or omission, be it past, present, or potential."[8] Recommendation No. 7 further explains that the term "ground" includes actual or presumed grounds. It provides as example that the presumption that someone is a Muslim when in reality that is not the case, such treatment constitutes still discrimination based on (a presumed) religion grounds.. In that Recommendation it is also noted that discriminatory actions are usually based on a combination of different grounds with other factors and thus the use of "restrictive expressions such as the difference of treatment solely or exclusively based on grounds such as…" should therefore be avoided."[9]

Montenegrin Law on Prohibition of Discrimination recognizes terminology such as "unequal treatment" and "differentiation" based on a certain ground and incorporates definitions from Recommendation No. 7. (See Chapter III of the Handbook)

What is not discrimination: the concept of positive measures

The so-called "positive discrimination" or more often referred to as "positive measures" or "special measures" are a set of normative and factu-

Kingdom [GC], 2010, § 63; E.B. v. France [GC], 2008, § 47; Marckx v. Belgium, 1979, § 32.

8 'ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination' (n 5) 14.

9 Ibid 15.

al actions that aims to foster greater equality by supporting specific groups of people who endured or endure ingrained discrimination so that they can have similar access as others in one community. In the UN legal framework, positive discrimination is mostly referred to as "special measures" while the EU uses terms such as "specific measures" or "positive action". The ECtHR uses "positive obligation" or "positive action". As we see, in practice the international normative framework abandoned the "positive discrimination" phrase as it is a contradiction in itself.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly endorses this concept. Article 4 of the Convention defines that temporary special measures to ensure equality between men and women shall not be considered discrimination and such measures should cease to exist once the objectives of the measures are accomplished. Interpretations of this provision are given in several General Recommendations. For example, in General Recommendation No. 25 (2004) the Convention is described as a dynamic instrument and reinforces the temporary nature of measures that are to "improve the position of women to one of de facto or substantive equality with men". [10]These measures are not only legislative in their nature but also encompass executive, administrative, and other regulatory instruments, policies, and practices. For example, relocation of resources in the budget, or targeted recruitment and promotion of women over men are such measures.

The Committee on the Elimination of Racial Discrimination (CERD) on a few occasions addressed the scope of special measures. So for example in General Recommendation No. 30 on Discrimination against Non-Citizens in paragraph 4, CERD defines that different treatment based on citizenship or immigration status constitutes discrimination. However, if such differentiation is an outcome of the special measures taken, such treatment will not be considered discriminatory. Further on in the CERD General Recommendation No. 32, special measures are defined as supplementing acts that are designed to secure disadvantaged groups to enjoy equal treatment. CERD recognized that the terminology used to describe such measures might differ between States.[11] This Recommendation also makes a distinc-

10 Para. 18.
11 Para. 12.

tion between the Conventional obligation to take special measures and the general positive obligation of States to secure respect for human rights on a non-discriminatory footing.[12] Besides, it makes the requirement that "special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example, the rights of persons belonging to minorities to enjoy their own culture."[13]

When it comes to the UN Convention on the Rights of Persons with Disabilities (CRPD) Article 5.4. establishes that "specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination." Thus, with special measures as positive actions, State parties have a goal to provide for the respect of the principle of equality and non-discrimination. In such cases, the equality that special measures or arrangements elevate equality is a social goal and not just normative preconditions to the fulfilment of constitutional rights.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Article 1.4 recognizes the necessity of introducing special measures in the national legislative and executive framework in order to ensure "adequate advancement" to equal enjoyment or exercise of human rights. Convention just like CEDAW defines these measures as temporary.

ECRI General Policy Recommendation No. 7 as well reiterates the temporality of special measures which are designed "to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated" … "or to facilitate their full participation in all fields of life".[14]

Likewise, ECtHR held that member states have a positive obligation to correct factual inequalities by adopting measures or actions that can contribute to it. if such action is not taken by the member state, the ECtHR deemed it to be a breach of Article 14.[15] For example in Andrle v. the

12 Para. 14.

13 Para. 15.

14 Para. 5.

15 See more in ECtHR: *Taddeucci and McCall v. Italy,* 2016, § 81; *Kurić and Others v. Slovenia* [GC], 2012, § 388; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44; *Muñoz Díaz v. Spain*, 2009, § 48; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175; *Stec and*

Czech Republic, the applicant, a divorced father who had the custody of two minor children complained that measures prohibiting him to retire at the age of 57 were discriminatory on the basis of sex as such possibility was given to women in a similar position. The ECtHR found that such measures are not discriminatory as their goal was to amend the inequalities and hardships that women face in society such as generally lower salaries and pensions as well as a general cultural expectation that women should work full-time, take care of children and the household.[16]

According to the EU Anti-discrimination Directives in order to remedy and prevent situations when the application of the same rule without consideration of relevant differences occurs member states must ensure to adjust their legal framework so that policies can provide for "substantive equality" over formal equality. The consequence of governments failing to consider and apply special measures indicates the existence of indirect discrimination.[17]

Some of the examples of special measures in national legislations are: reserving posts for women in the typically men-dominated workplace, reserving posts for ethnic minorities in public services like military or police, reducing public transportation prices for groups with reduced earning capacities, different conditions for retirement and pension, different requirements for employment, etc.

Example No. 1:

The National Police Academy adopted a new Rulebook according to which upon testing the candidates, and in case more candidates have the same number of points, in ranking them on the final list of admitted candidates, the female candidates will have priority. The rationale behind such provision in the Rulebook was based on the fact that policing is widely perceived as a male profession and in many Police precincts, the only female employed are those dealing with administration and finances, thus police patrols are predominantly male.

Others v. the United Kingdom [GC], 2006, § 51; *Thlimmenos v. Greece* [GC], 2000, § 44; the *Belgian linguistic case*, 1968, § 10 of "the Law" part.

16 ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 2011, § 53.

17 *Handbook on European Non-Discrimination Law* (2nd ed, Council of Europe 2018) p. 70.

After graduating from high-school, N.P. a male candidate with impeccable records applied to study at the Police Academy. On testing, he scored well but not sufficiently to be highly ranked at the ranking list. In fact, he was next on the list to be admitted should someone decide not to pursue police education. He lodged a complaint to the Academy Board, complaining that he was discriminated against, as the last candidate on the list of admitted recruits was a female that had the overall same score, with the difference that she did better in physical testing and he had better scores in his high-school degree.

Upon receiving his complaint, the Board dismissed it on the grounds that it was unfounded pursuant to the Rulebook.

Question: Would you agree that N.P. was discriminated against, having in mind that his previous education results were better than those of admitted candidate?

Discrimination as a violation of the principle of equality

As indicated before, the International Bill of Rights was founded on the values of non-discrimination and equality. First and foremost guaranteeing equal protection before the law and before the courts and tribunals. Equality is considerably embedded across the UN Declaration and Covenants guaranteeing a broad range of human rights. It has contributed to the further development of the non-discrimination principle across the international human rights legal framework, including the regional human rights protection mechanisms. The right to equality and non-discrimination are now cross-cutting principles that repeatedly reiterated protection from discrimination. Both International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR) in their Article 2 put forward equality as a precondition for the protection given in the mentioned instruments. In more or less similar manner non-discrimination is guaranteed in several instruments such as the Convention of Rights of Child (Article 2), The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 7), the Convention of Persons with Disabilities (Article 5). As previously mentioned, the Convention on the

Elimination of All Forms of Racial Discrimination prohibits discrimination based on the ground of race and the Convention on the Elimination of all Forms of Discrimination Against Women prohibit discrimination on the ground of gender. The Principle of equality and prohibition of discrimination, according to the General Recommendation No. 7 applies to

> *"all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; an exercise of economic activity; public services." (para. 7)*

Likewise, the principle of equality is a bedrock of the Convention on preventing and combating violence against women and domestic violence (so-called Istanbul Convention). This Convention in its Preamble links the standards it promotes and protects to those established in the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) and its Optional Protocol (1999) as well as General Recommendation No. 19 of the CEDAW Committee on violence against women, the United Nations Convention on the Rights of the Child (1989) and its Optional Protocols (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006).

In addition to the ECHR, in the treaty system of the CoE, the European Social Charter (ESC) plays an important role in the protection from discrimination and respect of the principle of equality. As stated in the preamble the purpose of the ESC is for the member states "to secure to their populations the social rights specified therein in order to improve their standard of living and their social well-being". The protection of human rights now shifts or upgrades to the level of protecting those human rights that are related to everyday human needs such as employment and working conditions, housing, education, health, medical assistance, and social protection. More specifically ESC aims to protect the most vulnerable individuals: elderly, children, people with disabilities, and migrants. The Revised ESC contains

a general provisions on non-discrimination stating in Part V Article E – that The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. For example, the European Committee on Social Rights (ECSR) found MSs of the CoE in violation of the principle of non-discrimination in relation to Article 1(2)which provide "to protect effectively the right of the worker to earn his living in an occupation freely entered upon". In the case of Montenegro, the ECSR found that Nationals of the other States Parties do not have access to certain jobs, which constitutes a discrimination on grounds of nationality.

The rights established by the ESC are transposed in the EU legal framework. Moreover, one of the main Copenhagen criteria for the successful EU accession is the fulfilment of political criteria. Political criteria stand for institutional protection of democracy and rule of law, human rights and respect and protection of minorities. With this in mind, the principle of equality became one of the founding values of the EU, and this is the core of Acquis Communautaire. Violation of the principle of equality results in discrimination. The standard of protection against discrimination was further developed in the secondary EU legislation, following the expansion of EU competencies and the development of the Single Market project. For the full realization of the Single Market project, "four freedoms" were defined as the backbone of the successful implementation of one market on the EU territory: free movement of goods, services, capital, and people. To make sure that such freedoms are protected, the secondary EU legislation was adopted in the forms of several Directives that guarantee equality and non-discrimination. (see Chapter II of this Handbook)

As any modern constitution provides for safeguarding the rule of law, the principle of equality and non-discrimination so does Montenegrin too. Law on Prohibition of Discrimination in its Article 1(2) provides that besides this Law, the prohibition of and protection from discrimination and promotion of equality is regulated and exercised by other laws as well. Much like in the international human rights legal framework, the principle of equality is tied with the principle of non-discrimination and are cross-cutting principles in the national normative body of the text.

Forms of discrimination

There are various forms of discrimination. This subchapter examines differences between direct and indirect discrimination, multiple and intersectional discrimination, harassment, and instruction to discriminate as well as what constitutes unequal or less favourable treatment.

Direct discrimination exists when a person is treated less favourably based on certain "protected ground". Whether such treatment is less favourable it is determined through a comparison between the victim of alleged discrimination and another person that does not possess that protected characteristic in a similar situation.

The three-prong test to establish the occurrence of direct discrimination mandates to assess:

A. if the individual is treated less favourably;
B. by comparison to how others being in a similar situation have been or would be treated;
C. and whether the reason for such treatment is a certain characteristic, which falls under a "protected ground".[18]

To add to this, both ECtHR and CJEU established that **discrimination by association**[19] can fall within the scope of the protected ground. This means that the victim of discrimination does not have to be a person possessing characteristics that are protected. This type of discrimination can happen when a person is associated (being a friend, partner, spouse, or parent) to a person who possesses a certain characteristic that falls under the "protected ground". Such discrimination happens more often than we think as it is a rather subtle way in which we can be discriminated against. Many of us have heard of stories of people who were not employed because were parents of a disabled child, or were treated differently at the workplace as the management learned that their partner belonged to a different "race" or ethnicity; or stories

18 *Handbook on European Non-Discrimination Law* (n 17) 43.
19 See CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 2008. and ECtHR, *Guberina v. Croatia*, No. 23682/13, 2016.

about a kindergarten or a school refusing to enrol a child because the family asking for enrolment also has another child that is on the autism spectrum; or an heterosexual being discriminated for the fact that he/she participated in gay pride events. This, for example, happened to a person who participated in Pride marches in Poland.[20]

The comparator in such cases are persons other than the applicant. So for example in Weller v. Hungary, the applicants (a father and twin sons) were excluded from "maternity benefit" on the ground of the nationality of their mother. The court established that a practice according to which families with children of a Hungarian mother and foreign father are entitled to this benefit while that was not the case of families of a Hungarian father and foreign mother, was discriminatory. For the Court, there was no reasonable justification for such practice and thus applicants were discriminated against by the association to the origin of their mother and the spouse respectively.[21] The EU and ECtHR have a rather similar definition of direct discrimination but the establishment of the discrimination is different. While the ECtHR formula is that there must be a difference in the treatment of a person in analogous, or "relevantly similar situations"[22], under the EU legal framework "direct discrimination is not dependent on the identification of a complainant who claims to have been the victim."[23]

Less favourable treatment is at the core of direct discrimination and represents the first evidence of a difference in treatment. The determination of whether such treatment was less favourable is done by comparing the alleged victim's situation to someone else in a similar situation. The comparator must be suitable. For example in P v. S and Cornwall County Council, the CJEU found that the dismissal of an employee that was undergoing gender reassignment from male to female constituted unfavourable treatment. As to the relevant comparator, the CJEU stated that "where a person is dismissed on the ground that he or she intends to undergo or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed

20 Poland, District Court in Warsaw, V Ca 3611/14, 18 November 2015.

21 ECtHR, *Weller v. Hungary*, No. 44399/05, 2009, § 37-38.

22 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 2007, § 157.

23 CJEU, C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, 2008, § 25.

to belong before undergoing gender reassignment."[24] For the ECtHR, the comparability should be assessed in light of the aim of the contested measure and not in an abstract context.[25] An example in which violation of rights was not established in the case of two sisters who lived together for over 30 years who made a complaint against national legislation that according to them was discriminatory since inheritance tax is imposed on siblings but not on those in civil partnerships. ECtHR established that cohabitating siblings cannot be compared to married couples or those in a civil partnership due to the nature of their relationship.[26]

Even not a judicial body in a *strict sense* such as the European Committee of Social Rights (ECSR) developed a more collective approach when making a comparison in its case law. So for example when making an assessment ECSR will take into consideration the comparability of categories of workers rather than the legal status they have under national law.[27]

To establish the ***causation***, one should ask a simple question: if a complainant would be treated differently if he/she did not possess the characteristic that falls in the scope of a protected ground. In practical terms "when considering whether direct discrimination has taken place, one is assessing whether the less favourable treatment is due to a 'protected ground' that cannot be separated from the particular factor being complained about."[28]

For example in *Stoica v. Romania*, ECtHR indicated that its "task is to establish whether or not racism was a causal factor in the impugned conduct of the authorities during the events and the ensuing investigation."[29] In making that assessment Court noticed that conclusion that there have been no racial aspects, in this case, was based only on the reports of police officers and that bias was ascribed only to the Roma statements during the criminal investigation but not to the police state-

24 CJEU, C-13/94, P v. S and Cornwall County Council, 1996, § 21.
25 *Handbook on European Non-Discrimination Law* (n 17) 47.
26 ECtHR, *Burden v. the United Kingdom* [GC], No. 13378/05, 2008, §60-66.
27 *Handbook on European Non-Discrimination Law* (n 17) 49. See: ECSR, Associazione Nazionale Giudici di Pace v. Italy, Complaint No. 102/2013, 2016 and ECSR, Fellesforbundet for Sjøfolk (FFFS) v. Norway, Complaint No. 74/2011, 2013.
28 ibid 50.
29 ECtHR, *Stoica v. Romania*, No. 42722/02, 2008, §118.

ments which essentially was part of the military prosecutor's reasoning and conclusion in this case.

In Richards v. Secretary of State for Work and Pensions complainant who had undergone male-to-female gender reassignment surgery wished to claim her pension on her 60th birthday, which was the pensionable age for women in the United Kingdom. CJEU noted that direct discrimination was established because a person who had undergone male-to-female gender reassignment following national law would have been granted a pension, had she been held to be a woman under national law.[30]

Example No. 2:

An accounting company had an inner advertisement for a senior position. After working for more than fifteen years as an accountant and was a well-respected employee in the company, D.B.P. a mother of three applied for the position. She had extensive experience, a stellar billing record and reputation to be liked and approachable as a team player. After being interviewed for the position she was one of the top candidates. Just days before the senior leadership of the company announced who will get the partnership position, she informed the management that she was expecting her fourth child. Two days later her boss informed her that she did not get the posting. Instead, a younger female colleague with less experience but equally qualified and competent and not married was promoted. Although D.P.|B. admitted that her colleague deserved the position, she enquired what was the predominant factor that made the senior leadership to pick someone else. Her boss told her that they felt they needed someone who would be more dedicated to the position. For, D.B.P. this meant the fact that as she was pregnant and about to ask for maternity leave, the management decided to opt for someone who will not need to take such a leave. She filed a complaint claiming that she was discriminated as her pregnancy was taken as a disadvantage.

Question: Would you argue that this was a case of direct discrimination? Is there a difference in treatment, given the fact that D.B.P. admitted that her colleague was as deserving as she was?

30 CJEU, C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions,* 2006, §38.

Indirect discrimination

When a particular rule, policy, or practice applies to everyone in the same way but it has the effect on some people of putting them at a particular disadvantage we are talking about indirect discrimination. Such practice or a rule is seemingly neutral and both the EU and CoE legal framework recognises that treating the same people who are in a different situation put the principle of equality at risk. The core understanding of indirect discrimination is that different situations should always be treated differently. As mentioned earlier in this chapter, even failing to incorporate special measures can lead to indirect discrimination.

Within the scope of the CoE legal framework, ECtHR has found that differences in treatment "may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group."[31] Similarly, in the third section of the Final Report on the Human Right Situation of the Roma, Sinti, and Travelers in Europe , the Commissioner for Human Rights, Mr Alvaro Gil-Robles, noted that the fact that a significant number of Roma children did not have access to education of a similar standard enjoyed by other children was in part a result of discriminatory practices and prejudices.[32]

ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination similarly defines indirect discrimination. In paragraph 8 of the explanatory memorandum to this Recommendation, it is stated that definitions of both direct and indirect discrimination draw inspiration from those contained in the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and on the case-law of the European Court of Human Rights.

31 ECtHR, D.H. and Others op. cit. 22, §129.

32 United Nations High Commissioner for Refugees, 'Refworld | Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti, and Travellers in Europe' (Refworld) <https://www.refworld.org/docid/4402c56b4.html> accessed 20 August 2020.

As noted before, under EU law, the requirement for the principle of equality is enshrined in the founding Treaties. After the Treaty of Amsterdam, a set of directives was created and thus further on developed equality protection measures. According to Directives 97/80/EC and 2000/43/EC for indirect discrimination to happen discriminatory intent is not necessary. Directive 97/80/EC in Article 2 on the burden of proof in cases of discrimination based on sex provides that "indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". Furthermore, Article 4 which concerns the burden of proof, reads:

> *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*

Directives 2000/43/EC and 2000/78/EC aim to prohibit in their respective spheres all acts of direct or indirect discrimination based on race, ethnic origin, religion or belief, disability, age, or sexual orientation. The preambles to these Directives indicate both the possibility of establishing indirect discrimination based on statistical evidence as well as the fact that to apply the principle of equal treatment effectively, the burden of proof is on the respondent.

In the context of the European Social Charter, the ESCR has found that "indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all."[33]

33 ECtHR, *International Association Autism-Europe v. France*, Complaint No. 13/2002, 2003, §52.

Essentially three elements are important in the assessment and determination of indirect discrimination:

A. there is a neutral rule, criterion, or practice;
B. it affects a group that possesses characteristics under-protected ground in a significantly more negative way;
C. as compared to others in a similar situation.

Neutral rule criterion or practice

What is in particular important in making a distinction between types of discrimination is that when we talk about indirect discrimination there is always a rule or criterion or practice, that seems to be neutral but, in its essence,, it is not. According to EU law, that kind of rule does not even have to have discriminatory intent. In both cases, discrimination is a result of treatment and it is always determined by an appropriate comparator. A person with a disability that uses a wheelchair can be excluded from employment either because the employer does not want to employ them (direct discrimination) or because to enter the offices one must use stairs which makes it impossible for people using wheelchairs (indirect discrimination). The latter also discloses that there is a concealed criterion that appears to be neutral.

In *Brian Francis Collins v Secretary of State for Work and Pensions*, the complainant had dual citizenship (Ireland and the US) and most of his professional life worked in the US and Africa, moved to the UK in 1998 to find a job in the social services sector. According to British laws, jobseeker allowance was a benefit granted to those who reside legally in the UK. His petition to get an allowance was denied because he is not a habitual resident in the UK. While CJEU accepted that member states can formulate a legitimate aim that a job-seeker has to have a genuine link to the employment in the member state in which he claims job-seeking allowance, however, EU citizens can rely on the Treaty to have access to the benefits that intend to facilitate access to the employment. As a comparator Court assessed that "the position of the abovementioned person must be compared with that of any national of a Member State looking for his first job in another Member State without having yet entered into an employment relation-

ship there, who benefits from the principle of equal treatment only as regards access to employment."[34] Thus for the Court, it was not permissible under the legal regime of the Union for a residence condition to apply in a disproportionate and discriminatory way, which essentially constituted indirect discrimination based on nationality.

According to the ECtHR, indirect discrimination may arise both, from a neutral rule[35] or a de facto situation.[36] In *Hoogendijk v. the Netherlands*, an applicant lost her benefits to which she had been entitled to as she suffered from a high degree of disablement. New measures by the Dutch government were introduced to remove the exclusion of married women from the relevant security scheme. According to the Court persons who are significantly in different positions must be treated differently. In this case, the applicant also showed that official statistics and figures indicate that more women were affected by such regulation in comparison to men. Although for Court "statistics in themselves are not automatically sufficient"[37] the Court could not ignore the fact that out of 5 100 persons who lost their benefits on the account of failure to meet the income requirement that this group consisted of about 3300 women and 1800 men, "Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex."[38]

Similarly, in *European Action of the Disabled (AEH) v. France* the ECSR reasoned that while reduction in public funding for social protection could equally affect everyone that requires such protection, it is likely so that person with a disability is more affected and dependent on community care to live independently and in dignity in comparison to others.. Therefore the ECSR took the view that "budget restrictions in social policy matters are likely to place persons with disabilities at a disadvantage and thus

34 CJEU, C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions, 2004, §30.
35 ECtHR, Hoogendijk v. the Netherlands, No. 58641/00, 2005.
36 ECtHR, Zarb Adami v. Malta, No. 17209/02, 2006, § 76.
37 ECtHR, Hoogendijk, op. cit. p. 21.
38 Ibid. pp 21-22.

result in a difference in treatment indirectly based on disability.[39]

Significantly more negative in its effect

As mentioned before besides policy or criterion being neutral in its character, indirect discrimination also has a negative effect to the extent that the protected group is being put in a particular disadvantage. The core of differentiation between indirect discrimination and direct discrimination is in that "it moves the focus away from differential treatment to differential effects."[40]

Statistical data and analysis can help in the determination of effects that policies produce. Both courts, , seek in statistics presented to them for a particular large disproportion in treatment. The EU Racial and the Employment Equality Directives do not explicitly indicate in their provisions that statistical proof is needed, however as indicated before in this text, in their preamble it is stipulated that indirect discrimination can be established by any means including statistical data.

For example in *Zarb Adami v. Malta*, the ECtHR established whether the jury service imposed on the applicant was discriminatory. The complainant claimed that in his lifetime he served to a jury in three criminal proceedings while being unable to appear for the fourth, he was fined approximately 240 EUR. As he failed to pay the fine he was summoned before the judge where he pleaded that the fine was discriminatory as other people in his position were not subjected to the burdens and duties of jury service and the law and/or the domestic practice exempted women from jury service, but not men. Also, he claimed that only 3.05% of women had served as jurors as opposed to 96.95% of men. The national court rejected the applicant's claims. According to the ECtHR, it (Government) did not show that the difference in treatment pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[41]

39 ECSR, *European Action of the Disabled (AEH) v. France*, Paragraph 144 Complaint No. 81/2012, 2013.

40 *Handbook on European Non-Discrimination Law* (n 17) p. 56.

41 ECtHR, Zarb Adami, op. cit. § 82

Comparator

As it was the case with direct discrimination finding a proper comparator is a final and important part of the assessment. In such a process as noted before the focus moves to the effect of the discrimination, thus the comparison is to be made between the effects that a certain rule or measure has on the alleged discriminated group or person belonging to a group and the other comparable group. We have seen the comparator group in the case of *Hoogendijk v. the Netherlands* and *Zarb Adami v. Malta*; comparator groups were men and women, and likewise, comparator groups could be homosexual and heterosexual couples, persons with disability and persons without it, older and younger employees, foreign nationals residing in a country but of different ethnical origin, etc. To prove indirect discrimination lawyers must compare advantaged and disadvantaged groups. However, not all persons belonging to a certain protected group are disadvantaged. That was established in several cases by the CJEU when a formally neutral rule affects the entire group it is no longer indirect but direct discrimination. For example, in *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* the CJEU agreed that "life partnership" in Germany is about the same rights and responsibilities as assigned to the institution of marriage and thus refusing to pay the "survivor pension" that was available to married couples put same-sex partners in a disadvantaged group. However, since this would be a situation that is applicable throughout society, CJEU declared that this is a case of direct discrimination based on sexual orientation.[42]

Example No. 3:

Local Government owned Company in catering and public event management published recruitment add in the national news portal searching for a number of workers with a certain set of qualifications that include organizational skills and hospitality management. Besides having some experience in similar tasks there were no additional requirements posted. One of the applicants, P.K., for the position was a person with journalist degree, with almost no experience in hospitality management but with experience in working with clients and customers as after graduation, he worked for a private company as a reception clerk. He was invited for the interview, but as

42 CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt derDdeutschen Bühnen* [GC], 2008.

the user of wheelchairs could not access the office premises of the company, as it was situated in a building that has no elevator or wheelchair ramp. He was informed that he should have disclosed this information in his application, even though the application per se did not ask for such information. The manager of the company agreed to interview over the phone. After a day he was informed that he was not hired on the grounds that he does not meet the requirements to work as an office clerk or to communicate with clients. Also, the company stated that occasionally employees would be required to use their own cars to meet clients outside of the premises or to handle other related tasks that require driving skills. The company published the list of people that are going to be hired on their website and P.K. realized that he had a better resume and higher education degree in comparison to the person who was hired as a communication manager.

He filed a complaint alleging that he was indirectly discriminated on the basis of his disability as the driving requirement was never mentioned either in the advertisement or during the interview. He was primarily interviewed for the position of communication with clients, which can be done over email and phones. In addition, since the premises were not adapted to facilitate wheelchair operation, P.K. claimed that the company refused his application solely on that basis and not because of his qualifications. His complaint was rejected.

Question: Are these grounds enough for P.K. to claim that he was discriminated against on the basis of his disability? If you would be his legal advisor, would you recommend filing a private lawsuit against the company? If yes, why?

Multiple and intersectional discrimination

European Institute for Gender Equality defines intersectional[43] discrim-

43 Some thirty years ago Professor Kimberlee Crenshaw coined the term intersectionality. Much of her work was dedicated to the research of the concept of critical race theory. Her paper on intersectionality was the critique of the notion that discrimination and racism in the law were irrational as authors before her pointed that once those are removed the legal and socio-economic order would revert to a neutral state. Her analysis was focused on three court cases that dealt with racial and sex discrimination at the same time: *De-*

ination as "discrimination that takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable." In international law, CEDAW recognized intersectionality as well. In the CEDAW General Recommendation 28 on the Core Obligations of State parties under article 2, Committee stated that: "State parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned."[44]

The concept that started by analysis of the discrimination of women based on their sex and "race" led to today's understanding that no group is homogenous. However, it should be noted that there is a difference between multiple discrimination aa discrimination that is based on several grounds but operates separately and intersectional discrimination which presupposes that certain protected grounds are inseparable.

It seems that jurisprudence is yet not applying the terms in their judgments, although analysis shows that in the assessment of the claims, ECtHR applied an intersectional approach but in the judgment did not use the term. In *B.S. v. Spain*, the court found that national courts failed to take into account the applicant's particular vulnerability as she is an African woman working as a prostitute.[45] Similarly, in *N.B. v. Slovakia*, a case concerning forced sterilization of a Roma woman in a public hospital, she claimed that she was discriminated against both on the ground of race and sex. Court agreed with the discrimination claims but noted that such practice affects vulnerable individuals of different ethnic grounds, and eventually it did not examine Article 14 claims separately but found violations of Articles 3 and 8.[46]

Graffenreid v. General Motors, *Moore v. Hughes Helicopter, Inc.*, and *Payne v. Travenol*. Crenshaw argued that the court's narrow view of discrimination of both racism and sexism. She showed that the law seemed to forget that black women are both black and female, and thus subject to discrimination on the basis of both race, gender, and often, a combination of the two. She showed that discrimination can happen on multiple grounds.

44 UN, CEDAW (2010), General Recommendation 28 on the Core Obligations of States Parties under Art. 2, CEDAW/C/GC/28, 16 December 2010, para. 18.

45 ECtHR, *B.S. v. Spain*, No. 47159/08, 2012.

46 ECtHR, *N.B. v. Slovakia*, No. 29518/10, 2012.

Under EU Law there are no specific provisions that imply intersectional discrimination. It does, however, list at a number of grounds in the Charter Article 21 that are not mentioned in other treaties, such as genetic features or property. In the EU Racial and Employment Equality Directives recitals state that women are victims of multiple discrimination as well.

Example No. 4:

B. is a transgender woman who works in one of the largest and busiest toy stores in town. As a part of daily tasks, salespersons also work in the storage room and thus are occasionally required to carry heavy items. B. is of Roma origin and when she applied for the job she was hired due to the company inclusion policy and affirmative action. As she suffered a traffic accident she endured permanent disability and most of the time is prevented from carrying heavy items. Additionally, she is never tasked to work at the main showroom as they are being changed every month and employees spend time with children visiting the store playing with the toys that are on display for that month. At a holiday season gathering, during the distribution of bonuses, she found out that she was less paid than her colleagues, despite having the same experience and working just as hard as others. When she asked her manager about it, she was told that she is paid less due to the fact that she works less in the storage and she was never tasked to work in the showroom and thus others are exposed to more physically enduring jobs.

Question: She is considering complaining, but she is not sure if she was discriminated. What advice would you give her?

Harassment and instruction to discriminate

Harassment is a specific type of discrimination and it used to be associated with direct discrimination. Nowadays the differentiation is made to recognize "particularly harmful form of discriminatory treatment."[47] According to Articles 2(d) and 2(1)d of the Gender Equality Directives, sexual harassment is a specific type of discrimination which consists of unwanted verbal, non-verbal, or physical conduct that is of a "sexual" nature.

47 *Handbook on European Non-Discrimination Law* (n 17) 64.

Under EU Law[48], harassment is considered to be discrimination when:

A. unwanted conduct related to a protected ground takes place;
B. with a purpose or effect of violating the dignity of a person;
C. and/or creating an intimidating, hostile, degrading, offensive, and humiliating environment.

According to the Explanatory Memorandum to the Employment and Racial Equality Directive as long it is of serious nature harassment can have different forms: "from spoken words and gestures to the production, display, and circulation of written words, pictures or other materials."[49] Both harassment and instruction to discriminate are defined as unwanted conduct related to racial or ethnic origin, according to the Racial Equality Directive.

The comparator is not needed as the harassment in itself is wrong, so there is no imaginary situation in which someone would make a case that harassment in a certain context is legitimate. Harassment can consist of one isolated incident or several incidents over a period of time. It can take many forms, such as threats, intimidation, or verbal abuse; unwelcome remarks or jokes about sexual orientation or quid pro quo sexual favours, gender identity, or gender expression.

The instruction to discriminate is considered to constitute discrimination, however, there is no clear definition. Under the scope of ECHR, there are no specific provisions that define prohibition of harassment or instruction to discriminate, but ECtHR did note in a number of judgments that harassment may fall under the protection of rights to private and family life (Article 8)[50] or the right to be free from degrading and inhuman treatment or punishment (Article 3)[51], likewise in connection to the peaceful assembly (Article 11).

48 Racial Equality Directive, Art. 2 (3), Employment Equality Directive, Art. 2 (3), Gender Goods and Services Directive, Art. 2 (c), and Gender Equality Directive (recast), Art. 2 (1) (c).
49 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM/99/0566 final - CNS 99/0253, 25/11/199,9 and Proposal for a Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation, COM/99/0565 final - CNS 99/0225.
50 ECtHR, *Đorđević v. Croatia*, No. 41526/10, 2012.
51 ECtHR, *Yazgul Yilmaz v. Turkey*, No. 36369/06, 2011.

In Baczkowski and Others v. Poland, the Court found violations of Article 14 in cases of harassment and instruction to discriminate in conjunction with Article 11. Before organizing marches for raising awareness about sexual orientation, the Mayor of Warsaw had made public announcements of a homophobic nature declaring that he will not issue permission to organize such events. Following his announcement, the body in charge of granting permission refused to state the fear of clashes. According to the ECtHR, the Mayor's statement could have influenced decision making and thus found that this amounts to discrimination based on sexual orientation.[52]

Examples of instruction to discriminate and harassment:

- Landlord instructs real estate agents not to rent his apartment to homosexual couples, people of a certain race, or older people living alone.
- Instructing someone to avoid working with a team member because they believe he or she is homosexual.
- Harassment is also when a person is being subjected to homophobic banter even if that person is not homosexual. This would amount to discrimination based on sexuality.
- If someone's child is a trans woman, and colleagues or neighbours make jokes about her transition, which amounts to harassment related to gender.
- Someone working on a construction site is being called 'princess' when they found out he was gay.

Unequal/less favourable treatment

Not all different treatment nor treating similarly persons who are in different situations constitute discrimination. In the context of both, direct and indirect discrimination, ECtHR and CJEU established that the difference in treatment is justified when states are pursuing a particular aim to achieve certain policy. Under EU law though, "only specific limited exceptions to direct discrimination are provided for, and a general justification is examined only in the context of indirect discrimination. In other words, under the anti-discrimination Directives, in cases of alleged direct discrimination, the difference in treatment can only be justified where it is in pursuit

52 ECtHR, *Bączkowski and Others v. Poland*, No. 1543/06, 2007.

of particular aims expressly set out in those directives."[53]

As mentioned earlier when assessing if certain treatment was discriminatory ECtHR will first determine if there was a difference in treatment or if there was a failure to treat differently persons that are in different situations. According to the ECtHR jurisprudence, for a policy to not constitute discrimination the state must provide "an objective and reasonable justification."[54]

Once the existence of different treatment is established ECtHR conducts test:

1. Is the difference or absence of difference objectively justifiable, meaning does it pursue a legitimate aim?
2. If such treatment is reasonably proportionate to the aim pursued?

In this chapter, we have already discussed the issue of identification of different treatment and with few examples, it was established that the important role in the determination of it plays comparator, so, for example, the standard is that homosexual couples are being compared to heterosexual couples or homosexual women with heterosexual women (see *E.B. v. Franc*, 2008), men and women are comparable in discussing parental leave (see *Konstantin Markin v. Russia* [GC], 2012) or remanded prisoners with convicted prisoners (see *Varnas v. Lithuania*, 2013). On the other side, the standard was also established of non-comparable situations: cohabiting sisters cannot be compared to spouses or civil partners in regards to inheritance tax (*Burden v. the United Kingdom* [GC], 2008); pensioners employed within the civil services and those in the private sector as regards to the pension entitlement (*Fábián v. Hungary* [GC], 2017). It is worth noting that:

> *"jurisprudence shows that differential treatment relating to matters considered to be at the core of personal dignity, such as discrimination based on race or ethnic origin, private and family life are more difficult to justify than those relating to broader social policy considerations, particularly where these have fiscal implications".*[55]

53 *Handbook on European Non-Discrimination Law* (n 17) 92.

54 ECtHR, *Molla Sali v. Greece* [GC], 2018, § 135; *Fabris v. France* [GC], 2013, § 56; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175.

55 *Handbook on European Non-Discrimination Law* (n 17) 93.

When making an assessment ECtHR often adopt the "margin of appreciation" method to determine the state's sphere of discretion to impose policy measures that might appear discriminatory. If this margin is "narrow" judges are to apply a higher degree of scrutiny. A "margin of appreciation" is a concept that allows to a Party to the Convention some leeway between the protection guaranteed by the Convention and the way such protection is applied in a member state. What is important to emphasize is that ECHR provides for a minimum standard of protection, thus applying a higher degree of scrutiny is important so that this threshold is not lowered. It was one of the earliest established concepts for the court as the first case formally decided on it was Lawless v. Ireland when ECtHR was assessing if derogation from the ECHR was valid concerning Article 15 (derogation in time of emergency). Subsequently, this method was used in the Belgian Linguistic case but not in the connection with Article 15, but in regard to the alleged violation of Article 2 Protocol 1 (right to education) and Article 8 (family life) in conjunction with Article 14 (non-discrimination). This case essentially defined mentioned legal doctrine as a formula that will help to adjudicate if the principle such as equality was violated by examining if there are an objective and reasonable justification for a policy that could amount to unequal treatment if such policy was pursuing a legitimate aim and was proportionate to the aim pursued.[56] For example in *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR acknowledged that the exclusion of other nationalities (in this case Roma and Jewish) from the concept of "constituent peoples" (namely: Bosniacs, Croats and Serbs) is essentially preventing them to run for the office and that it was done so in a times that were particularly challenging.[57] However, the ECtHR did not find this argument valid to justify the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina and that the constitution provision lacked an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1. Or in the case of *Mamatas and Others v. Greece*, Court held that maintenance of economic stability and restructuration of the debt in the

56 Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits) No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), §42.
57 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], No. 27996/06 and 34836/06), 2009, § 45.

context of political, economic and social crisis constitutes a legitimate aim and thus found no violation.[58]

On the other hand, ECtHR did not find "family values as the foundation of social reasons" to be considered a legitimate aim in enacting so-called "gay propaganda laws" even though the policy aimed to protect the minors. For the Court, the way laws were formulated and applied "served no public interest".[59]

If a legitimate aim is established, then the Court needs to assess whether a difference in treatment is also proportional, meaning: there should be a reasonable relation of proportionality between the State's obligation to respect for the rights and the protection of the interests of the society and the means to achieve the aims sought.

For example in *Fabris v France* the Grand Chamber reversed a prior Chamber decision and held that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol 1, determining that the applicant, a child "born of adultery", was discriminated as the national laws prevented him from inheriting the mother's estate. In determining so the Court stated that for "for the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[60]

However, we must not forget that the Court recognises that national authorities have more direct knowledge of the circumstances in their society and thus in principle, national judges would be able to make a better assessment of the public interests and policy that aims to achieve such interests, as it was mentioned before in the *Mamatas and Others v. Greece or Belgian* linguistic case. Thus, sometimes the State's margin of appreciation remains wide.

58 ECtHR, *Mamata,s and Others v. Greece*, No. 63066/14, 64297/1,4 and 66106/14, 2016, § 103.

59 ECtHR, *Bayev and Others v. Russia*, No. 67667/09, 2017, § 67.

60 ECtHR, *Fabris v. France*, [GC], No. 16574/08, 2003, § 56.

Hate speech

The common understanding of hate speech is that it consist in an abusive or threatening speech or writing that is targeting a particular group and expresses prejudice based on prohibited grounds such as "race", religion or sexual orientation.

The UN Strategy and Plan of Action on Hate Speech defines it as "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language regarding a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or another identity factor."[61] Article 19 of the Universal Declaration of Human Rights protects freedom of expression but it is Article 19(3) of the CCPR that specifies that freedom of expression can be restricted under the condition that it is provided by law and are necessary for the respect of the rights or reputations of others, the protection of national security or public order or public health or morals. Article 20(2) prohibits "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination forbids propaganda activities which promote and incite racial discrimination. In addition, alarmed by the emergence and occurrence of racism, racial discrimination, xenophobia and intolerance raised in "subtle and contemporary forms and manifestations" the UN adopted two measures: the Durban Declaration and Programme of Action of September 2001 and the outcome document of the Durban Review Conference of April 2009 and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence from 2012. In essence, in the course of one decade, the UN recognized that prompt and coordinated international response must be made in the dissemination of hate speech thus it calls for internet service providers to follow international and regional standards of freedom of expression while disseminating racist messages and any form of intolerance and discrimination.

61 Strategy available at: https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf

When it comes to the EU legal framework, the freedom of expression is protected under Article 11 of the Charter as well as the established non-discrimination principle under Article 21. Diversity, multiculturalism, and multi-ethnicity of European societies are some of the most cherished features of the EU, thus no wonder its commitment to protecting such society from racist and xenophobic forms of communication. As a result of that commitment, the EU is bound to protect fundamental rights set in the TEU but also by the common constitutional traditions of its MS. On that note, EU adopted the European Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia through criminal law which not only reinforces co-operation between judicial and law enforcement authorities but also requires them to take measures in combating particularly serious forms of racism and xenophobia and criminalize such acts. This includes public incitement as well. Two years later Directive 2010/13/EU or the so-called Audiovisual Media Services Directive was adopted. This Directive requires member states to ensure that media providers do not produce content that contains any incitement to hatred based on race, sex, religion or nationality.

At the CoE level number of recommendations and resolutions were adopted over the time which targeted hate speech, such as: Committee of Ministers Recommendation 97(20) from 30 October 1997 which defines hate speech and condemns all forms of expression that incite racial hatred, xenophobia, anti-Semitism and intolerance, Recommendation 97 (21) from 30 October 1997 on media contribution to fight against intolerance, Resolution 1510(2006) on Freedom of expression and respect for religious beliefs, Recommendation 1805(2007) on blasphemy, religious insult and "hate speech" against persons on grounds of their religion.

Article 10 (freedom of expression) is one of the backbone articles of the ECHR and it is considered an essential foundation of any society. For ECtHR, it is a "basic condition for its [society] progress and for the development of every man." This was confirmed in Handyside v. the United Kingdom where ECtHR held that freedom of such is the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic

society".[62] While freedom of expression is vital for democratic societies, sometimes certain restrictions to it provide for a more tolerable society. For ECtHR "[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance …, provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued."[63] The term hate speech has not so far defined by the ECtHR, in *Gündüz v. Turkey* referred to it as "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)."[64] In deliberating cases in connection to the freedom of expression and hate speech the ECtHR relies on two Articles. The first one is Article 17 (prohibition of abuse of rights) protects the negation of the fundamental values of the ECHR that can be the result of a hate speech and the second is paragraph 2 of Article 10 (the restrictions on protection) in the situations when certain speech is deemed not to be against the fundamental values of the ECHR.

A more specialized body devoted to the fight against racism and intolerance is ECRI a monitoring body of the Council of Europe which publishes periodic country reports and general policy recommendations. Recommendation No. 7 criminalizes hate speech that incites violence, hatred, or discrimination including insults and defamation of a person[65] or group of a person based on non-closed list of the protected grounds.

In General Policy Recommendation No. 15 ECRI defines hate speech much broader and it is any speech that entails:

> *"The use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well*

62 ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 1976, § 49.

63 ECtHR, *Erbakan v. Turkey*, No. 59405/00, 2006, § 56.

64 ECtHR, *Gündüz v. Turkey*, No. 35071/97, 2004, § 40.

65 This however does not protect public officials, state or state symbols. More on this: Mirko Đuković, 'Hybrid Regimes and Satire: a Love Affair' IACL-AIDC Blog (24 September 2020) https://blog-iacl-aidc.org/2020-posts/2020/9/24/hybrid-regimes-and-satire-a-love-affair

any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity, and sexual orientation."

At the very beginning, the Explanatory memorandum to this Recommendation sets forth that in comparison to previous definitions this one includes significant elements that differ from those found in other documents. Now the hate speech also extends to advocacy and incitement of hatred (of any kind) but intimidation as well. It strengthens previous measures and recommendations, but it also builds u on the overall country monitoring of the implementation of GPR No. 7 and 2. It is important to note that the Recommendation recognizes the importance of freedom of expression thus it provides for inputs on how to tackle hate speech without restricting freedom of expression.

Many situations could fall under the hate speech umbrella, and ECRI Recommendation No. 15 goes beyond the known situations. According to the Recommendation, incitement means a "statement about groups or persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them." The form in which this statement can be expressed covers written and spoken words, signs, symbols, pictures, music, plays and videos. Any means of communication of the idea that encourages hate towards someone. ECRI is also specifically aware of the perils of denial of certain facts such as war crimes or trivialization of genocide that can also be seen as an incitement for hate. Alongside the established jurisprudence, satire, and objective news reporting are excluded from this context.

The recommendation, in particular, defines that the purpose of hate speech sometimes is not only to directly discriminate or stigmatize a group or a person but also to incite others to "commit acts of violence, intimidation, hostility or discrimination against those targeted by it."[66]

66 'ECRI General Policy Recommendation No. 15 on Combating Hate Speech' para 14.

Furthermore, the intent the incite might be established either in an unambiguous call by the speaker using hate speech for others to commit certain acts or it can be read through the language used or other relevant circumstances such as the event where the speech occurred.

The Recommendation also offers the risk assessment test which considers:

1. The context in which the hate speech occurred (are there any serious tensions in the society that this speech is linked to);
2. The capacity of the person giving the speech (political, religious, or other leaders);
3. The nature and strength of the language (is it provocative and direct, does it involve use of misinformation, negative stereotyping, is it capable of inciting acts of violence);
4. The context of the specific remarks (are they isolated occurrence or are they reaffirmed several times);
5. What is the medium used to transfer the message (was the event live);
6. The nature of the audience.

This risk assessment test goes beyond the formulation given in paragraph18 of the ECRI Recommendation No. 7.[67] Meaning that Recommendation No. 15 suggests that assessing hate speech is not only about the intent but "where the effect can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used." According to ECRI, this goes in line with the ECtHR view that criminal sanctions are legitimate for remarks made when it should be expected to aggravate or provoke explosive situations.[68]

Once the hate speech takes the form of conduct that is in itself a criminal offence it is may be referred to as a hate crime.[69]

67 The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

68 'ECRI General Policy Recommendation No. 15 on Combating Hate Speech' (n 67) n 16. See more in: ECtHR, Zana v. Turkey [GC], no. 18954/91, 1997 and ECtHR, Sürek v. Turkey (no. 1) [GC], no. 26682/95, 1999

69 OSCE ODIHR Hate Crime Reporting: https://hatecrime.osce.org/what-hate-crime

Example No. 5

In the midst of a political campaign well-known writer held a speech in front of thousands of people diminishing and dehumanizing opponents. He specifically targeted minority people and made remarks about their political choices. The heated speech spurred up the mass chanting their names and sending disapproving messages. The speech targeted specific political group and their voters calling them traitors, nationalistic waste that are unwelcome in the society. As a result, a group of people from the crowd went to the neighbourhood where one of the political leaders that were called on in the speech lives. The mass chanted his name, used various slurred language, associating him in a bad context. In the same time, other group did the same in front of the family house where his parents live.

Question: Would you argue that such behaviour does not constitute hate speech, or is it allowed in a political campaign?

Hate crime

A hate crime is a crime motivated by hate or prejudice on grounds such as "race", colour, language, religion, citizenship, national or ethnic origin, sexual orientation, gender identity or sex characteristics whether real or presumed... Such crimes may involve but are not limited to physical violence, or property damage. While hate crime is already a crime with a bias motives against a person or a property a hate speech is a form of expression that can incite acts of hatred against a person or group of person and in the most serious circumstances is a crime.

There are two important elements to hate crime: such an act must be criminalized meaning be under the criminal code and such crime must be committed with a bias motivation. The bias indicates that the perpetrator targeted a person or a group or their property because of the protected characteristic which is a fundamental trait that distinguishes them from the majority of society. Bias and prejudice play important role in distinguishing hate crimes from other crimes. For the purpose of this Handbook, bias and prejudice are seen as preconceived negative

opinions and stereotypical assumptions, intolerance or hatred about someone or a certain group which results in acts of threats, physical attacks, property damage or even murders.

The European Union Agency for Fundamental Rights (FRA) research shows that hate crimes should not be treated as any other crimes, because the impact of the offence extends beyond the actual victim or victims. For example murder or attack on the property of someone who belongs to a specific group that falls in the category of protected characteristic impacts other members of the same group, other groups or society at large. Attack on a member of a particular minority sends negative signals to other minorities as well.[70]

Each year OSCE Office for Democratic Institutions and Human Rights (ODIHR) publishes annual hate crime report. The last report suggests that while an overall international and national legal framework in combating hate crime exists, the data show that low implementation scores many instances. According to the report, 53 out of 57 countries prohibit hate crime, and not many countries have appropriate mechanisms for police to record hate crimes as a separate category. Besides, ODIHR found that "the vast majority of bias-motivated crimes go unreported."[71]

Under the EU legal framework the before mentioned Decision 2008/913/JHA left options open for member states on how to tackle hate crime in their criminal code. The decision, however, is restricted to those hate crimes that were committed against someone due to their race, colour, religion, descent, or national or ethnic origin. Despite that, member states opted to widen the scope so they followed the grounds of discrimination forbidden under Article 14 of the ECHR and Article 21 of the Charter.

As stated in the OSCE ODIHR Report one of the issues is the fact that victims do not report on this particular crime although Framework De-

70 FRA brief: Crimes motivated by hatred and prejudice in the EU available at: https://fra.europa.eu/sites/default/files/fra-brief_hatecrime_en.pdf

71 OSCE ODIHR 2018 Hate Crime Reporting available at: https://hatecrime.osce.org/what-do-we-know

cision 2008/913/JHA stipulates that prosecution of hate crimes does not depend on the victim's report or accusation (Article 8). In 2012 the Directive 2012/29/EU was adopted. This Directive of the European Parliament and the Council established minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. This instrument included the protection of LGBTI citizens and thus includes grounds such as sexual orientation, gender identity, and gender expression. Victims do not have to be a member of a particular group of the protected ground because someone can be targeted and thus be discriminated against by association.

The ECtHR jurisprudence reiterated time after time that hate crimes acts amount ta particular destruction of fundamental rights. Respecting the difference in the approach to criminalize and prevent such crimes from state to state in line with the margin of appreciation, ECtHR insists on enacting laws with efficient protection from crimes motivated by bias. In *M.C. and A.C. v. Romania*, it accepted that uncovering any possible discriminatory motives is a difficult task but "authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination".[72]

The jurisprudence suggests that violent acts committed due bias and prejudice are a serious form of derogation of human rights and states are to have that in mind in conducting an investigation. For example in *Virabyan v. Armenia*, ECtHR held that the state failed to take into consideration that an applicant who was arrested and beaten up during anti-governmental demonstrations had been ill-treated because of his political opinion. The circumstances of his background, political involvement, and the way he was ill-treated, for ECtHR amounted to torture and discrimination.[73]

72 ECtHR, *M.C. and A.C. v. Romania*, No. 12060/12, 2016, §113.
Als,o see ECtHR: *Nachova and Others v. Bulgaria* [GC], No. 43577/98 and 43579/98, § 16,; Members of the Gldani Congregation of Jehovah's Witnesses and Others, §§ 138-4,; and *Mudric v. the Republic of Moldova*, No. 74839/10, §§ 60-64.
73 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2012, §215.

In *Škorjanec v. Croatia*, ECtHR found that the state failed to acknowledge the general context of the attack and thus did not link the racist motives and an act of violence as the victim herself was not of Roma origin and refused to investigate if she was perceived to be Roma by the attackers. Also, they failed to acknowledge that she was discriminated against by association with her Roma partner.[74]

Jurisprudence likewise confirmed in *Đorđević v. Croatia* that states have a duty to investigate and prevent hate crimes on the part of private individuals or to protect victims of crime between private parties.[75]

The challenges of online hate speech and social media

A particular challenge is combating hate speech on social media. Although during the last decade number of platforms and news portals have developed and adopted policies to prevent the use of hate speech, the challenges to combat online hate speech are rising. To tackle this issue and to fight the spread of hateful, harmful and deceitful contents on its platform, Facebook has established a $130 million trust fund which will support the operation of its Oversight Board which is independent of Facebook. The mandate of the board is to review content that could be inconsistent with policies and values all the while respecting the freedom of expression within the framework of international law and human rights.[76]

Besides hate speech, there are other forms of illegal content that are of harmful nature. For example, an apology of terrorist acts and violence, graphic depiction of violence, fake accounts and impersonation, identity theft, incitement to violence, bullying, harassment, sexual exploitation of minors, non-consensual or unsolicited pornography, disinformation and fake news, defamation, etc.

74 ECtHR, *Škorjanec v. Croatia*, 25536/14, 2017, §,66 and §70.

75 ECtHR, Đorđević op. cit. (n51), §138 and §149.

76 One of the members of the board is former Judge of European Court of Human Rights and professor at Central European University, Andras Sajo, see at: https://www.ceu.edu/article/2020-05-20/andras-sajo-developments-social-media-are-decisive-democracy or https://www.oversightboard.com/news/announcing-the-first-members-of-the-oversight-board/

In regulating online content while respecting freedom of expression guaranteed by international human rights law, there are three parties to be considered: the states, the online service providers (OSPs) and users. While for OSPs it could be argued that there is no universal definition of what hate speech[77], earlier we have seen there are few different definitions as give the international legal standards. Thus the solution to this challenge is to have one uniform approach that would come from the international human rights law and thus be transplanted to the national legal frameworks that OSPs and users will have to comply with. This was indeed presented in the 2018 report to the UN Secretary General, Special Rapporteur on Freedom of Opinion and Expression David Kaye who argued that international human rights standards should be shaped in such a manner to hold accountable, both: states and companies across the world. The report suggests that States should "reconsider speech-based restrictions and adopt smart regulation targeted at enabling the public to make choices about how and whether to engage in online fora."[78]

Furthermore, in a report from 2019, Kaye recommends that "human rights protections in an offline context must also apply to online speech. There should be no special category of online hate speech for which the penalties are higher than for offline hate speech."[79] He also criticized OSP for avoiding to incorporate human rights laws as a guide in their rules especially given the impact they have on the human rights of the users and public. In that respect, he recommended that OSPs' content policy be tied to international human rights law directly.

As indicated before, Article 19 of the CCPR protects the right to freedom of expression and opinion. Additionally, Article 20 defines what types of

77 For YouTube hate speech exists when it promotes violence or hatred; Twitter does not ban "hate speech" as its policy understands "hateful conduct" or hateful imaginary; few days after mosques massacre in Christchurch, New Zealand, Facebook categorized white nationalism and white supremacy as hate speech.

78 David Kaye, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations, 6 Aril, 2018, available at: https://perma.cc/R5F3-YXSD

79 David Kaye, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations, 9 October 2019, available at https://undocs.org/A/74/486

expression must be prohibited but as it is a rather ambiguous article, the Rabat Plan of Action[80] was prepared to:

- gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of incitement to national, racial, or religious hatred, while ensuring full respect for freedom of expression as outlined in articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR);
- arrive at a comprehensive assessment of the state of implementation of the prohibition of incitement in conformity with international human rights law and;
- identify possible actions at all levels.

A six-part threshold was created in order to define restrictions on freedom of expression and incitement to hatred. In making assessment if something amounted to hate speech it should be taken into account: (1) the social and political context, (2) status of the speaker, (3) intent to incite the audience against a target group, (4) content and form of the speech, (5) extent of its dissemination and (6) likelihood of harm, including imminence.

The Convention on Cybercrime also known as Budapest Convention from 2001 is the first international treaty that addresses the internet and cybercrime. Although it is a Council of Europe treaty other non-Council of Europe countries signed it and ratified it: the US, Canada, Japan, South Africa, Israel etc. In 2006 the Additional Protocol to the Convention came into force. The protocol offers protection from discrimination on the internet and requires criminalization of racist and xenophobic materials, as well as threats and insults motivated by racism and xenophobia.

The very first case in which ECtHR examined the liability for user-generated comments on the internet news portal the was case of *Delfi AS v. Estonia*. Estonian national courts held the company liable for the offensive comments posted by its readers under the news article about the ferry company. Upon request of the company's lawyers, the portal

80 UN Human Rights Office of the High Commissioner, Rabat Plan of Action: https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx

removed offensive comments but only 6 weeks later.[81] The issue in question was not if the freedom of expression of the authors commenting on the article was breached but if holding Delfi liable for comments posted by readers is a breach of its freedom to impart information. ECtHR held that no violation of Article 10 was found due to the fact that the comments were extreme and since Delfi is a professional news portal that runs for-profit it is in fact applicant that was supposed to react promptly and remove offensive comments.

A more recent example is the case of *Beizaras and Levickas v. Lithuania* which will be discussed the Chapter V of this Handbook.

Already in its Recommendation No. 15 recitals, ECRI recognizes that the hate speech via electronic forms of communication is increasing and thus calls for more adequate reporting and data collection on online hate speech. It recommends member states to ratify the Additional Protocol to the Convention on Cybercrime in order to criminalize acts of online hate speech that are racist and xenophobic in nature. It extends recommendation to ratifying Framework Convention for the Protection of National Minorities and Protocol No.12 to the ECHR. Also, it recommends withdrawal from any reservation to Article 4 of the CERD and to Article 20 of CCPR, but also to recognise the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals under Article 14. The seventh recommendation focuses on regulation and self-regulation of media the and internet in connection to the online hate speech. In the Explanatory Memorandum, ECRI points that "While some regulation of the media and the Internet is not inconsistent with the right to freedom of expression, the placing of greater reliance on self-regulation to tackle the use of hate speech will in many instances be not only more effective but also more appropriate." For ECRI the basic requirement is not suggesting that new regulatory powers should be adopted but it requires that the existing ones become more effective thus it is prudent to widen the definition of what hate speech is and therefore regulators should rely on the one given in the Recommendation itself.

81 ECtHR, *Delfi AS v. Estonia*, No. 64569/09, 2015.

Prohibition of discrimination during the state of emergency

The Vienna Convention on the Law of Treaties of 1969 governs fundamental rules relating to the treaty law. The very basis of treaty law is principle pacta sunt servanda, which means that agreements must be honoured and adhered to. In the process of treaty drafting, states can disagree on the number of issues. In line with the international treaty law, they are allowed to place reservations and declarations in regard to the specific provisions of the treaty that they disagree with or they want to clarify what certain provision means in the particular national legal framework. However, it must be noted, that reservations to the provisions that are the aim of the treaty are impossible. The purpose of reservations is to either exclude (opt-out) from a specific provision or to modify the legal effect of certain provision of the treaty in its application (Article 2(1(d)) of the Vienna Convention). The purpose of declarations is to explain or clarify its understanding of a particular provision of the treaty. Reservations and declarations should not be confused with derogations. Derogations allow for a state party to an international treaty to temporally suspend or limit legal obligations in exceptional circumstances, such as armed conflict or national state of emergency.

Article 4 of the CCPR allows for contracting state to the Covenant that exceptional circumstances they can derogate certain rights. Similarly, Article 15 as a derogation clause allows for contracting states, in certain exceptional circumstances the possibility of derogating in some manner from their obligation under the ECHR. It is a rule that in such situations party to the treaty informs treaty body or relevant authority about the derogation.

The exceptional circumstances are those that amount to the need of declaring the state of emergency when governments in their constitutional rights are authorized to pass policies and govern in a manner they usually would not be able to do so. This has one purpose only: protection and safety of citizens. States of emergency can happen during a natural disaster or armed conflict of epidemic and pandemic, as we have seen some governments did so during Covid19 pandemics. Restrictions of rights must meet certain requirements such as legality, necessity, proportionality and non-discrimination. During global COVID19 pandemic, the UN Human Rights Office of the High Commissioner issued guidance for all state parties to the ICCPR.[82]

82 OHCHR Emergency Measures and Covid-19: Guidance, from 27 April 2020, available

Even so, certain rights cannot be derogated even in times of state of emergency. In the case of, ECHR those are rights protected under Articles 2 (right to life), 3 (freedom from torture, inhuman or degrading treatment or punishment), 4 (prohibition of slavery and forced labour) and 7 (no punishment without law). In addition, Protocol No. 6 prohibits derogation from the abolition of the death penalty in time of peace and limiting the death penalty in time of war, and Protocol No. 7 prohibits derogation from the ne bis in idem principle, while Protocol No. 13 does not allow derogation from the complete abolition of the death penalty. According to the international human rights standards the equal enjoyment of human rights must be protected even during a state of emergency.[83]

Some of the rights that could be temporarily suspended the are right to free movement, public gathering, freedom of expression and opinion, media freedoms. However, even in such circumstances, any derogation must be proportional to the aim of measures taken.

Be it as it may general international law requirement is that any restriction must meet the requirement of legality, necessity and proportionality and be non-discriminatory and these requirements provide for a safeguard to fundamental rights that cannot be suspended.[84]

In like manner, ECtHR examines if the policies put in place meet the aim of the measure, and for example in *A. and Others v. the United Kingdom* held that "the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation." The applicants were eleven detainees suspected of terrorism pursuant to the antiterrorist legislation adopted in the aftermath of 9/11. Not only that applicants were detained by the UK authorities but they suffered inhuman treatment and they were denied access to an effective remedy in connection to their Article 3 complaints and Article

at: https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf

83 UN Human Rights Committee (HRC), CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, available at: https://www.refworld.org/docid/45139c9b4.html [accessed 23 August 2020], para 7.

84 UN Human Rights Office of the High Commissioner, Emergency Measures and Covid19: Guidance available at: https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pd

13. Also, they claimed that the detention itself was contrary to the rights under Article 14 as UK nationals suspected of the same crime were left at liberty. Although ECtHR acknowledged derogating measures stipulate the Article 15 in connection to the situation in the aftermath of 9/11, Court found that those measures were disproportionate and discriminating against non-nationals since the threat was in principle posed by nationals and non-nationals. Thus the proportionality test revealed that the measures taken amounted to unjustifiable discrimination.[85]

Key points

When talking about discrimination, people often neglect other types of discriminatory behaviours and mostly focus on direct and indirect discrimination. This chapter shows that definition of discrimination has a wider scope and it also encompasses those situations in which discrimination occurs on more than one protected ground:

- While multiple discrimination means discrimination that occurs on the basis of several grounds operating separately, intersectional discrimination occurs when a person is being discriminated against on several grounds that operate and interact with each other at the same time.
- In establishing discrimination it is important to find a relevant comparator, in every situation except when discrimination occurs as a result of the harassment. As harassment is wrong in itself and can take various forms of behaviour there is no need to find a suitable comparable situation to establish it.
- Very important take from the international jurisprudence is that national courts and authorities are obliged to take into consideration if discrimination occurred as a result of being associated with someone.
- Very specific types of discrimination would be situations in which someone was instructed to discriminate as well as discrimination that resulted from hate and prejudice, as well as the consequence of the online hate speech.

85 ECtHR, *A. and others v. the United Kingdom*, No. 3455/05, 2009, §190

CHAPTER TWO - CONTEXT AND BACKGROUND: INTERNATIONAL STANDARDS AND KEY PRINCIPLES IN THE AREA OF DISCRIMINATION

No matter if read in constitutions or international treaties, human rights are understood as ultimate norms that protect all people everywhere from various political, legal, social, and humanitarian harm. The modern conception of human rights relies on principles outlined in the Enlightenment era but contemporary rights are built on the post-World War II awakening. The Nazi German and Fascist Italian regimes initially were the result of a democratic parliamentary process, thus after the War the humanity realized the weakness of democratic processes. To protect the future of humanity, human rights have been reinstalled in international and subsequently in national legal orders. Whatever the personal preferable discourse of understanding of human rights is: that they are moral principles of norms that are inalienable to us as we are inherently entitled to them because we are human beings or that human rights are norms separated from morality (since morality is not a universally based value) thus human rights exist as positive laws made by humans, there are four distinct characteristics of human rights:

1. Human rights are rights that impose duties of respect, protection, and facilitation by all actors in society;
2. Human rights are plural;
3. Human rights are universal;
4. Human rights have great importance but they are not absolute.

The evolutionary road of human rights protection followed the changes in the more and more globalized world. As the postcolonial and neo-colonial[86] politics took place over newly independent nations, the strong push to

86 "Kwame Nkrumah, the first president of independent Ghana, coined the termed 'neo-colonialism' to refer to the subtle mechanisms that perpetuated colonial patterns of exploitation in the wake of formal independence. Nkrumah argued that the achieve-

establish relevant international human rights protection mechanisms from these countries was visible. One of the examples is the International Labour Organization (ILO) that played an important role in establishing an international minimum standard of protection of workers and it also helped shape a moral discourse and vision of global order to be administered.[87]

The principle of non-discrimination is enshrined in Articles 2.1 and 26 of CCPR, Article 14 ECHR, Article 1 Protocol No. 12 ECHR, Article E of the ESC(r), Article 7 of the ICRMW, Article 4.3 of the Istanbul Convention. Under EU law in the EU Charter Article 21 expressly refers to additional grounds such as "ethnic origin", "genetic features", "disability", "age", and "sexual orientation". In terms of discrimination grounds, the ECtHR has interpreted the wording "other status" of Article 14 ECHR, extending the protection to several implied grounds such as age, disability, economic and social status, health situation, marital status, nationality, sexual orientation, and gender identity. The scope of protection from discrimination requires States to act against discrimination and not only in the conduct of public policies but also in private agents in all fields.

Standards on the prohibition of discrimination of the United Nations

Apart from the Universal Declaration of Human Rights, which does not create direct legal obligations to its signatories, it is a milestone document in humankind history that served as a backbone to develop a binding legal framework, other relevant international treaties that Montenegro is a party to are:

1. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol of the Convention against Torture;

ment of formal sovereignty had neither freed former colonies from the unequal economic relations of the colonial period nor given them political control over their territories" Excerpt From: Jessica Whyte. "The Morals of the Market.", epub, page 179

87 Yifeng Chen, 'The International Labour Organisation and Labour Governance in China 1919–1949', in Roger Blanpain, ed., China and ILO Fundamental Principles and Rights at Work (Alphen aan den Rijn: Kluwer Law International, 2014), p. 28.

2. International Covenant on Civil and Political Rights (CCPR) and Second Optional Protocol to the CCPR aiming to the abolition of the death penalty;
3. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
4. International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
5. International Covenant on Economic, Social and Cultural Rights (CESCR);
6. Convention on the Rights of the Child (CRC) with its Optional Protocol to the CRC on the sale of children child prostitution and child pornography and Optional Protocol to the CRC on the involvement of children in armed conflict;
7. Convention on the Rights of Persons with Disabilities (CRPD);
8. Convention for the Protection of All Persons from Enforced Disappearance (CED);
9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).[88]

The nature of the obligation imposed on the parties to the Covenant is such that it is both: negative and positive. While they must refrain from violation of rights, any possible restriction must be done in line with the provisions of the Covenant. As noted before, even such restrictions must be proportionate to the legitimate aim that governments are pursuing.[89] No restrictions are allowed to absolute rights, such as protection from torture or slavery. In addition, the enjoyment of rights is not limited to the citizens of a particular state party but rights should be protected and enjoyed by all individuals who may find themselves in the territory of a state party.[90]

What is the effect of the rights to equality and non-discrimination in the national legal orders? According to the General Comment no. 31, Article

88 Nota bene: to the day of publishing of this Handbook, Montenegro had not ratified CMW.

89 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: https://www.refworld.org/docid/478b26ae2.html [accessed 24 August 2020], para 6.

90 UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: https://www.refworld.org/docid/45139acfc.html [accessed 24 August 2020], para 1-3.

2(2) of the CCPR requires that States Parties take the necessary steps to give effect to the Covenant rights is unqualified and of immediate effect in the domestic order.[91] Furthermore "a failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State."[92]

The effective system in monitoring and reporting on the compliance of the states with their treaty obligations was needed, thus under the UN, one such mechanism is the Human Rights Council and other relevant treaty bodies that consist of independent experts and UN officers who work under the umbrella of the Office of the High Commissioner for Human Rights (OHCHR) and the UN Secretary-General Office. The aim of the Human Rights Council, which in 2006 replaced the UN Commission on Human Rights is a UN body with the mission to investigate an allegation of breaches of human rights and issues thematic reports on fundamental rights and freedoms. The HRC established Special Procedures to report or address specific country issues or thematic issues worldwide. One of the mechanisms developed is the so-called Universal Periodic Review (UPR) which is designed to support and expand the promotion and protection of human rights and thus it complements the work of other human rights mechanisms. It offers a report each year on forty-two states during three sessions of the HRC Working Group, meaning fourteen per session. One of the main focuses of the report is equality and non-discrimination.

The principle of equality as recognized in the CESCR is essential for protection from discrimination in the domain of labour rights, but more importantly, the principle of equality and non-discrimination is additionally reaffirmed with the work of ILO.

The ILO is a UN specialized agency that is composed of the representatives of governments, trade unions, and employers' organisations. ILO aims to promote social justice and international human and labour rights by creating a common international legal framework that establishes labour standards as well as to supervise their application. The work of ILO as one of the oldest agencies of the UN is paramount to the protection of equal-

91 UNHRC General comment no. 31, para 13.
92 Ibid, para 14.

ity and non-discrimination principle. ILO standards promote the protection of human dignity, freedom, equity, and security. To this day, those standards are set in the plethora of 189 conventions and treaties that govern collective (unions) and individual labour rights, workplace participation, equality, job security, and administration. However, the Declaration on Fundamental Principles and Rights at Work from 1998, identifies eight fundamental Conventions that bound all members. Those core conventions cover collective bargaining, forced labour, child labour, and discrimination. The nature of the Declaration is such that it bounds all Member States to respect and promote these rights and principles no matter if the relevant Conventions are ratified are not. In certain sense, these principles seem like constitutional instruments as they are regarded as human rights and are incorporated in international law. For the purpose of this Chapter, it is important to acknowledge that freedom from discrimination at work is enshrined in the Convention on Equal Remuneration (1951) and Convention on Discrimination in Employment and Occupation (1958). As ILO puts it, the Declaration recognizes that economic growth alone is not enough to ensure equity, social progress, and to eradicate poverty.[93]

Within the ILO, an Administrative Tribunal was set up and to this day its mandate is to provide guarantees of respect to rights, equality, and anti-discrimination in regards to employees of the UN and ILO. In 1949, the International Labour Conference amended the Statute of the Administrative Tribunal so that jurisdiction of the Tribunal got expanded and now complaints of employees of other international organizations are being accepted. Such was the World Health Organization.

Article II of the Statue sets out that Tribunal is competent to hear cases of alleged non-observance in substance or form, of the terms of appointment and is open to hearing cases even when the employment is ceased and to any person on whom the officer's rights have devolved on her or his death as well as to any other person who can show that she or he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

93 ILO Declaration on Fundamental Principles and Rights at Work, Recitals.

In *A. v. WHO*, Mr B.K.A. filed a complaint against the WHO, challenging the decision not to grant him the two-step within-grade increase which, he argued, WHO ought to have granted him at the time of his appointment under a fixed-term contract. The Tribunal held that "The principle of equality requires that persons in the same position in fact and in law must be treated equally. The failure to grant the complainant the two-step within-grade increase that at the material time was given to other long-term short-term staff members, who were in the same position as the complainant, constitutes unequal treatment and entitles the complainant to an award of material damages."[94]

In *P. v. WTO*, a complainant a national of the US challenged the WTO's decision to grant him local recruitment status upon joining the Organization based on the fact that he had a Swiss residence permit. He was a Geneva-based foreign correspondent of a news agency with headquarters in the United States. In that capacity, he was an accredited journalist to the United Nations Office in Geneva. Tribunal found that there was no unequal treatment or the abuse of authority since the principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently however in this case, the complainant's comparator was wrong and his complaint was dismissed.[95]

In *M.M. (No.7) v. WIPO*, the complainant challenged the decision to reject her claim of retaliation/harassment. On various occasions, she complained that she was a subject of retaliation, harassment, and unequal treatment by her three hierarchical supervisors (Mr J.T., Ms E.M., and Ms M.I.). On several occasions she filed complaints and asked for protection, however, she was subjected to the opposite as she was described by her supervisors as incompetent, difficult, and worthy of disrespect and mobbing. She claimed that she suffered Institutional harassment because the Administration supported the acts of retaliation. The Tribunal found that there was an indication of failure to establish a pattern of retaliation that in fact constitutes an error in law. According to the Tribunal, the Appeal Board's approach was flawed as it only took into consideration two incidents while she substantiated other alleged incidents as well. "As a result, the Board

94 ILO Administrative Tribunal Judgment 4029, *A. v. WHO*, 26 June 2018, Consideration 20.
95 ILO Administrative Tribunal Judgment 4022, *P. v. WTO*, 26 June 2018, Considerations 5-8.

failed to consider whether there was an accumulation of repeated events which deeply and adversely affected the complainant's dignity and career objectives." It also failed to consider whether there was a long series of examples of mismanagement and omissions by the Organization that compromised her dignity and career constituting institutional harassment as established in Judgment 3250.[96] Tribunal found that the complainant suffered institutional harassment.

Protection against discrimination in the European Union

The three Founding Treaties establishing the three European Communities (EC) did not address human rights. The main aim was economic integration. No explicit reference to human rights was made, but in the Treaty establishing the European Economic Community (EEC) contained a general prohibition of discrimination based on nationality as well as the principle of equal pay for male and female workers. EC faced the issue of the absence of the human rights provision just a few years after its establishment.

In *Stork case*[97] in 1959, the CJEU stressed that the High Authority of the ECSC is required to apply Community law and is not entitled to examine if principles of German constitutional law were infringed. For the first time in the Stauder CJEU stated that it ensures the respect of fundamental rights "enshrined" in the general principles of Community law.[98] Despite the lack of any mention of fundamental rights in the original Treaties, the CJEU has, since Stauder held the institutions to be bound by fundamental rights as general principles of Community law. That means that any breach of fundamental rights is the ground of possible annulment of any measure having legal effect adopted by the Community bodies.

Such was the tendency in *Nold v Commission and Rutili v Commission*. According to the Nold judgment, CJEU, intending to safeguard fun-

96 ILO Administrative Tribunal Judgment 4286, *M.M. (no.7) v. WTO*, 24 July 2020, Consideration 17.

97 CJEU 1/58 *Friedrich Stork & Cie v High Authority of the ECSC*, 1959.

98 CJEU 29/69 *Erich Stauder v City of Ulm – Sozialamt*, 1969.

damental rights, draws its inspiration not only from the constitutional traditions common to the Member States but also from international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.[99]

In Rutili, French authorities granted to Mr Rutili, an Italian national working in France, a residence permit which allowed him to reside only in one part of the French territory because of his political and trade union activities. The French Government justified these measures following the public policy derogation contained in Article 39(3) EC. CJEU referred to the ECHR and its strict interpretation of the public policy reservation that may possibly restrict the free movement of workers in the Member States and Court held that as an exception to a fundamental principle of Community law, its application must comply with all Community rules.[100]

Yet, even after the Stauder case, the EC did not grant fundamental rights an organic status. This way national courts were left with the dilemma: to refuse to apply EC law or to act under their constitutional liberties and provisions. This matter came to light in the Internationale Handelsgesellschaft case, where CJEU held that fundamental rights form an integral part of the general principles of law.[101]

Besides reflecting on the common constitutional tradition of the MS, in Hauer CJEU referred to ECHR as a source of law, having in mind that MS are parties of the ECHR as well.[102] CJEU has indicated that the ECHR has a particular status[103] as a source of law and it has also referred to other inter-

99 CJEU 4/73 *Nold v Commission*, 1974, § 13-14.

100 CJEU 36/75 *Rutili v Ministre de l`Interieur*, 1975, §32.

101 CJEU 11-70, Internationale Handelsgesellschaft, 1970, §3.

102 CJEU 44/79, *Hauer v Land Rheinland Pflaz*, 1979, §15.

103 The following are some examples of rights which the CJEU has accepted as part of the EU concept of fundamental rights referring to the ECHR: Freedom of expression: Case C–274/99 *Connolly v. Commission* [2001] ECR I–1611, Case C–340/00 *Commission v. Kwik* [2001] ECR I–10269; Freedom of religion: Case 130/75 *Prais v. Council* [1976] ECR 1589; Freedom of assembly: Stauder, supra note 97, Case C–112/00 *Schmidberger* [2003] ECR I–5659; Human dignity: Case C-36/02 *Omega* [2004]; Privacy: Case C–404/92 *P, X v Commission* [1994] ECR I–4737; Right to property: Hauer, supra note 101, Cases C–20/00 &

national human rights treaties as a source of fundamental rights, most notably the CCPR which implies that CJEU has recognized several categories of different rights such as civil rights, economic rights, rights of defence.

The 1986 Single European Act (SEA) was somewhat revolutionary in the context of human rights provisions. It does not simply represent the first Treaty that the community drafted ever since the Founding Treaty but it was the first one to refer to human rights. Maastricht Treaty was the turning point in the constitutional protection of human rights. Creating the EU based on three pillars, Treaty introduced a general provision in the Article F(2), protecting human rights as follows: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and as they result from the constitutional traditions common to the Member States as a general principle of Community law."

The Treaty of Amsterdam from 1997 stressed the importance of respect for human rights, inserting it amongst the founding principles of the Union and specifically empowers the CJEU to ensure that European institutions respect fundamental rights and freedoms.

The first case in which the relationship between the EU and ECHR was examined is M & Co case. The applicant, a company, complained of the fact that Germany had enforced a fine imposed on it by the European Commission (in anti-trust proceedings) and upheld by the CJEU. ECtHR found that the Community system both secured and controlled compliance with fundamental rights.[104] However, ECtHR held that application before that court was incompatible with the provisions of the ECHR and declared the application inadmissible, nonetheless M & Co ruling laid down the so-called doctrine of equivalent protection.[105]

C–64/00 *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v, The Scottish Ministers* [2003] ECR I–7411; Equality: Case 149/77, *Defrenne III* [1978] ECR 1365; Family life: Case C–60/00 *Carpenter* [2002] ECR I–6279, Case C–413/99 *Baumbast* [2002] ECR I–7091; Right to a judicial remedy Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.

104 ECtHR, *M & Co v. the Federal Republic of Germany*, No 13258/87, 9 February 1990.

105 "Doctrine of 'equivalent protection' has been initially devised in order to facilitate the participation of the State parties to the Convention in the European Communities/Union, a supranational organisation to which they have agreed to cede certain powers in a

The ECtHR acknowledged the possibility of ECHR effects over the EU law. In *Matthews v. the United Kingdom*, Ms Matthews, a resident of Gibraltar, brought proceedings before the ECtHR, claiming that the denial of her right to vote in European elections constituted a violation of Article 3 of Protocol 1 to the ECHR, a provision which guarantees the right to free elections. The question before the ECtHR was if the United Kingdom was under an obligation to secure elections, even though the elections were held under the Act that was in accordance with the Treaty.[106] The ECtHR found that even though the Council decision could not be challenged in front of it, MS is responsible to secure the rights in the Convention, even after the transfer of the sovereignty to an international organization.[107] ECtHR noted that CJEU did not have jurisdiction in the matter, as mentioned Act and the Decision of Council are part of primary law and held that the UK and the MS, were responsible for possible violation of the right to vote.[108]

Much of what was shown in the above-mentioned cases draws upon the standards set by the Council of Europe's practice in human rights protection which includes standards such as those on civil and political rights, social, cultural and economic rights, minority rights, the treatment of detained persons, and the fight against racism and intolerance. Slowly the EU has moved towards a consolidated approach to human rights. It was by a step-by-step process, from Stork in which the Court stressed it is not entitled to examine the principles of human rights protection of national constitutions through Stauder and Matthews case, that the EU approach towards human rights protection was changed. It evolved until the point we are facing now: accession of the EU to the ECHR.

In interpreting EU law in the context of the interpretation of Council Directive 97/81/EC concerning the Framework Agreement on part-time work CJEU referred to the ESC. Court noted that "agreements concluded

number of fields which may affect fundamental rights." Olivier de Schutter comments on Accession of the European Union to the European Convention on Human Rights, available at http://www.statewatch.org/news/2007/sep/decchutte-contributin-eu-echr.pdf

106 Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom.

107 ECtHR, *Matthews v. the United Kingdom*, No. 24833/94, 18 February 1999, §36.

108 Ibid. §33-35.

between social partners at European Union level, refers to the European Social Charter signed in Turin on 18 October 1961, which includes at point 4 of Part I the right for all workers to a 'fair remuneration sufficient for a decent standard of living for themselves and their families' among the objectives which the contracting parties have undertaken to achieve."[109]

Article 6 of the Treaty on European Union (Lisbon Treaty from 2009) opens the possibility of the EU to accede to the ECHR. Also, should the EU accede to the ECHR such accession shall not affect the Union's competences as defined in the Treaties. Finally, it confirms that ECHR's fundamental rights as a result of the constitutional traditions common to the MS shall constitute general principles of the Union's law.

However, since the EU has not acceded to the ECHR yet, an individual can't make a complaint before ECtHR when the EU derogates human rights. They can indirectly complain about the EU when lodging applications against their member state before the ECtHR. Another way is to submit a complaint to the national court which can refer the case to CJEU via preliminary reference procedure.

Starting from the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (FFEU), rights protected by the ESC correspond to those in the EU Charter of Fundamental Rights (Charter). Due to the expansion of the EU competences and under influence of the development of human rights protection mechanisms on the UN level, regional level (ECHR) as well as the constitutional traditions of the member states and development of the jurisprudence of the CJEU, in 2000 EU member states proclaimed Charter which contains a list of human rights guaranteed and protected under the EU legal framework.

With Lisbon Treaty Charter became a legally binding document, an EU Bill of Rights if you want. Charter has seven titles and the third one is devoted to equality. Article 20-26 emphasizes the importance of the principle of equality. Article 20 sets the principle of equality while article 21 prohib-

109 CJEU, Joined Cases C-395/08 and C-396/08, *Istituto Nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci,* 2010, §31.

its discrimination on an open list grounds and unlike similar documents includes a prohibition of discrimination on the grounds such as genetic features or property. Thus, while Article 20 is a constitutional principle much like the equality principle in the national constitutions, Article 21 ingrains non-discrimination principle in substantive norms. Article 22 protects cultural, religious, and linguistic diversity and Article 23 contains a gender equality clause. Article 24 defines the rights of the child and Article 25 concerns the rights of the elderly to lead a life of dignity. Finally, Article 26 recognizes and protects the right of persons with disabilities.

The Charter applies when institutions and bodies of the EU are implementing EU law but also the scope of protection applies when national authorities implement EU law, for example when EU member state implements EU directive or when directly applies EU regulation. In any other case, national constitutions and international conventions ratified in the member state apply.

As mentioned in Chapter I of this Handbook for the full success of the Single Market project, the EU had to ensure that equality and non-discrimination principles are fully integrated with the acquis. Furthermore, the secondary EU legislation, especially legislation developed after the Amsterdam Treaty (1999) provides for full respect of the equality principle and safeguards from discrimination. In 2000, the Employment Equality Directive (2000/78/EC) and the Racial Equality Directive (2000/43/EC) were adopted. The first one prohibits discrimination based on sexual orientation, religion or belief, age, and disability in the area of employment. The second Directive prohibits discrimination based on race or ethnicity in the context of employment, but also in accessing the welfare system and social security, as well as goods and services. Following these two directives, in 2004 and 2006 two new directives were adopted. The Gender Goods and Services Directive (2004/113/EC) Gender Equality Directive (recast) (2006/54/EC). The first one prohibits sex discrimination in the area of goods and services while the second guarantees equal treatment concerning access to social security, welfare, and education.

Overall grounds of protection in the EU anti-discrimination directives vary. Protection on the grounds of race and ethnicity in relation to the

access to employment, welfare systems, and goods and services; sex discrimination is prohibited in relation to the access to the employment, social security, and goods and services; and sexual orientation, disability, religion or belief, and age are protected grounds in the context of access to the employment. It must be noted that all Equality Directives must comply with the Charter itself.

The EU anti-discrimination law is limited to specific areas, meaning it can be only applied in those cases that fall within the scope of EU law. What does that mean in practice?

While in Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministers, relying on Articles 21 and 23 of the Charter of Fundamental Rights the CJEU found that an exception in the Gender Goods and Services Directive permitting differences in the insurance premiums and benefits between men and women was invalid[110], in Bartsch, the CJEU clarified that where the allegedly discriminatory treatment contains no link with EU law, the application of the principle of non-discrimination is not mandatory.[111] In this case, the widow of an employee who died before the expiry of the deadline for implementation of Directive 2000/78/EC was not granted her spouse's right to a pension. According to the occupational pension scheme spouses entitled to it are surviving spouses that are no more than 15 years younger. Since she was 21 years younger she was denied her request. Although such provision was discriminatory CJEU ruled that it did not fall within the scope of the Union law since the deadline for implementation of the directive had not expired.

The Council of Europe and protection against discrimination

Unlike the EU that was born from economical and industrial resources integration, only to be developed into a political union, later on, the CoE from its birth worked towards the affirmation of rule of law, democracy,

110 CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres* [GC], 2011.

111 CJEU, C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [GC], 2008.

human rights, and social development.[112] ECHR is one of the main instruments in supporting the aim of the CoE and it represents one of the best systems in the sphere of protection of human rights in the world on an international level. Rolv Rysdall, former president of ECtHR described it as a "basic law of Europe".[113]

The court was established by the virtue of article 19 of the Convention. However not before Protocol 11 entered into force in 1998 did the individuals have direct access to the ECtHR, but through the European Commission for Human Rights. Protocol 11 made a huge impact on the work of the Court since it turned it into a permanent and full-time body of the CoE.

Unlike the EU, where binding acts have a direct effect in the national legal systems, ECHR is incorporated into national legal orders of the member states, either through constitutional provision on obligatory ratification in the national Parliaments or through judicial decision. Individuals, groups, or non-governmental organisations can submit an application before the ECtHR against the contracting state, alleging violations of the rights. It is, of course, possible to have a case brought before the Court by inter-state complaints. However, compared to the number of individual or group complaints the number of inter-state cases is remarkably small.

The main instrument for human rights protection is the ECHR. Article 14 guarantees protection from discrimination against the enjoyment of the rights protected by the convention. In 2000 Protocol 12 was adopted and was ratified[114] by Montenegro in June 2006. Although it is not ratified by all signatories of the ECHR, its purpose is to widen the scope of the prohibition of discrimination to equal treatment, including rights guaranteed by the national laws.

The European Social Charter (ESC) was adopted in 1961 and represents one more human rights treaty that plays an important role in upgrading the standard of protection from discrimination and enjoyment of human

112 Preamble and Article 1 of the Statute of the Council of Europe.

113 F. Lič, Obraćanje Evropskom sudu za ljudska prava, Beogradski centar za ljudska prava i Misija OEBS u Srbiji 2007, p. 6.

114 The Chart of signatures and ratifications of Protocol 12 is available here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures

rights. It represents an integrated set of international standards in the protection of social and economic rights. While ECHR is protecting fundamental rights, the ESC was created to support the protection of everyday human rights related to employment, health, social protection, education, and housing. In the 90ies the result of the "revitalization" of the ESC happened with the so-called Turin Protocol, set to revise and supplement the implementation of the ESC. The Revised Charter expanded the list of rights that were emerging from the number of issues and cases over the years, so ESC evolved into protecting rights from termination of employment, protection of the rights of claims in the event of insolvency of the employer, right to dignity at work, protection of workers' representatives and so on. One of the major changes was entry into force of the Additional Protocol that proved for a System of Collective Complaint which aims to increase the effectiveness, speed, and impact of the implementation of the ESC.

One more interesting fact about the revision of the ESC is the fact that the provisions in the charter besides being normative are also regulatory in their nature, so, for example, Article 15 concerns the integration and participation of the persons with disabilities in the wider community. ESC goes to those lengths to create a positive provision stipulated in paragraph 3 requiring parties to include persons with disabilities and their representative organizations in the process of design of the laws that are to facilitate the requirement from paragraph 1.

Essentially protection from discrimination under ESC was generated through a horizontal clause. Much like ECHR the prohibition of discrimination covers various grounds including any "other status" in the course of implementation of laws. The body overseeing the implementation of ESC and deliberating complaints is the European Committee of Social Rights which reaffirmed this horizontal effect of the anti-discrimination clause. In its decision in the case of Autism-Europe against France found that France has failed to achieve sufficient progress in advancing the provision of education for persons with autism.[115] France violated obligation under Article 15 § 1 and Article 17 § 1 of the revised ESC, either alone or when read in combination with Article E.[116] Additionally, accord-

115 ECSR, *Autism – Europe against France*, Complaint No. 13/2002, 2004, §54.
116 Ibid. §47.

ing to the ECSR, the scope of protection from discrimination in the ESC is wider than the one under Article 14 of the ECHR and that is because of the range of rights protected in the ESC in comparison. It goes further to cite ECtHR and Thlimmenos v. Greece, where ECtHR found that the principle of equality that is reflected therein means treating equals equally and unequals unequally. In that regard, ECSR prohibits not only direct discrimination but also all forms of indirect discrimination.

Amongst other CoE Instruments that support protection from discrimination there are:

1. Framework Convention for the Protection of National Minorities from 1994 (Article 4 affirms principles of equality and prohibition of discrimination);
2. Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) from 2014 (Article 4 prohibits discrimination on any grounds, and it also abolishes laws that discriminate against women);
3. Convention on Action against Trafficking in Human Beings from 2005 (Article 3 sets the non-discrimination principle);
4. Convention on Access to Official Documents from 2009 (Article 2 sets the right to access to official documents without discrimination on any ground);
5. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems from 2003 (relies on the Protocol 12 to ECHR and general prohibition of discrimination in defining it for the purpose of the Protocol);
6. Convention on Human Rights and Biomedicine from 1997 (Article 11 prohibits any form of discrimination against a person on grounds of genetic heritage).

Besides, within the Council of Europe, the European Commission against Racism and Intolerance (ECRI)[117] was established in 1993 and became operation in 1994. It is a human rights body which specialises in questions relating racism, xenophobia, antisemitism, intolerance, and racial

117 More on ECRI at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/

discrimination. One of the most important functions of ECRI is its country monitoring which helps Members states to identify policy and legislative gaps in fighting discrimination.

ECRI also work on general themes and in the period from 1996 to 2016 published 16 General Policy recommendations containing guidelines to address a wide range of issues in combating racism, xenophobia, antisemitism, and intolerance, such as racial discrimination in connection to migration, education, employment, antisemitism, etc.

The Commissioner for Human rights is an independent and impartial non-judicial institution that was established in 1999 to provide support to the CoE activities in the area of promotion and awareness of human rights. The activities of the Commissioner consists on country visits, thematic reporting and advising, as well as awareness-raising activities.

The Commissioner works closely with authorities and CSOs of member states to identify shortcomings in the respect of human rights. Also, it facilitates the activities of national ombudsperson and other human rights structures. Just like ECRI the Commissioner cooperates with other human rights monitoring mechanisms either national, regional, or international. The Commissioner is elected by the CoE Parliamentary Assembly from a list of three candidates proposed by the Committee of Ministers for one term in office of six years.

The Commissioner is a non-judicial body but it has the authority to act as a third party in the proceedings before ECtHR. In addition to the country monitoring and country reports, currently, the office is carrying out more targeted country visits focusing on a specific topic. The Commissioner is also in charge of issuing papers highlighting concerns related to specific human rights and suggests ways to address them. The Commissioner can also issue opinions on certain legislation and practice of the member states as well as communicate to the Committee of Ministers of CoE in respect to the execution of judgments of the ECtHR. The office of the Commissioner is also active in publishing analysis or summaries of recommendations in certain thematic fields.

Prohibition of discrimination under the ECHR

Article 14 of the ECHR prohibits discrimination in relation to the enjoyment of rights provided in the Convention, while Protocol No. 12 extends that prohibition beyond the scope of the Convention. Article 14 provides that:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

The equality guaranteed in article 14 is such that any violation can only be assessed in conjunction with a certain substantive right from the ECHR. However, the list of protected grounds is not exhaustive and this was confirmed in several cases. For example, in *Salgueiro da Silva Mouta v. Portugal,* the applicant complained that the Lisbon Court of Appeal discriminated against him when awarded parental responsibility for his daughter to his ex-wife based on his sexual orientation, as the court of lower instance granted him those rights because his ex-wife was not complying with the terms of the divorce agreement. The Court unanimously found a violation of Article 8 in conjunction with Article 14 of the Convention.[118] Similarly in *Mazurek v. France*, the applicant claimed to be discriminated against as he was unable to inherit his mother's estate since he was an "adulterine child". Although in the time he was born his mother was legally married, in his birth certificate she was the only named parent. Amongst other French Court of Cassation disagreed that inheritance rights had anything to do with Article 8. ECtHR found that in regards to their civil rights, the principle of equality protects and applies to both children born in and children born out of wedlock it also determined that unequal treatment was not reasonable to the proportionality between means employed and the aim pursued.[119]

The reason why such grounds were not listed in the Protocol 12[120], the Explanatory Report suggests that

118 ECtHR, *Salgueiro Da Silva Mouta v. Portugal*, No. 33290/96, 1999, §28.

119 ECtHR, *Mazurek v. France*, No. 34406/97, 2000, §49, §55.

120 To date, Protocol No. 12 (opened for signature on 4 November 2000 and entered into force on 1 April 2005) has been ratified by twenty out of the forty-seven member states of the Council of Europe. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures

> *"expressly including certain additional anti-discrimination grounds (for example, physical or mental disability, sexual orientation or age) [appeared to the drafters of the Protocol as] unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because the inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included."*[121]

ECtHR on occasion reminded that Article 14 merely complements the other substantive provisions. In *Carson and Others v. the United Kingdom*, a case concerning the failure of the UK to index-link pensions of a group of people working in the UK but emigrating to South Africa, Australia, and Canada, ECtHR found no violation of Article 14 but more importantly it emphasized that Article 14 applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide.[122] Thus it is necessary and sufficient, for the facts of the case to fall within one or more Articles of the Convention.

In *Molla Sali v Greece* applicant complained about the fact that Greek courts applied Sharia law to an inheritance dispute as her husband's will has been made following Greek civil law while Greek courts considered that the will was devoid of effect and instead applied principle from Shariah inheritance law that is applied to Greeks of Muslim faith. ECtHR reiterated that Article 14 has no independent existence but it does not presuppose a breach of substantive provision and to this extent, it is autonomous thus it extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee.[123] Meaning in this case ECtHR read violation of the substantive article in conjunction with Article 14 but it did not examine the violation of that substantive right alone. In some cases such as *Dudgeon v. the United Kingdom*, when ECtHR found that there is no need to examine claims under

121 The Explanatory Report to Protocol n°12 to the ECHR, § 20.

122 ECtHR, *Carson, and Others v. the United Kingdom* [GC], no. 42184/05, 2010, §63.

123 ECtHR, *Molla Sali v Greece*, No. 20452/14, 2018, §123, to see more on this: *E.B. v. France* [GC], no. 43546/02, §§ 47-48, 2008; *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 158, 2016; *Biao v. Denmark* [GC], no. 38590/10, § 88, 2016, and *Fábián v. Hungary* [GC], no. 78117/13, § 112, 2017.

article 14 when it already found that a breach of substantive right was determined on its own as well as in conjunction with Article 14.[124]

In *Danilenkov and Others v. Russia*, ECtHR confirmed the 'horizontal effect' of Article 14 in situations when national authorities do not take measures to prevent and protect from discrimination in disputes between private parties.[125] Similarly in *Milanović v. Serbia*, a case in which the religious leader of Hare Krishna in Serbia was subjected to threats and physical attacks by private individuals who are gathered in various nationalistic groups, ECtHR held that it is on State's authorities to conduct an effective and adequate investigation even in cases of disputes between private individuals. Especially when the violation of rights comes from prejudice on someone's personal characteristic.[126]

So what is the role of Article 1 of Protocol No. 12? It defines the general prohibition of discrimination:

1. *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

As stated before, this article extends the scope of protection against discrimination to "any ground" and any "right set forth by law".

In *Savez crkava "Riječ života" and Others v. Croatia* ECtHR confirmed that "Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 introduces a general prohibition of discrimination." [127] More recently in *Pilav v. Bosnia and Herzegovina* a case of Bosniak being refused to lodge his candidacy for the Bosnian Presidency because he was a Bosniak

124 ECtHR, *Dudgeon v. the United Kingdom*, No. 7525/76, 1981, § 67.
125 ECtHR, *Danilenkov and Others v. Russia*, No. 67336/01, 2009, §§ 131-136.
126 ECtHR, *Milanović v. Serbia*, No. 44614/07, 2012, §90.
127 ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, No. 7798/08, 2011, §103.

living in a municipality that is part of Republika Srpska, Bosnia's Serb-dominated entity, ECtHR found that notions of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol 12 ought to be interpreted in the same manner.[128] In this way, ECtHR pushed forward in fighting against discrimination based on ethnicity. Explanatory Report to Protocol No. 12[129] gives more insight into the scope of the protection from Article 1. Accordingly, there are four categories of cases where a person is discriminated against, in other words, to determine if Article 1 is applicable ECtHR needs to assess if the discrimination occurred:

1. in the enjoyment of any right specifically granted to an individual under national law;
2. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
3. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
4. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

A practical guide to restriction of rights: Covid19 pandemic

This year was marked as a year in which fight against Covid19 tested the democratic capacity of our institutions to safeguard the health of the nation but also not to infringe on guaranteed fundamental rights and freedoms. Unlike a virus that does not discriminate, the State authorities do. According to the UN research on Covid19 and Human Rights, three rights are at the frontline of the pandemic: right to life and duty to protect life, the right to health and access to healthcare, freedom to movement.[130] As has been pointed in this chapter certain restrictions to certain rights are allowed but those limitations must be necessary for the purpose they are pursuing,

128 ECtHR, *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 2016, §40.

129 Explanatory Report to Protocol No. 12 §22.

130 Covid-19 and Human Rights: We are all in this together, April 2020, available at: https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf

proportionate and non-discriminatory.[131] The response to the fight against an ongoing pandemic must not discriminate on any grounds at any point. Hence, the international treaty bodies and jurisprudence of the courts established methods which policymakers should apply when creating rules governing our living. According to this method, there are minimum requirements that must be met in order not to jeopardise the essence of the right concerned. They have to be interpreted strictly in the light and context of the particular right.[132] The limitations must be: prescribed by law, based on law, necessary and justified. Some rights, such as freedom of movement, freedom of expression or freedom of peaceful assembly may be subject to restrictions for public health reasons, even in the absence of a state of emergency. These restrictions, however, must meet the following requirements:

- Legality: The restriction must be "provided by law". (must not be arbitrary or unreasonable)
- Necessity: The restriction must be necessary for the protection of one of the permissible grounds stated in the treaty (pressing social need)
- Proportionality: The restriction must be proportionate to the interest at stake
- Non-discrimination: No restriction shall discriminate contrary to the provisions of international human rights law.

For the ECtHR, limitations must pass a three-part test: legality, legitimacy and necessity. Following chart offers the review of this test that can be easily applied to any case at any time.

131 According to the ICCPR article 4, no derogation from articles 6 (right to life) 7 (cruel and inhuman treatment), 8 (slavery and servitude), 11 (imprisonment for not fulfilling a contractual obligation), 15 (due process), 16 and 18 (nationality and privacy) are allowed.
132 According to the ICCPR article 4, no derogation from articles 6 (right to life) 7 (cruel and inhuman treatment), 8 (slavery and servitude), 11 (imprisonment for not fulfilling a contractual obligation), 15 (due process), 16 and 18 (nationality and privacy) are allowed. Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights (Annex, UN Doc E/CN.4/1984/4)

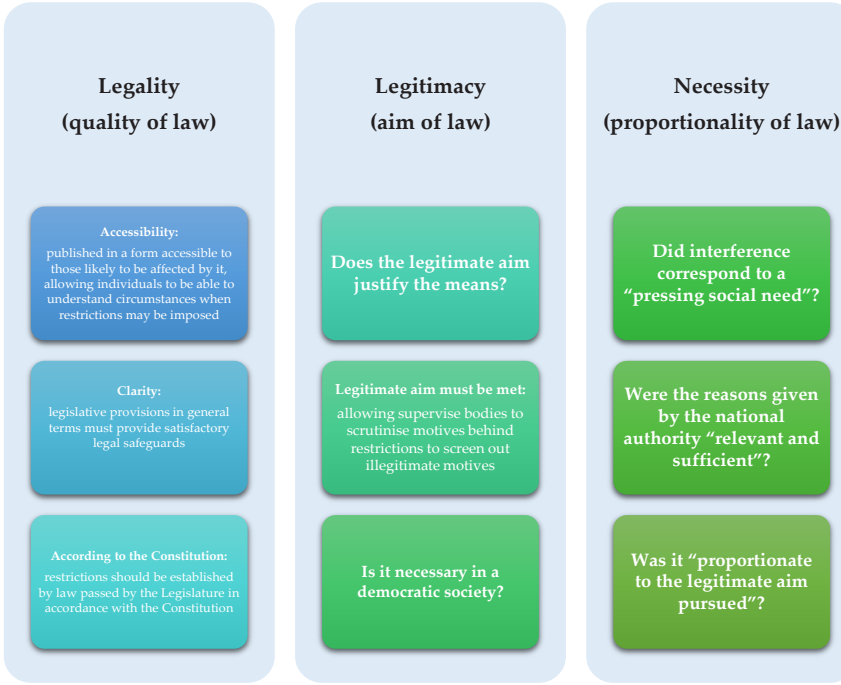

Chart 1

Following chart is a practical 'checklist' of conduct of the authorities or private parties vs. the basis of discrimination, that could be helpful in the determination if certain conduct was discriminatory or not, at all times and not just during the state of emergency.

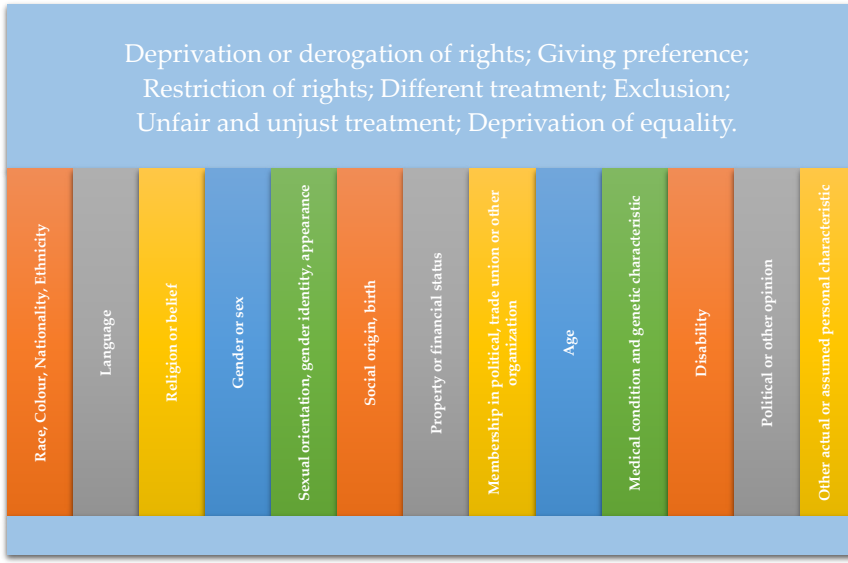

Chart 2

Key points

- The international human rights standards represent the minimum of protection below which states should not go. If a certain state disagrees with the particular provision of the treaty it can put a reservation on it, but that reservation cannot be made to the provision that is the aim of the treaty itself.
- The nature of the obligation imposed on states is negative and positive, meaning while governments must refrain from violation of rights and restriction must be done in line with the provisions.
- During the state of emergency caused by wars, natural disasters or pandemics, states can only derogate rights following prescribed rules and procedures, and even then they must be proportionate to the legitimate aim that governments are pursuing.
- While the CoE human rights protection path was based on the protection of rule of law and promotion of democracy in the post II WW period, the EU had a different approach, and only through decades

of CJEU jurisprudence, and being challenged by MS, it developed judicial protection of fundamental rights and freedoms that was based both on principles of the ECtHR and common constitutional heritage of MS.

- Unlike ECHR and its protocols which apply at all times, the EU Charter applies when states and institutions exercise EU law.
- Social rights are often seen as social goals and are often being qualified as secondary rights. However, the work of ECSR contributed to the protection from discrimination as it understood the horizontal effect it has in the national legal systems.
- Protocol No. 12 extends the prohibition of discrimination beyond the scope of the Convention.

CHAPTER THREE - NORMATIVE FRAMEWORK OF PROHIBITION OF DISCRIMINATION IN MONTENEGRO

In the aftermath of regaining its independence, on 28 June 2006 Montenegro became a member of the UN. Following its membership, it ratified several international treaties. In respect to the human rights treaties and their protocols on 23 October 2006 Montenegro ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and its Optional Protocol of the Convention against Torture (6 March 2009); the International Covenant on Civil and Political Rights and Second Optional Protocol to the CCPR aiming to the abolition of the death penalty; the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child and its Optional Protocol to the CRC on the sale of children child prostitution and child pornography and Optional Protocol to the CRC on the involvement of children in armed conflict (2 May 2007). Also, on 2 November 2009 Montenegro ratified the Convention on the Rights of Persons with Disabilities and on 20 September 2011 the Convention for the Protection of All Persons from Enforced Disappearance. Montenegro accessed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families on 23 October 2006 but this convention has not been ratified yet. In addition, Montenegro accessed the Convention of the International Labour Organisation (ILO) becoming a member of this Organization on 14 July 2006. Montenegro is as well a member of the International Organization for Migrations (IOM) since 28 November 2006.

The first membership to any international organization happened on 22 June 2006 when Montenegro accessed Helsinki Final Act and became a member of OSCE.

On 11 May 2007, Montenegro became a CoE member state. Since then Montenegro signed and ratified around 95 conventions and protocols under the CoE umbrella. In respect to those related to human rights, three documents are still pending for ratification: Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, European Convention on the Adoption of Children (revised). Montenegro ratified ECHR and all the Protocols except for Protocol No. 16. It also ratified European Social Charter, the European Charter for Regional and Minority Languages and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment as well as the Istanbul Convention. Montenegro ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

By force of the Constitution and principle of legal order set in article 9, all ratified and published international agreements and generally accepted rules of international law have supremacy over the national legislation and are directly applicable when regulating relations differently than the national law. Article 17 stipulates that all rights and liberties shall be exercised based on the Constitution and confirmed international agreements. Additionally, Article 118 promulgates that Court is bound to rule based on the Constitution, laws as well as published international agreements. And finally, Article 145 regulates the conformity of legal regulations and it states that law must conform with the Constitution and confirmed international standards. This means that Montenegro obliged itself to incorporate standards of protection outlined in the international and regional human rights legal framework that is a subject of this Handbook.

Constitutional and legal protection against discrimination

The previous Constitution adopted in 1992 on the other hand dealt with this matter obliquely by promoting equality among all citizens regard-

less of their specific differences. The constitution-giver decided to elevate this legal principle to the highest legal level placing it among the major constitutional values, at the very beginning of the Constitution. As a general legal act, it did not provide any details on how to be protected from discrimination. Article 8 of the Constitution of Montenegro with Amendments I-XVI[133], introduces the prohibition of discrimination as a principle for the first time in Montenegrin legal history. It prohibits direct or indirect discrimination on any grounds but it also stipulates that in case national legislation is introduced with certain special measures aimed at contributing to equality and protection of persons who are in an unequal position, that such legislation shall not be considered discrimination. As it was stated in Chapter I of this Handbook, international standards deem special measures as temporary, and once achieved the goal of the measures such measures should be revoked. The same standard is affirmed in Article 8(3).

Part II of the Constitution is Montenegrin "Bill of Rights". In 6 chapters, it provides for general provisions on human rights, civil liberties, political rights, economic, social, and economic cultural rights as well as minority rights.

Article 25 allows for a temporary derogation of human rights and civil liberties, however, it prohibits derogation from non-discrimination principles on any grounds, inflicting or encouraging hatred or intolerance, ne bis in idem, as well as forced assimilation.

Certain provisions of the Constitution are such to protect the principle of equality and it specifically targets a specific group. So, for example, Article 64(4) stipulates that youth, women, and the disabled shall enjoy special protection at work, and Article 68 offers general protection of people with disabilities. All children are equal in rights no matter the type of family they are born into (Article 72).

Ordinary courts by any means are to protect Constitutional legal order. In their adjudication judges are supposed to apply international stand-

133 Official Gazette of Montenegro 38/2013.

ards and ECtHR jurisprudence, however, they are not allowed to assess the conformity of laws. This is the role of the Constitutional court, but ordinary court judges ought to halt the proceeding and invoke Article 54 of the Law on Constitutional Court. In such a case ordinary court judge stops the ongoing process and submits a question of the conformity of certain legal provisions from any law to the Constitution, especially if such a provision might be derogating certain human rights. The President of the Constitutional Court has to inform the President of the Supreme Court about the proceeding before the Constitutional Court which should decide on the question in forty-five days.

Article 149 enumerates the responsibilities and authority of the Constitutional Court. In point 3 it states that the constitutional appeal due to the violation of human rights and liberties can be examined only under the condition that all the effective legal remedies have been exhausted. In recent years a growing debate contests the superiority of the Courts and the hierarchy within the judicial system. While the Constitution clearly stipulates that the highest Court is the Supreme Court (Article 124), it assigns the Constitutional Court as protector of constitutionality and legality (Article 11(6)). Constitutional Court is an authority separated or excluded from the ordinary judicial system. And rightfully so as it has a particular role that falls outside of the scope of the judicial system: protection of constitutionality and legality, constitutional order, and safeguarding human rights and freedoms. Recently, a controversial issue occurred when the Supreme Court assumed the competence to protect the constitutionally guaranteed right to a trial within a reasonable time, including in cases of constitutional complaints.[134] On the other hand, the Supreme Court tends to disagree with the findings of the Constitutional Court when it repeals and individual act and remands the case back to the Supreme Court.[135] A potential solution to the issue

134 See more in M. Đuković, Montenegrin Constitutional Court in 2019, in Albert, Richard and Landau, David and Faraguna, Pietro and Drugda, Šimon (eds), I·CONnect-Clough Center 2019 Global Review of Constitutional Law (October 2020), Clough Center for the Study of Constitutional Democracy (2020), p. 229.

135 Mihajlo Dika, Ivana Martinovic, Analiza uticaja odluka Ustavnog suda Crne Gore na sistem redovnih sudova sa posebnim ostvrtom na odnos Ustavnog i Vrhovnog suda Crne Gore, Savjet Evrope, 2018, p.49-54.

would be the ratification of a so-called Dialogue Protocol to the ECHR, that allows that highest courts and tribunals of a High Contracting Party, would be able to request from the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols. As noted in the introduction to this Chapter, Montenegro did not sign or ratified this Protocol yet.

Law on the prohibition of discrimination

One of the key legislation that establishes the system of protection from discrimination was adopted in 2010.[136] In December of the same year, Montenegro officially became a candidate country for accession to the EU. In 2012 EU and Montenegro officially opened the negotiation on the accession by opening the key chapters. It was not long after that European Commission gave a somewhat negative opinion on the Law on the prohibition of discrimination stating that it is not entirely compatible with the acquis Communautaire. Thus the Law was amended in 2014 as well as in 2017. Article 2 of the Law on Prohibition of Discrimination states that discrimination is prohibited in any form and on any ground and it also defines direct and indirect discrimination:

> *"Discrimination is any unjustified, legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction, or preferential treatment of a person in comparison to other persons, based on race, colour of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organisation as well as other personal characteristics."*

136 Official Gazette of Montenegro no. 18/2014, 42/2017.

Article 2a states what kind of measures shall not be considered to be discriminatory. It enumerates a comprehensive list of seven different occasions when certain conduct that might amount to discrimination should not be construed as one, amongst others: situations concerning the protection of public health and security, public order to all means necessary to fulfil aims in a democratic society, in connection to the performance of certain professional activities and employment, etc. Those who report discrimination are to be protected from any harm that might come onto them for doing so.

Article 5 relies on the constitutional provision on special measures that should be only imposed until the goal of such measures is reached.

While mobbing has been erased from this law, as it is regulated in a separate one, this Law still provides an exhaustive list of special types of discrimination such as harassment and sexual harassment in Article 7, segregation in Article 9, hate speech in Article 9a whereas now the definition is wider. Article 10 to 19 prohibit discrimination: when using the facilities/buildings and areas in the public domain; discrimination in goods and service in the public and private sector, health conditions, age, political discrimination, discrimination in the field of education and vocational training, discrimination in the field of labour, racial discrimination and discrimination based on religion and belief Article, discrimination of persons with a disability, discrimination based on gender identity and sexual orientation. As a more serious form of discrimination Law in Article 20 recognizes intersectional discrimination, repeated discrimination, prolonged discrimination, done via public media, and the one that has particularly severe consequences.

However, it should be noted that the definition of discrimination on any on the mentioned grounds is not only stipulated in this law but it is further defined in separate laws that prohibit discrimination. For example, in the domain of labour as it will be noted further in this text, or the domain of protection of people with disability, etc.

The Law prohibits, in Article 16, discrimination in the field of work. Discrimination is prohibited under Article 2 paragraph 2 of this law of per-

sons seeking employment, as well as employees, i.e. persons who perform work with the employer on some other grounds. The Article states that it is not considered discriminatory to make a difference, exclude or give a championship due to the personal property of a person representing the actual and decisive condition of doing the job if the purpose that is to be achieved is justified and if the condition is proportionate, as well as taking safeguards against certain criteria of the person in paragraph 1 of this Article. Based on this, in cases of workplace discriminations, Article 24 outlines the procedure for Court proceedings: ''Anyone who believes they have been hurt by discriminatory conduct by an authority, a business society, another legal entity, an entrepreneur and a natural person is entitled to protection before the court, in accordance with the law… In a dispute for protection against discrimination, audits are always permitted."

The latest changes to the Law should improve the promotion of equality and the application of the principle of equality of persons regardless of their racial or ethnic origin, the prohibition of racial discrimination, the introduction of sexual harassment as a form of discrimination, defining the act of aiding in discrimination as a discriminatory behaviour, as well as inciting and announcing of discrimination act. Also, the amendments have expanded the competences of the Protector of Human Rights and Freedoms as a national mechanism for protection from discrimination. Now the Protector can:

> *"initiate proceedings for protection against discrimination before the court or appear in that proceedings as an intervener when the party makes it probable, and the Protector assesses that the defendant's actions discriminated on the same grounds against a group of persons with the same personal characteristics or would result in unequal treatment such that they may cause systemic violations of the principle of non-discrimination, in particular, a serious violation of the dignity of the person, or the person seeking protection from discrimination could otherwise be placed at a particular disadvantage on any of the grounds referred to in Article 2 paragraph 2 of this Law"*

The burden of proof is placed on the accused of discrimination and this applies in the procedures before the Protector. Additional value to the new amendments is reflected in prescribing the obligation for courts, state prosecutor's offices, misdemeanour authorities, police authorities, and inspection bodies to keep records of discrimination cases. The data gathered from this activity should be submitted to the office of Protector by 31 January every year. The law also provides for misdemeanour liability with fines from 100 euros to 2000 euros for a person responsible to administer and keep records in the state body as defined in the Law.

On that note ECRI Conclusion from this year[137] suggest that it is positive that a working group was established to support and create the development of the Rulebook to streamline data records, however, "ECRI considers that there is still no system in place with a view to collecting disaggregated data and providing a coherent as well as an integrated view of the cases of racist and homo/transphobic hate speech and hate-motivated violence. It, therefore, concludes that this recommendation has not been implemented."[138]

Labour Law

On 23 December Montenegro adopted the new Labour Law[139] which entered into force on 8 January 2020. After more than a decade and eight major legislative and judicial interventions it replaced previous, so often doubted and legally contested, Law. The adoption of the Labour Law is qualified by a rather peculiar political turmoil in the country at the very end of 2019 which caused the utter reduction of parliamentary discussion.

The Law was pictured as a bearer of many improvements and complying with acquis requirements and ILO recommendations. However, the Labour Law did introduce several novelties in the field of collective bar-

137 ECRI Conclusions on the Implementation of the Recommendations in Respect of Montenegro Subject to Interim Follow-up, 2 June 2020, CRI(2020)26.
138 Ibid, p.5.
139 Official Gazette of Montenegro No. 74/2019.

gaining agreements, employees' monetary claims, employment agreements, dispute resolution, etc.

Regarding anti-discrimination provisions, the Law somewhat expanded the scope of its effect compared to the previous one. The complete harmonisation was achieved towards Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive 2006/54/EC of the European Parliament and the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women & others.

Article 1 granted protection from discrimination not only to Montenegrin employees in both the private and public sector but also to foreign citizens with employment on the territory of Montenegro, which could be important for eventual EU citizens willing to work in Montenegro. The same applies to entrepreneurs which should be understood in the context of a newly adopted Business Organisations Law and Innovative Start-Ups Encouragement Programme. Furthermore, Article 7 forbade nominally any sort of discrimination both in the process of seeking the employment and through the period of employment with regards to race, skin colour, nationality, social or ethnical background, connection with minorities, language, religion or belief, political or other opinion, gender, gender transformation, gender identity, sexual orientation, medical state, disability, age, property, marital or family status, pregnancy, affiliation or supposed affiliation to the group, political party, union or other organisation, or to any other personal feature. The provision identified both direct and indirect discrimination and is sanctioned by the absolute annulment of discriminatory provisions in the employment agreement, which is rather important since Montenegrin courts pay ex officio attention when nullity occurs.

For the first time, it specifically forbade discrimination on the grounds of professional social insurance systems (Article 11). However, this provision could be challenged with regard to the recent Civil Partnership Law. It remains to be seen how the same-sex (officially registered) partners could deal with the enforcement of this anyhow well-intended clause.

Even though discriminating employees with regards to professional training and specialisation was already unallowed, the Labour Law expanded it even to the level of practical working experience (Article 12). Yet it fails to provide with mechanisms on how to strengthen it or control it, neither which institution shall be deemed responsible for the monitoring of it, so the trouble of transposing the letter-of-law to real-life still remains.

Article 41 paragraph 3 explicitly announces that any discrimination towards part-time employees shall be considered illicit. With all the previous experience in mind, part-time employees did suffer discrimination, not in the field of agreements, commercial conditions, but from the fact that they were usually considered a sort of "auxiliary workers" who should not get the chance to be further involved in the company. This segment was left out from both public and parliamentary discussion and yet it appears to be of great importance.

One of the major legal shifts, howsoever, happens in Chapter VI of the Law regulating the protection of the employees' rights. Contrary to what one may expect reading the title of the chapter, we could witness a huge downfall in the protection, since the legislator chose to abandon the previous (even though not well elaborated) system of employer's responsibility to take the burden of proof once the dispute appears. The Labour Law provided in Article 142 that the burden of proof lays upon the person that claims to suffer a violation of rights. It does not directly imply that an employee is to be considered as that very person, but remember the fact that the vast majority of employment disputes has been initiated by employees should be a warning and a thing to expect in the future as well. The fact that this provision is situated in the chapter dealing with the protection of employees' rights should pretty much be convincing itself. A slight alleviation was given in Paragraph 2 of the same Article allowing the possibility

for the burden of proof to be transited from employee to employer within discrimination disputes. Still, it should meet one condition: an aggrieved party must provide sufficient facts for the court or relevant authority to place the burden upon the respondent. Practically, the claimant (employee) should still gather enough evidence to deliver in the dispute and to persuade the court or agencies to decide on this matter. By mere reading of the clause, we receive the impression that the burden of proof should instantly pass from one side to another, but it is not imaginable that it could happen without some sort of formal decision or at least an instruction.

What could make things even harder for the employee is a procedural complication in rights' protection (which is, to some extent is opposite to the provision of the Prohibition of Discrimination Law). The Labour Law promulgated a mandatory pre-judicial process obliging the employee to initiate a process at the National Agency for the Peaceful Settlement of Labour Disputes or at the Centre for Alternative Dispute Resolution. It is only after this process was finished an employee may seek for protection before the court.

Finally, it remains unclear why the lawmaker gave up on the provision of previous Labour Law that even provided the right to judicial protection (claim) to person discriminated against while seeking employment. Even though there is no new general collective agreement, and judging by the previous one, it should not be expected that once it is adopted it should contain any specification or elaboration with regards to any anti-discrimination clause from the Law. In conclusion, it remains to be seen how the case law shall be established and developed, since it may appear a more operative and efficient bulwark for protection from discrimination that the Labour Law itself.

Media Law

The Montenegrin Law on Electronic Media was adopted in 2010 and has been amended on several occasions in the last decade.[140] This summer

140 Official Gazette of Montenegro No. 46/2010, 40/2011, 53/2011, 6/2013, 55/2016, 92/2017.

a set of media laws was adopted. Following recommendations and obligations stemming from international treaties that Montenegro is a party to, a new set of laws aligned national legislation with the acquis, and lawmakers introduced a legal framework based on the CoE principles. Law on the national public broadcaster was adopted, and as of this year, Public Broadcaster should be more institutionally, politically, and financially independent. The Media laws were garrisoned by the Ministry of Culture.

Montenegrin Law on Media[141] Article 2 (1) prohibits the interpretation of the Law for reasons of censorship and restrictions to freedom of speech or expression calling (2) upon the principles of the ECHR and the practices of the precedent law of the ECtHR. Concerning freedom of expression and protection from discrimination, Article 3 of the Law outlines the general principles governing the field of AVM services: 1) freedom, professionalism, and independence; 2) prohibition of any form of censorship; 3) balanced development of public and commercial providers of AVM services; 4) free and equal access to all AVM services; 5) development of competition and pluralism; 6) application of international standards; 6a) application of the rules on state aid to public broadcasting services; 7) objectivity, the prohibition of discrimination and transparency. The principles relate to Article 48 (2) which outlines bans on AVM services that breach the beforementioned principles. The Law outlines restrictions on reception and retransmission of AVM services in Article 6 (1) among which for those services that "…threaten to jeopardize the fight against incitement to hatred based on race, sex, religion or nationality, endangering dignity…" Citing cases of urgency, Montenegro may take measures to restrict the freedom to receive and re-cancel AVM services upon request being obliged to inform the EC and the Member State under jurisdiction should such cases occur.

Furthermore, Article 26 defines that internet publications that are audiovisual in its character are also covered by this Law. In case such media breaches principles set forth in Article 3, the founder of the portal is obliged to remove such comment, no later than 60 minutes after it was published.

141 Official Gazette of Montenegro No. 82/2020.

In comparison to the previous legal framework, the new Law has a separate chapter on the Protection of specific rights. Articles 34 – 47 contain a provision on protection of particular personal rights and freedoms as well as the court's jurisdiction in case some of these rights are violated. In Article 3 Law calls upon the principles of freedom of expression in journalistic freedom of expression of opinion, and anti-discrimination. The principles relate to Article 36 of the Law that bans media from publishing information that threatens to lead to various forms of discrimination. This article defines what constitutes harmful information and incite hatred and intolerance, following the ECRI recommendation no. 15. The same article prohibits AVM services that incite hatred or discriminate on grounds such as race, ethnicity, colour, sex, language, religion, political or other belief, national or social origin, property status, trade union membership, education, social status, marital or family status, age, health status, disability, genetic inheritance, gender identity or sexual orientation. Media have a special responsibility in the protection of children and minors. It is prohibited to publish content that promotes organ, tissue, or human cells commercialization as well as the marketing of any sort of illegal substances, tobacco, ammunition, and medical treatment not approved by relevant laws. Article 41 allows for the competent court at the proposal of the state prosecutor to limit dissemination of media content which is a direct and intentional incitement to commit criminal offences especially those that are or promote "violent threat or illegal changes to the constitutional order, terrorism, violation of territorial integrity violence or hatred towards a group or a member of a group determined based on race, colour, religion, origin, national or ethnic affiliation or any other personal characteristic."

With such provision, Montenegro embraced ECRI Policy Recommendation No. 15 which reminds of the international legal framework that should be in place in all member states to protect from discrimination and to prohibit incitement to hate. More specifically ECRI refers to the European Convention on Transfrontier Television which requires that program services shall not allow contact that incites racial hatred. Also, under the Istanbul Convention, any manifestation of online/offline sexist speech is considered sexual harassment, thus national legislation should make laws that prohibit such behaviour.

Article 30 of the Law states that a journalist is obliged to "… disclose the source of information at the request of the State Prosecutor when necessary to protect the interests of national security, territorial integrity, and health protection". Reporters Without Borders have labelled Article 30 of the Media Law as "witch hunt against journalists" as journalists could be pressured to disclose the source of information at the request of the Special State Prosecutor an attack on freedom of speech and media freedoms. In its 2020 Report[142], Montenegro ranked 105th out of 180 countries in press freedom. This could potentially create further problems as the media may have to commence judicial processes to protect their sources of information. The European Commission has consistently indicated low to no progress in the area of media freedom. In its 2019 Report[143] (pp. 65-66) the Commission indicated that there was no progress and that there were no implementations of its previous recommendations and indicated the Montenegrin Agency for Electronic Media's lack of authority to impose sanctions. Despite some improvements in the area of freedom of expression, the EC has highlighted the limited developments in cases of attacks against journalists (p.6).

The ECtHR already adopted quite a few decisions concerning the freedom of expression in the Montenegrin context. In Koprivica v. Montenegro, the applicant claimed that his rights to freedom of expression as a journalist and editor in chief of one of the weekly magazines that was openly opposing the Government in the 90ies was violated when national courts found him guilty of defamation of one of the journalists working for Government-run media. Applicant and founder of weekly magazine 'Liberal' were ordered by ordinary courts to pay the sum of 5,000 euros ("EUR") for the non-pecuniary damage suffered since they published an article "The Sixteen" which named the two ICTY officials who had allegedly prepared the file and then went on to list the names of the sixteen journalists that were going to be tried for incitement to war before Criminal Tribunal for the former Yugoslavia. National courts found that the applicant should have focused on the accuracy of the information in question rather than having it published as soon as pos-

142 Reporters Without Borders, 2020 World Press Freedom Index, available at: https://rsf.org/en/ranking

143 Commission Staff Working Document, Montenegro 2019 Report, Brussels 2019.

sible. The court took the view that the veracity of the assertions could not be established by the applicant consulting the article's author or another colleague but only by reliable evidence, which was lacking in this case. The ECtHR has found a violation of the right to freedom of expression (Article 10) of the ECHR because the domestic court obliged the applicant to pay €5,000 in damages and court costs, which were 25 times his monthly income, based on libel damages.[144]

Gender Equality Act

The first Law on Gender Equality[145] was adopted in 2007. This law is the first anti-discrimination law in Montenegro and the most important mechanism for achieving gender equality. The aim of the Law on Gender Equality was and is to provide and exercise rights based on gender equality, as well as to define measures to eliminate discrimination based on gender and create equal opportunities for the participation of women and men in all areas of social life. Rights-based on gender equality, according to this law, are provided and exercised under international acts and generally accepted rules of international law. The newly adopted Constitution in 2007 also introduced the gender equality principle which additionally strengthens the legal basis for the Law on Gender equality.

In 2015 the Law on Amendments to the Law on Gender Equality[146] was adopted in the Parliament of Montenegro. The Law obliged legal entities, responsible persons in a legal entity, and entrepreneurs to comply with anti-discrimination norms and norms that ensure full implementation of the principles of gender equality. Article 1 of the amended law includes protection from discrimination of people of different gender identity, meaning different from their biological sex and gender assigned at birth. Article 2 of the Law introduces gender equality that implies equal participation of women and men and introduces persons of

144 ECtHR, *Koprivica v. Montenegro* No. 41158/09, 2015, §73.

145 Official Gazette of Montenegro, No. 46/07 (31.07.2007) and No. 73/10 (10.12.2010) and No. 40/11 (08.08.2011).

146 Official Gazette of Montenegro, No. 35/15.

different backgrounds and gender identities in all areas of the public and private sectors, equal position, and equal opportunities.

Article 6a, the Law discrimination cases from this Law fall within the competences of the Ombudsperson. Besides, the procedure on the petitions in cases of discrimination on the grounds of sex was transferred from the competence of the Ministry of Human and Minority Rights to the competence of the Ombudsperson[147].

In Article 4 The Law introduces an enlarged scope of sanctions for gender-discrimination-based violations and the principle of equal treatment between men and women in certain areas of life, especially discrimination against women on grounds of pregnancy. In Article 33 the Law prescribes fines in the amount of ''1,000 to 10,000 euros to be imposed on a legal entity, if a woman due to pregnancy or motherhood, or the person due to gender reassignment, puts at a disadvantage compared to other persons, during employment, self-employment, exercising social rights protection and other rights."

In 2016, the National Council for Gender Equality was formed, as a new institutional mechanism for the implementation of gender equality. Eight advisory bodies - committees have been formed within the Council to consider issues in certain areas of importance for gender equality, to monitor in more detail the implementation and improvement of equal opportunities policy within their areas. The Law and the amendments to the Law on Gender Equality had the intention to harmonize with the Law on the prohibition of discrimination, as well as with the Acquis Communautaire. This primarily refers to the harmonization of the definition of discrimination based on sex with the definitions of direct and indirect discrimination following EU standards.

The Law on Amendments to the Law on Gender Equality is in line with the European Union Directives relating to gender equality and equal treatment of women and men: Council Directive 79/7/EEC on the progressive application of the principle of equal treatment for men and

147 N. Drobnjak, S. Bajić, Komentar Zakona o Rodnoj Ravnopravnosti, Ministarstvo za ljudska i manjinska prava Crne Gore i Misija OEBS-a u Crnoj Gori, Podgorica, 2015, p. 4.

women in areas of social protection; Council Directive 2000/78/EC establishing a framework for equal treatment in employment and occupation; Council Directive 2004/113/EC applying the principle of equality between men and women in the possibility of obtaining and procuring goods or services; Directive 2006/54/EC of the European Parliament and the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2010/41/EU of the European Parliament and the Council applies the principles of equal treatment for men and women engaged in self-employment and repealing Council Directive 86/613/EEC[148].

Judicial protection: Selected Case Law

This subchapter offers a few examples that should provide for an account of how the anti-discrimination legal framework is being implemented before national courts and how some of those cases end up before the ECtHR.

As mentioned before Montenegrin Law on Prohibition of Discrimination in its Article 2 also defines discrimination including direct and indirect one in the same manner as described in chapter I of this Handbook. Accordingly, the Constitutional Court has adopted the ECtHR as well as the UN Human Rights Committee practice in a three-prong test assessment. In a constitutional complaint judgment from 2012, the Court explicitly determined that:

> *"The first condition for the determination of discrimination is the existence of similar, ie. comparable factual situations including a comparison of equal or different treatment. The second condition is determination if the different treatment in the certain legal proceeding was a result or is based on a certain status (characteristic) of the individual and because of that,*

148 Ministry of Human and Minority Rights of Montenegro, Action Plan for Achieving Gender Equality 2017-2021 With the Implementation Program for The Period 2017-2018, Podgorica, 2017, p. 15.

they have been a victim of less favourable treatment. The third condition is examination whether the individual was treated differently in similar factual circumstances or if the individual was treated equally in significantly different circumstances and such treatment was reasonable and justifiable." [149]

In practice, the ordinary courts are obliged to apply ratified international treaties and follow the jurisprudence of ECtHR. Ordinary courts, however, are not allowed to assess if a certain constitutional right was breached or if the legal provisions of secondary legal acts might contribute to the discrimination. If in doubt, according to Article 54(2) of the Law on the Constitutional Court of Montenegro, ordinary court judges can halt the proceeding and initiate the proceeding for assessment of constitutionality before the Constitutional Court. Even so, it happens that discrimination against religious minorities can conceal racism, and thus understanding discrimination on the protected ground such as race is blurry.

Discrimination and hate crime

The case in question is *Alković v. Montenegro* in which a Montenegrin national who is Roma and a Muslim was discriminated against not only in his neighbourhood but also by the authorities in the criminal investigation. Namely, Mr Rizo Alković with his family moved into an apartment block built for socially-disadvantaged families. On numerous occasions, they were victims of racially motivated attacks on them and their property. After reporting crimes, part of the criminal investigations initiated by the applicant was discontinued and some led to the acquittal of the indicted perpetrators. The issue in question was also the fact that as opposed to this, the applicant was found guilty for unauthorized recording, for which he was sentenced to 40 days prison and fined an additional 800 EUR for the minor offence of threatening a neighbour. As a result, his family had to move out of the apartment. For ECtHR, there were two questions to be answered that relate to article 14: one on the ground of racial or ethnic origin (failure to investigate potential racist motive) and the other on the ground of religion taken alone or in conjunction with

149 Constitutional Court of Montenegro, U – I br. 3/09, 26 December 2012.

'being a Roma' (discrimination in the enjoyment of Convention rights). In its judgment Court made an assessment concluding that domestic legal framework provides for sufficient protection, however "the manner in which the criminal-law mechanisms were implemented in the present case by the judicial authorities was defective to the point of constituting a violation of the respondent State's obligations under Article 8 of the Convention … in conjunction with Article 14 of the Convention."[150]

Importance of implementing international standards even when national laws are not in conformity with those standards

In *Šabanović v. Serbia and Montenegro*, the applicant complained under Article 10 of the Convention of a breach of his right to freedom of expression stemming from his criminal conviction. Namely, in 2003, a daily newspaper in Montenegro published an article, stating that the water in Herceg Novi was full of bacteria, and such an article was based on the statement by the water inspector who claimed that he knows that due to the analysis of water performed by public authorities. In response to this article, the applicant, in his capacity as director of a public water company, held a press conference where he stated that the water was safe. In dismissing the inspector's allegations he stated that he did that only to promote the interests of private water companies as instructed by his political party. After the inspector pressed criminal defamation charges and the court found the applicant guilty, he was sentenced to up to three months of imprisonment. The Higher Court of Montenegro dismissed the applicant's appeal.

In making an assessment of the facts as well as to proceeding before the national courts, ECtHR found that "in its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be exces-

150 ECtHR, *Alković v. Montenegro*, No. 66895/10, 2018, §73.

sive."[151] The ECtHR continues stating that "the final criminal judgment at issue obviously amounts to an interference with the applicant's right to freedom of expression"[152] but it needs to be decided if such interference was necessary in a democratic society. In that respect, ECtHR valued that the applicant responded to a newspaper article in the capacity of a person responsible to the citizens as at the time he was Director of the Water Supply Company. The conference aimed to inform the public and the condemnation of the Chief Inspector was a criticism of his behaviour in the capacity of an official rather than his private life. Again, for ECtHR, this was a statement of fact rather than a value judgment, and thus "the domestic courts, notwithstanding the applicant's encouragement to do so, failed to situate his remarks in a broader context, namely the debate generated by the quality of the drinking water in the area concerned. In view of this rather restricted approach to the matter, it can scarcely be said that the reasons given by the domestic courts can be considered relevant and sufficient."[153] The ECtHR found Montenegro in violation of Article 10(2) of the ECHR for criminally prosecuting a public official for his statements made on issues of public debate that also called into question the execution of a public function by another official.

Case of a repeated discrimination claim

According to the research on protection from discrimination before national courts, most cases with a positive outcome for the complainant were cases of discrimination based on disability as a protected ground. [154]Authors show that although Law on the prohibition of discrimination protects from so-called "repeated discrimination" (Article 20), courts are still reluctant in following through with such requests from applicants.

For example in a case before the Basic Court in Podgorica, a person with a disability that is a CSO activist was unable to enter the Parliament of Montenegro building and take part in the events organized in the Parliament.

151 ECtHR, *Šabanović v. Serbia and Montenegro*, No. 5995/06, 2011 §38.
152 Ibid. §40.
153 Ibid. §42.
154 I. Vukčević, M. Marković, Zaštita od diskriminacije u praksi crnogorskog pravosuđa, Institut za pravne studije/Centar za demokratiju i ljudska prava, 2016, p.40.

The Court partially upheld the applicant's claim and showed that discrimination occurred as Parliament did not adjust the facility following its obligation as stipulated in national and international legal standards. This discrimination was a consequence of a Parliament building not being adjusted neither by sloping ramp or hydraulic crane to enter the building nor did it install elevators. The only way for persons in wheelchairs to have access to the building was with the help of a friend that would use physical force to move wheelchairs.[155] By failing to do so, the Court found that the applicant has suffered indirect discrimination. However, while upholding this part of the claim, the Court rejected to uphold the second part which is to order the repetition of the discrimination. According to the Court such a claim that stems from the (at that time Article 26 para 2 point 1 of the Law on Prohibition of discrimination) cannot be requested in this type of legal proceeding.

In the appellate proceeding, the same view had the court of the second instance, the High Court in Podgorica. High Court found that the first instance court made a correct assessment when rejected the claim to be unfounded.[156]

Both Courts conceded on the fact that applicant was discriminated against and that she is entitled to the non-pecuniary damage especially due to the defamation of her reputation and violation of her rights protected he Article 2 (3) and Article 10 (1) of the Law on Prohibition of Discrimination[157] in connection to with the Article 2(1) and Article 8(1(1.2)) of the Law on Prohibition discrimination against persons with disabilities[158] and Article 207 of the Law on Obligations.

However, the Supreme Court in the revision procedure, although agreed with the finding of the lower court in respect to the indirect discrimination, it disagreed with the assessment of the compensation for non-pecuniary damages. Also, the Supreme Court found that lower courts had a very restrictive approach to the second part of the claim: a request to

155 Osnovni sud u Podgorici (08.04.2014) P 4981/13.
156 Viši sud u Podgorici (05.06.2014) Gž 2407/14.
157 At that time Law from 2010: Official Gazette of Montenegro, No. 46/10.
158 Official Gazette of Montenegro, No. 39/11.

stop repeating of discrimination. For Supreme Court, lower courts failed to acknowledge that discrimination occurred not once but on several instances (03.09.2013., 01.10.2013., 10.10.2013. and 18.12.2013.) and that the request made is adequate according to Articles 24, 26 and 18 (3) of the Law on Prohibition of Discrimination. The legal reasoning of the Supreme Court indicates that if these provisions are not used aa s legal basis to uphold such a request, then what would be the mechanisms of the protection of repeated discrimination. It also points that "Otherwise, the complainant, as well as other victims of discrimination, in such and similar cases, would not be able to protect themselves from possible future acts of discrimination of this type, would have to file new lawsuits for each case of such discrimination, instead of protecting the victim of discrimination by imposing a ban on the recurrence of discrimination, which would provide full protection against new discrimination."[159]

Criminal offence against a transgender person

On 30 September 2017 defendant M.B. attacked a transgender person on the street. The Basic Court found him guilty as the judge determined that M.B. was aware of his acts when he endangered public peace and also abused the victim by committing violence against them. He acted out of hatred towards the presumed gender identity of the victim. Besides inflicting minor bodily injuries to them he also repeatedly insulted them, grabbing them by the upper arms and throwing them on the concrete kicking them in the back. The Court found him guilty and sentenced him to imprisonment for 4 months. In addition, M.B. was obliged to pay an amount of EUR 372.80 as well as EUR 30.00 as a lump sum for the costs of the criminal proceedings and to reimburse the injured party for the costs of the proceedings and their lawyer.[160] The judge found committed crimes under Article 399 in conjunction with Article 42a(1) of the Criminal Code to be aggravating as they were committed out of hatred towards a particular group.

However, High Court in Podgorica in the appellate proceeding determined that while Basic Court judge correctly assessed as mitigating cir-

159 Vrhovni sud Crne Gore (09.04.2015.) Rev 822/2014.

160 Osnovni sud u Podgorici, (19.02.2019.), K 192/2018.

cumstances on the part of the defendant's youth (he was 20 years old) and no prior conviction, and as aggravating circumstance the fact that he acted out of hatred towards others, because of their gender identity, Basic Court Judge did not make a proportional assessment between the two. For High Court defendant's youth and his personality play a more important role in this case. Thus, this court suspended the Basic Court sentence and determined defendant to be sentenced to imprisonment for a term of six months that will not be executed if the defendant does not commit a new criminal offence within two years period of time.[161]

This case shows that in practice Montenegro legal framework qualifies such offences as crimes under criminal and courts take into consideration that perpetrators act from the place of bias and prejudice.

Key points

- The national legislative framework is aligned with most of the international legal standards and principles, especially with the EU acquis.
- The scope of the discrimination definition is now wider and it has both horizontal and vertical effect.
- The amendments to the Gender Equality Act follow the recommendation of relevant treaty bodies, and now includes gender identity as a protected ground.
- Assession to Protocol 16 of the ECHR should clear out the tense relationship between the Supreme Court as the highest court in the ordinary judicial system and Constitutional Court as a special body separated from other authorities, which is in charge to protect and safeguard constitutional order.
- New Labour Law forbids discrimination on the grounds of professional social insurance systems it is yet to be seen how will this work out in practice having in mind recently adopted Civil Partnership Law.

161 Viši Sud u Podgorici, (19.06.2019.), Kž 302/2019.

CHAPTER FOUR - MECHANISMS FOR PROTECTION OF DISCRIMINATION IN MONTENEGRO

Institutional setting and human rights protection mechanism varies from country to country. One cannot claim that there is a perfect mechanism, as legal and political systems differ and thus each country follows its own traditions by incorporating international standards of protection from discrimination and promotion of equality. In this chapter, an overview of the institutional setting as well as the competences and activities in the domain of the protection from discriminations is offered. Following the most recent developments in the legal framework, this chapter discusses five important mechanisms that contribute to human rights protection. This, however, does not mean that protection from discrimination is the exclusive competence of the mechanisms discussed in this chapter, but it is predominantly entrusted to them. Other institutions, such as the academy, schools, research centres, health care facilities, foundations, unions, media, culture and art guilds play important role in promotion, education and facilitation of human rights culture in the society.

Ombudsperson institution

Protector of Human Rights and Freedoms is an institution established by the Law in 2003. Constitution from 2007 in Article 81 defines the institution of Protector of Human Rights and Freedoms as an independent and autonomous authority that takes measures to protect human rights and liberties. The mandate of the office is to exercise those duties in line with the Constitution, laws, and confirmed international agreements as well as principles of justice and fairness. The mandate of the Protector is six years. Protector is elected by the Parliament on the proposal of the President of the State. In the first ECRI country monitoring report, it was recommended that Ombudsperson should be authorized to have inves-

tigative powers, and part takes in court proceedings (as specified in the ECRI Recommendation No. 7). The amendments to the law expanded its authority and powers of Ombudsperson are in line with ECRI Recommendation No. 2 as well.[162]

Amended Law on Protector further regulates the mandate, authority, the proceedings, and the composition of the institution. Article 3 authorizes Protector to act on its initiative, or to act upon the request of a person suffering a violation of a certain right. All proceedings before this office are free of charge.[163] If the initiative to instigate the proceeding on the behalf of someone else occurs, Protector needs authorization by the person who suffered violation. The work of the Protector is public unless otherwise stipulated by the law.

Each year by 31 March, the Office of the Protector submits Annual Report on its work including a presentation of the cases on which the Office acted, as well as the statistical analysis and evaluation of the state of human rights and freedoms in Montenegro. This Report should also include recommendations and measures that Protector proposes for the improvement of human rights protection and the elimination of failures in the future. The Report should have a comprehensive assessment of the situation in the field of discrimination. The violation of rights that Ombudsperson is authorized to investigate can be a result of certain policy measures from the positive law, of violation of certain rights, or even failure to act when it should have by the public authorities.

The Ombudsperson can have one or few deputies. Parliament approves the proposed deputy structure. Article 9 stipulates that within the competence of the Protector is to introduce internal task distribution and Law itself recognizes the need for thematic division so that office deputies cover areas such as the protection of the rights of persons deprived of liberty specifically for the prevention of torture and other forms of cruel, inhuman or degrading treatment and punishment; protection of minority rights; protection and promotion of the rights of the child; protection of the rights of persons with disabilities; gender equality and

162 See §24 of General Policy Recommendation No. 7.

163 Official Gazette of Montenegro, No. 21/2017.

protection against discrimination. All deputies are elected by the Parliament on the proposal of the Ombudsperson.

Ombudsperson cannot be held accountable for the given opinions and recommendations while acting in accordance with the competencies and powers prescribed by the Law.

Chapter III of the Law regulates the competences of the Ombudsperson. It has no authority over the work of the courts, except in the following cases: of delays in the proceeding; abuse of procedural powers; or non-enforcement of court decisions. The Ombudsperson may initiate the adoption of laws, other regulations, and general acts to harmonize law with international standards. When doing so receiving institution is obliged to respond to the initiative. Also, it is authorized to give opinions on laws, bylaws, and other acts. It is in its competence to initiate proceedings before the Constitutional Court of Montenegro for the assessment of conformity of law with the Constitution and ratified and published international treaties (Article 19). Issuing opinions and recommendations can be done at the request of another institution. Ombudsperson is authorized to warn, criticize, propose, or recommend. It is not in its competence to change, repeal, or annul the acts of other institutions. It does not have the competence to represent the parties in the proceedings, nor is it possible to make an official complaint and seek remedies on the behalf of parties. Most importantly, Ombudsperson cannot award compensation for human rights violations.

Special powers are conferred onto Ombudsperson in the IV Chapter of the law. Article 24 stipulates that the:

> *"Protector, deputies and Advisers authorized by the Protector, without prior notice have the right to inspect the premises in organizations, institutions and other places where a person deprived of liberty is or may be and visit a person deprived of liberty and check respect for his rights. Also they can without the presence of an official or other person, in person or through an interpreter, talk with a person deprived of liberty, as well as with another person who is considered able to provide the necessary information."*

The law specifically regulates that in performing these tasks Ombudsperson is to do so in line with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

This law (Article 27), as well as the Law on Prohibition of Discrimination (Chapter III, Article 21), authorises the Protector upon obtaining consent from the discriminated person to initiate proceedings for protection against discrimination before the court or appear in that proceedings as an intervener.[164]

Anyone can file a complaint, either in writing or orally at the premises of the Ombudsperson. In any case, the complaint must contain information based on discrimination. The complaint can be individual or collective. It can be done via authorized Member of Parliament. A person deprived of liberty does so in a sealed envelope. The complaint must contain the name of the perpetrator, description of the violation, facts and evidence, legal remedies that have been used, indication if the applicant's name should be anonymous or not, and personal data of the applicant.

All organizational units of the Institute for the Execution of Criminal Sanctions have installed mailboxes in which deprived of liberty may submit complaints. Complaints boxes have also been set up in six institutions for accommodation and care of children.

How does the proceeding look like? The Ombudsperson informs the responsible authority that manages the institutions whose act or actions or lack of actions thereof about the submitted complaint and its content. It sets a deadline for submitting the declarations and documents asked, which cannot be shorter than eight days. The law is explicit and everyone must submit what was asked and in that sense, the institution must make available all information regardless of the degree of secrecy and provide direct insight into official files, documents, and data, as well as provide copies of the requested files and documents and finally to allow free access to all premises. If the authority does not comply

164 See subchapter on Law on Prohibition of Discrimination.

it is obliged to inform the Protector about the reasons, failure to do so amounts to obstruction of the work of the Protector. If that is the case higher instance authority or Parliament or the public shall be informed. After the completion of the examination of the violation of human rights, the Ombudsperson gives an opinion on whether and in what way the violation occurred. When the Protector determines that there has been a violation of human rights and freedoms, the opinion also contains a recommendation on what should be done to eliminate the violation, as well as the deadline for its elimination. The institution to whose work the recommendation refers to is obliged to submit, within the set deadline, a report on the actions taken to implement the recommendation. Should an institution fail to comply the Protector may notify the higher authority, submit a special report, or inform the public. Ultimately the Protector may submit to the competent authority an initiative for initiating disciplinary proceedings, such as proceedings for dismissal of a person who violated someone's rights. In case of a misdemeanour, the Protector may file a request to initiate misdemeanour proceedings.

Ombudsperson's Annual Report is one of the most detailed and comprehensive documents in the domain of human rights prepared by public authority. Report for 2019 indicates that 94,76% of applications have been completed with an average time per case of 71 days. It issued 215 recommendations and in 135 cases the violations were removed or remedied during the proceeding. In 2019 there were 100 complaints about the work of the judiciary and 96% of those complaints have been resolved.[165] The largest portion of the complaints related to the violation of the right to trial within a reasonable time. The Protector reminds us that any unjust violation of this right creates legal uncertainty. The report also indicates that the major citizens' distrust results from the overall weaknesses of the administrative proceedings that unreasonably take long or ultimately create a "ping pong" effect, where the same case is being returned to the first instance several times.[166] This reflects on the enjoyment of property rights which also are aggravated by the inefficient inspection authorities.

165 Ombudsperson Annual Report (2019) available at: https://www.ombudsman.co.me/docs/1590478014_www-final---05---izvjestaj-o-radu-za-2019.pdf
166 Ibid. 229.

The state of economic, social, and cultural rights, as well as the measures taken by the authorities to achieve them, is still below the standards prescribed by the confirmed and published international instruments in these areas. Although much of these rights are dependent on economic development and growth that does not mitigate the State's obligation to take measures to ensure the required level.

Annual Report suggests that persons with disabilities are still being marginalized and stigmatized the most in comparison. Despite the ECtHR standards that suggest the necessity of inclusion of citizens with disabilities in society, these people are being excluded from access to many of the rights.

Multiple and intersectional discrimination is noted in particular in the case of Roma women, as well as women of other ethnic origins. In many cases on top of being discriminated against for the mentioned protected ground, they are additionally suffering as they are women with disability, transgender or lesbian. Some are also suffering from domestic violence. Acceptance of the LGBT community is moving at a slower pace, although some progress was made in the legislative framework when a new law on same-sex partnership was adopted.

The Ombudsperson is accredited with a B-status by the Global Alliance for National Human Rights Institutions (GANHRI) and in 2019 it became a member of the European Network of National Human Rights Institutions (ENNHR).

Ministry of Human and Minority Rights

The Ministry for Human and Minority Rights of Montenegro is a special organizational unit in the Government of the Republic of Montenegro. This Ministry performs management activities articulated in the Rulebook on Internal Organization and Systematization of the Ministry for Human and Minority Rights. Ministry oversees and monitors the implementation of non-discriminatory acts including other related docu-

ments in the domain of human and minority rights protection. It gathers relevant data and based on the overall program of the Government proposes the laws and other regulations to fight against discrimination and inequalities. Ministry likewise is in charge of the adoption of relevant bylaws, rulebooks, and guidelines as well as to implement various action plans and strategies in its jurisdiction.

Article 2 of the Rulebook[167] on Internal Organization and Systematization of The Ministry of Human and Minority Rights sets out the institutional setting of the Ministry. The Ministry is headed by the Minister for Human and Minority rights, often a representative of the national minority. The institutional setting divides the authorities of the ministry into two groups. The Secretary of the Ministry oversees the competences of several directorates and departments such as Directorate for Promotion and Protection of Human Rights and Freedoms, Directorate for Promotion and Protection of The Rights of Minority Peoples and Other Minority National Communities, Directorate for Relations with Religious Communities, Department for Gender Equality Affairs, Department for Promotion and Protection of Roma and Egyptian Rights, Department for European Integration, Programming and Implementation of EU Funds, General Affairs School, and the Financial Affairs Department. These bodies are headed by general directors and superintendents who oversee the work of independent consultants and clerks. The other body of significance is the Cabinet of the Minister with a similar organizational scheme like the other bodies of the Ministry.

According to the Systematization Rulebook Article 12, the Secretary of the Ministry is responsible for work co-ordination of organizational units in the Ministry; ensures the realization of relations and co-operation with governing bodies in the area of human and minority rights and other bodies; other activities at the behest of the Minister.

Director for the Advancement and Protection of Human Rights and Freedoms coordinates and manages the work of the Directorate; in control of performing activities in the directorate's operations; responsible for the timely, lawful and complete execution of operations; distributes jobs to

167 For the Rulebook see: http://www.mmp.gov.me/organizacija

immediate executors; performs the most complex and professional tasks in the work of the Directorate; decides on the most complex issues in the directorate's work district; other activities at the behest of the Minister.

Director for the Promotion and Protection of the Rights of Minority Peoples and Other Minority National Communities coordinates and manages the work of the Directorate; in control of performing activities in the directorate's operations; responsible for timely, lawful and full execution of tasks; distributes jobs to immediate executors; monitors the work of minority councils; performs the most complex and professional tasks in the work of the Directorate; decides on the most complex issues in the directorate's work district; performs other tasks at the behest of the Minister.

Director for Religious Relations coordinates and manages the work of the Directorate; in control of performing activities in the directorate's operations; responsible for timely, lawful, and full execution of tasks; distributes jobs to immediate executors; performs the most complex and professional tasks in the work of the Directorate; decides on the most complex issues in the directorate's work district; performs other tasks at the behest of the Minister.

The Head of the Department for Gender Equality is in charge of Gender Equality Affairs; conducts analyses and research in the field of gender equality; participates in the development and realization of projects and programs in the field of gender equality; follows comparative experiences in this field; is responsible for organizing the work of the Department, responsible for timely, quality and proper execution of tasks; performs normative legal activities; performs the most complex tasks in the department's work district; performs other tasks at the behest of the superior.

The Head of the Department for the Promotion and Protection of Roma and Egyptian Rights performs tasks related to co-ordination and co-operation with state bodies and local self-government bodies to develop and implement operational measures and activities on the plan to

improve the position of Roma and Egyptians in Montenegro; produces reports on the realization of international documents in the area of protection and improvement of the rights of Roma and Egyptians; produces reports, analyses and information on the position of Roma and Egyptians in Montenegro; other activities related to the promotion and protection of the rights of Roma and Egyptians in Montenegro; perform other tasks at the behest of the superior.

The Head of the Department for European Integration, Programming, and Implementation of EU Funds manages the department's work, performs activities and undertakes appropriate activities related to issues of importance to Montenegro in the field of EU integration, performs activities in the function of the High Program Officer SPO, participates in international and regional activities and initiatives related to EU integration, prepares materials for information and reporting of the Government on activities under the jurisdiction of the Ministry in the field of EU integration, cooperates with other institutions relevant to joining the EU, drafts proposals for projects/programs for obtaining funds from the performs other tasks at the behest of the superior.

Besides, three administrative units exist in the Ministry and those are Cabinet of the Minister, General Affairs Department, and Financial Affairs Department.

On 1 July 2020 Montenegro adopted Law on Life Partnership of Same-Sex Persons and it was passed with minor controversy and objections by the representatives of minority parties. The second significant law adopted under the sponsorship of this Ministry was the Law on the legal status of religious communities and freedom of religion, however, this Law showed to be a thing of disputes and controversies which blurred the line set in the principle of secularism in the Constitution.

The European Commission Progress Report stresses the weak institutional capacity to battle discrimination towards the Roma and the Egyptians. Although some further alignment with the EU Acquis has been achieved, especially with the Amendments to the Law on Gender Equal-

ity, the Report (p.4, 24) indicates that there have been little to no improvements concerning gender-based violence yet again indicating the lack of institutional resolve. Hence the institutional capacity and budgetary allocation remain problematic in terms of battling with the beforementioned specific forms of discrimination.

In terms of gender equality, the Government is implementing an Action Plan for activities regarding the achievement of gender equality (2017-2021) envisioned to be implemented at state and local level in areas of promotion of gender equality and the human rights of women; gender-sensitive education, and education; gender equality in the economy; gender-sensitive health care; gender-based violence; gender equality in media, culture, and sports; gender equality in the decision-making process in political and public life and institutional mechanisms for the exercise of gender equality policies and international cooperation. The success of the strategy is to be further evaluated, however, some provisional evaluations[168] (p. 53-55) indicate that the improvement in most of the beforementioned areas is low to medium.

Besides the Gender Equality Action Plan 2017-2021, some of the notable other plans, strategies, and projects of the Ministry based on the Working Program[169] of the Government of Montenegro include Strategy for the inclusion of Roma and Egyptians in Montenegro 2016-2020; Strategy for improving the quality of life of LGBTI persons in Montenegro 2019-2023; Strategy for protecting persons with disabilities from discrimination and promotion of equality for the period 2017-2021; and Minority Policy Strategy 2019-2024. As mentioned, the strategic aim of the Gender Equality Action is to establish a society of equal opportunities and the elimination of all forms of gender-based discrimination. While the Strategy for the inclusion of Roma and Egyptians focuses on education, employment, housing, and health care the Minority Policy Strategy is focused on implementing international standards and measures to im-

168 Evaluation of the Plan to achieve gender equality in Montenegro (2017-2020), Strikovic S., MHMR, and OSCE Mission to Montenegro, 2020, Podgorica.

169 The Ministry of Human and Minority Rights has not published this year's program The Working Program of the Government of Montenegro is available at: http://www.gov.me/ResourceManager/FileDownload.aspx?rId=397995&rType=2

prove living conditions so that minority national communities are integrated into Montenegrin society fully. This year marked a positive step forward equality when a national legal framework was introduced with the same-sex civil partnership, the Strategy for improving the quality of LGBTI is focused on defining measures for further implementation of international standards. The strategy for protecting persons with disabilities places special attention on working with local governments.

Gender-based mechanisms

The first body to oversee gender equality was the Committee for Gender Equality of the Parliament of Montenegro which was established in 2001 as the permanent working body. Following its competences, it considers the draft laws, other regulations, and general acts related to the implementation of the principles of gender equality. It monitors the application of these rights through law enforcement, but not only anti-discrimination laws concerning gender but also children's rights, family laws, employment, entrepreneurship, education, health, social policy, and welfare. It also prepares reports on the improvement of the principles of gender equality, participates in the preparation, drafting, and harmonization of laws and other acts with the standards of European legislation and programs of the European Union relating to gender equality, affirms the signing of international documents dealing with this issue and monitors their implementation, and manages the cooperation with the civil sector in this area.

The Office for Gender Equality was established within the auspices of the Ministry of Human and Minority Rights of Montenegro and establishes the activities, projects, and campaigns and the gender equality work on various levels of governance. In this regard, the Plan of Activity for Achieving Gender Equality (2017-2021) with the Implementation Program for the Period 2017-2018 is implemented at three levels, national, local, and through cooperation with civil society organizations. The Action Plan prioritizes several fields of activities: promoting gender equality of human rights of women, gender-sensitive education, gender equality in the economy, gender-sensitive health care, gender-based vi-

olence, gender equality to media, culture, and sport, and equality in the decision-making process in political public life. These spheres of activities are divided into goals[170] which ought to be achieved by 2021:

- Gender equality principle integrated into the development and implementation of all national policies (programs and strategies) and actions of state bodies.
- Consistent implementation of international instruments for gender equality and especially the protection of women's human rights.
- Ensured implementation of anti-discrimination legislation with an assessment of the impact, quality, and degree of application of legal regulations.
- Introducing the gender component in teaching in primary and secondary schools.
- Increasing the level of knowledge of employees in the education system about gender equality.
- Achieving gender balance in the choice of professions in secondary and higher education institutions.
- Improved gender equality in higher education institutions.
- Increased employability of women, especially hard-to-employ categories.
- Encourage women's entrepreneurship and self-employment.
- Strengthening local institutions and women's capacities to enable and encourage entry into entrepreneurship.
- A high degree of harmonization of work and family obligations of women and men has been achieved.
- Ensuring effective law enforcement and reduce gender-based discrimination in the labour market.
- Reducing the pay gap between men and women.
- Improving prevention and early detection of malignant diseases.
- Improved measures to preserve the reproductive health of all women and girls.
- Increased awareness of health workers about gender-sensitive health care.
- Improved health system response in recognizing and responding to cases of violence.

170 Ibid., pp.41-96.

- An effective system for monitoring the implementation of measures from the Strategy for Combating Trafficking in Human Beings 2012-2018 has been established.
- Raising public awareness about the occurrence, problems, and ways of combating gender-based violence.
- Strengthened system of social and other support and protection of all victims of domestic violence.
- Developing awareness among citizens, especially civil servants responsible for the application of the law on all forms of discrimination and gender-based violence, and their education.
- Increased media visibility of the implementation of gender equality policies.
- Improved knowledge of media employees about gender equality.
- Promoting gender equality in the field of culture.
- Improved media promotion of successful women.
- Promoting gender equality in sport.
- Achieved a balanced representation of women and men in the legislature at all levels.
- Implementation of UN Security Council Resolution 1325 - Women, Peace, and Security.
- Strengthening mechanisms for the implementation of gender equality at the national level and improving their coordinated action in reporting.
- New and strengthened existing mechanisms for gender equality at the local level.
- Strengthened capacities of the Department for Gender Equality for the implementation of gender equality policy.
- Continuous cooperation with civil society organizations.
- Introduce gender-sensitive budget management in local governments and ministries.
- Inclusion of European standards of gender equality in national legislation and integration of gender equality into the process of EU accession negotiations.
- Improved cooperation with institutional mechanisms in the countries of the region.
- Increased level of information of women and the general public about the basic rights of women arising from UN and EU legal documents.

One of the more significant activities was the publication of Montenegro's first Gender Equality Index in January 2020. The Gender Equality Index was developed through a joint partnership of the Statistical Office of Montenegro, the Ministry of Human and Minority Rights, the UNDP Office in Montenegro, the EU Institute for Gender Equality in Vilnius, with the support of an independent expert and EU financial support through the IPA project 2014 "Support to anti-discrimination and gender equality policies". The calculated value of the Gender Equality Index for Montenegro is 55, while the average value for the EU-28 is 63 pointing out that Montenegro needs to make further progress. Only four countries in 2019 had a lower index value than Montenegro: Romania, Slovakia, Hungary, and Greece[171].

In the past period, the Ministry of Human and Minority Rights was involved in several projects and activities regarding gender equality topics such as the project: "Educational and economic empowerment of women to start their own business". Additionally, the Ministry announced a public competition for financing projects/programs of non-governmental organizations in the field of gender equality entitled "For a stronger society in terms of gender equality". The past period was noted with the Association of Professional Journalists of Montenegro research "The position of female journalists in the Montenegrin media", a part of a project implemented within the Program for Support of Anti-Discrimination and Gender Equality Policies, implemented by UNDP in partnership with the Ministry.

The Ombudsperson's office has paid special attention to gender equality in its annual Report. In 2019, the report states that this area of rights is still perceived in the wrong way, especially how the public perceives the meaning of gender equality as solely women's participation in administrative bodies. The Ombudsperson called upon the State to implement its gender policies and highlighted the State's responsibility highlight-

171 Ministry of Human and Minority Rights, Sector Analysis for determining the proposals of priority areas of public interest and the necessary funds for financing projects and programs of non-governmental organizations from the Budget of Montenegro in 2021, Podgorica, 2020, p. 7, available at: http://eusluge.euprava.me/ServiceImages/eParticipacije/4ac03f8e-edc9-47b9-8d70-565a6b1daccb.pdf

ing that the MHMR ought not to be the only body to pay attention to human rights issues as it is the responsibility of all government bodies. Although most ministries have a gender equality officer in charge, it seems that due to the burden of other types of responsibilities there is not enough space for full specialization in gender equality. In the Report, the Ombudsperson draws attention to one of the most problematic areas within gender equality, and that is gender-based violence, which is becoming more pronounced from year to year[172].

Courts/Judiciary

The whole Chapter IV entitled "Judicial Protection" of the Law on the prohibition of discrimination is dedicated to offering a legal background for how one could initiate a discrimination dispute before the court.[173] What happens to be of great importance is that any person feeling to be a victim of discrimination could seek judicial protection under the form of a lawsuit Article 24 (1-2). Paragraph 4 of the same Article contains a strict provision that all cases after the discrimination lawsuit are to be ruled as urgent. Yet, that is not the case with the Law on Civil Procedure[174] as it is for example the case in labour disputes. Thus, Article 434 of the Law on Civil Procedure strictly determines that labour disputes must be ended not later than six months from the date the lawsuit was submitted. Since the discrimination disputes are omitted from this provision, as it was said, we could only speculate that the decision in this sort of disputes could last at minimum 150 days from submission of the lawsuit, even though in practice it occurs to be much longer. Comparing these two acts one more inconsistency is to be noticed. The Prohibition of Discrimination Act provides that judicial revision before the Supreme Court should be allowed always in discrimination disputes, regardless of the dispute value. Yet the Law on Civil Procedure fails to determine this

172 Protector of Human Rights and Freedoms, Report on Protection against Discrimination from the Perspective of the Institution of the Protector of Human Rights and Freedoms of Montenegro for the Period 01.01. - 31.07.2019., Podgorica, 2019, pp. 41-43
173 Chapter III provides rules on non-judicial protection before the General Ombudsman.
174 Official Gazette of Montenegro No. 22/2004, 28/2005, 47/2015, 48/2015, 51/2017, 75/2017, 62/2018, 34/2019, 42/2019 and 76/2020

issue when determining exceptions for revision, which in practice could raise a risk for dissatisfied parties to be allowed to submit a revision.

Depending on the specific claim goal from Article 26 of Law on the prohibition of discrimination, the lawsuit could be deemed as condemnatory (prohibition of exercising the discriminatory activity, the prohibition of repetition of discriminatory activity, and compensation of damage) or declaratory (establishment of the fact that the respondent has acted discriminatorily against the plaintiff and publication of the judgment in media on the expenses of respondent). The deadlines for lawsuit submission are somewhat adequate it appears, since the plaintiff may file a claim to the court one year after learning that discrimination happened (subjective deadline), and not later than three years from the date discrimination was exercised (objective deadline).

With regards to the burden of proof issue, it is regulated that if a claimant succeeds to prove the likelihood of the respondent committing an act of discrimination, the burden passes to the respondent, which is very important and should be understood as an encouraging provision. Otherwise, discrimination victims would be rather disheartening to submit lawsuits in the first place. Nevertheless, it still lays upon the individual judge to determine whether the claimant did succeed in this matter or not.

As determined to ease the battle against discrimination, the Law significantly extended the number of persons authorised to submit a discrimination lawsuit. So, along with the discriminated person, a lawsuit may be filed-on behalf of the discriminated person(s)-by organisations or individuals who are dealing with the protection of human rights, with the written consent of a discriminated person or a group of persons to do so (Article 30). Having in mind that discrimination could-or it frequently truly does-cause unwanted effects for a discriminated person towards his or her social life, reputation, etc., so often ending with the very victim suppressing it, it should not surprise much that they would not want prominent anti-discrimination organisations or individual activists to take over their cases and possibly to expose them to the general public.

In the end, but not at the smallest the least, a major part of anti-discrimination protection is played at the "domain légal" of the Constitutional Court of Montenegro. Article 68 of the Law on Constitutional Court[175] regulates that any person, natural or legal, even the settlement or group of persons and other organisational forms that do not have the status of a legal person, may file a constitutional complaint when a violation of any human right, consequently the protection of discrimination, occurs. The constitutional complaint may be filed when an individual act, action, or inaction of state authority, public administration body, local self-government or local government body, legal person, or other entity that exercises public powers caused the violation. In this way, the protection from discrimination right, in the deepest sense, was founded based on Article 14 of the ECHR and its Protocol 12. In its obligatory Opinion U–I br. 3/09 from 2012, the Constitutional Court of Montenegro decidedly identified three steps in investigating the violation of the anti-discrimination principle, all of which could be summed as: (*i*) a comparison test, (*ii*) equal treatment, and (*iii*) protected grounds. As it shows, the first two clearly arise from the plenteous case law at the ECtHR. When it comes to the protected grounds, we have seen in this Handbook that the national legal framework follows that standards set in acquis, as well as CoE documents and it, has expended the scope of the protection. All persons shall be deemed equal before the law and exercise their rights and freedoms freely, within the legal boundaries, to Constitution and international agreements regardless of any particularity or personal feature. So, any other imaginable ground should be considered within discrimination disputes as to the possible protected ground for the three-step path. This was manifestly delivered within the Constitutional Court Opinion U-II br. 49/11 and 59/1 from 2014.

In conclusion, the role of the Constitutional Court is double-natured. It clearly provides the right to constitutional complaint after the exhaustion of all effective and even extraordinary legal remedies, on one hand, while it delivers the standards for all other courts to help them calibrate the processual path in discrimination cases.

175 Official Gazette of Montenegro No. 11/2015

Police/Law Enforcement

For the purpose of this Handbook term 'police' is used to refer to all civil servants belonging to the executive branch of government that are empowered by the state to enforce the law and ensure safety, prevent crime and civil disorder. To understand the role of police in protection from discrimination it should be noted that it is a general understanding that police is in charge to protect and respect basic human rights and freedoms.

According to Article 2 of the Law on Internal Affairs[176] police job is to maintain and support the exercise of freedoms and rights of citizens. Article 11 outlines the principle of policing and performing police tasks that are based on the principles of legality, professionalism, co-operation, proportionality in the application of powers, efficiency, impartiality, non-discrimination, and timeliness. Article 14 states that Police officers act in accordance with the Constitution, certified international treaties, laws, and other regulations. Police officers adhere to the standards of police conduct, especially those arising from obligations established by international documents, and relate to the duty of serving people, respect for legality and suppression of illegalities, the exercise of human rights, anti-discrimination in the execution of police tasks, restriction and restraint in the use of means of coercion, prohibition of torture and the use of inhumane, the obligation to refuse illegal orders and to counter any form of corruption.

Police powers, in terms of this Law, are collection and processing of personal and other data; determining the identity of the person and the identity of the case; calling; detention; temporary restriction of freedom of movement; issuing warnings and issuing orders; use of other people's traffic means or means of connection; temporary seizure of the case; stopping and examining persons and objects; a public promise of reward; filming in a public place; police observation, i.e. observation; use of the means of persuasion, conducting special police actions. ECRI reiterates that the police job is also the promotion of democracy and rule of law.

176 Official Gazette of Montenegro No. 44/2012, 36/2013, 1/2015, 87/2018

As indicated before in this Handbook, ECtHR found that the national legal framework provides sufficient protection but the lack of proper enforcement is an issue.[177] There are no specific provisions or guidelines available that indicate the role of the police in the fight against discrimination apart from the mentioned provisions. ECRI General Policy Recommendations No 11 specifies that there should be a focus on building a good relationship between the police and community and thus it is needed to train the police in policing a diverse society[178] while maintaining the legal obligation or the authority of the police to prevent discrimination. In that respect in 2006, a national Police Academy was established, and since 2012 it has a status of a higher educational institution, meaning enrolment to the Academy is possible upon graduation from secondary school. The education and training last 2 years and graduation is possible after obtaining 120 ECTS. The overall educational plan and syllabus suggest that students are being educated in various disciplines including Psychology, Forensic medicine, as well as Constitutional law, Human rights, and Ethics. Training in anti-discriminationpolicies and practice are also conducted in cooperation with the CSOs.[179]

According to the Rulebook for the recruitment of the candidates, affirmative measures are applied if candidates opt for it (Article 12).[180] Meaning when applying for the Academy, candidates who believe that they belong to a certain group that is not in an equal position in society can state so. This provision however does not apply to gender equality. When more than one candidate scores the same number of points, the female candidates have the advantage in the ranking.

This indicates that police education in Montenegro follows overall ECRI recommendations to train police in working in a diverse society and to recruit members of minority groups and to ensure that officers.

177 Alković op. cit. 95, § 70.

178 ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, IV.16

179 NGO CAZAS, Challenges in the work of police officers in ensuring respect for the rights of LGBTI persons, http://cazas.org/2016-12-19-01-31-60/izazovi-u-radu-policijskih-sluzbenika-na-osiguravanju-postovanja-prava-lgbti-osoba

180 Rulebook on recruitment of the candidates, No. 2499/1 from 28.06.2019.

One of the overall internal goals of the Police forces was to follow recommendations and legal obligation to employ more women in a traditional man dominated sector. Thus, a Gender Equality Plan was prepared and as a consequence, a Handbook on gender equality was introduced so that they would raise awareness about the issue. Also, according to the internal research, only 10% of employed personnel in Police forces are women, thus one of the first goals is changing this reality. Most of them work in administration and forensics. One of the greatest obstacles to having more policewomen in the ranks is the prejudices in society. Some of the activities in 2019/2020 to combat those prejudices include: securing institutional mechanisms through the human resources bureau, include at least 15% of women in working groups, teams, and delegations, integrate more women in international cooperation activities including referring women to peacekeeping missions, and institutionalize women societies within the Police, ensure public visibility of policewomen, promote educational and training activities in secondary schools so that more women would be interested in applying to become policewomen, promote parental and maternity leave and flexible working hours for policewomen in such cases as well as train and educate on gender equality other police officers as well as decision making bodies. One of the institutional mechanisms also included taking measures to increase the number of women in managerial positions in the Police Directorate. And finally, the education and training in gender equality and anti-discrimination at the workplace were also included in the activities. The support in achieving gender equality goals comes from the Ministry for Human and Minority Rights.

Gender-based violence remains deeply problematic for Montenegro as noted in the last EC Report: "…despite an increase in criminal complaints, lenient penal policy and the practice of processing gender-based violence cases as misdemeanour cases risk discouraging victims to report offences. There is little improvement in the capacity and gender sensitivity of existing institutions. Effective victim support services are yet to be provided, along with better and more accessible legal aid." The EC indicates the fact that the number of officers keeps increasing between reporting periods (p. 33)

One that notes one more specific goal in building trust in the Police forces is building mechanisms for protection from domestic violence and equipping the space for conducting interviews with victims of domestic violence. This goal is both oriented towards supporting gender equality measures within the Police forces but also opening up towards a more vulnerable community. In that respect, a Handbook on the conduct of police officers in cases of domestic violence was prepared and distributed across the country. Police got more involved in the public campaign of a fight against women as well as setting up SOS telephone lines for domestic violence reporting with 24h on-call duty. In the distribution of information about these specific measures, Police cooperated with NGOs that are involved in the development of mechanisms for the protection of victims of domestic violence. These materials targeted both: police forces and victims of abuse and domestic violence. In creating safe spaces for victims of domestic violence all police canters were equipped to have in mind the needs of children.

Finally, the general prohibition of discrimination from Article 7 of the Law on State Administration applies to civil servants working with law enforcement agencies.[181] According to the regulation civil servants and officers of the state are not allowed to discriminate on any of the grounds such as race, colour, nationality, social or ethnic origin, connection with a minority people or a minority national community, language, religion or belief, political or other opinion, gender, gender reassignment, gender identity, sexual orientation and/or intersex characteristics, health status, disability, age, property status, marital or family status, belonging to a group of assumptions about belonging to a group, political party, trade union or other organization, as well as based on other grounds.

In addition, the Code of Ethics[182] specifies that in performing police work, officers are to not discriminate on any ground (Article 5).

In terms of prevention of online hate speech and internet crime, as mentioned before Montenegro ratified Budapest Convention and Additional Protocol to it. National Montenegrin Incident Response Team was

181 Official Gazette of Montenegro No. 2/2018 and 34/2019.

182 Code of Ethics, available at: http://www.mup.gov.me/ResourceManager/FileDownload.aspx?rId=187094&rType=2

established and works under the Ministry of Telecommunications, and additionally, Policy established cybercrime division. However, we are witnessing online targeting of the LGBT population as well as minorities, especially in times of high political tensions in the society (elections, controversial laws, protests), that there is no proper follow-up or the reporting mechanisms are not followed enough.

The national pride parades, held in the capital of Montenegro, Podgorica are held peacefully with good cooperation with law enforcement. However, EC states that "…the number of reported cases of hate crime and hate speech towards LGBTI persons is increasing and prosecution of these crimes remain insufficient"[183]

Key points

- Incorporating ECRI Recommendations, national protection mechanisms have been empowered and additionally reaffirmed the important position that the Ombudsperson office has in the legal and political system of Montenegro.
- Office of the Ombudsperson has the role to warn, criticize, propose and recommend but it cannot change, repeal or annul the acts of other institutions, nor it has judicial competences. It can, however, assume the role of the third party intervener in the proceedings.
- Gender protection mechanisms are now in the domain of the Ombudsperson office, and in its Annual Report, it highlighted that gender equality remains a challenge at the institutional setting and political level of the Government.
- The first Gender Equality Index results place Montenegro below average in comparison to the EU data.
- Assession to Protocol 16 of the ECHR should strengthen the role and capacities of the judiciary in protection from discrimination.
- Police play a pivotal role in the protection of the principle of equality and the fight against discrimination, however, it is still perceived as a predominantly male profession, and thus efforts are being made to achieve greater gender balance in the law enforcement system.

183 EC Report op. cit. p. 30.

CHAPTER FIVE - EXPLANATIONS AND EXAMPLES OF MOST COMMON DISCRIMINATION GROUNDS IN PRACTICE

As we have seen from the previous chapters anti-discrimination law had evolved and expanded in the course of decades work of various international institutions and courts including national courts. This shows that the international legal framework in protection from discrimination can be seen as a living instrument. It changes, it evolves, it adapts and more importantly, it is following the changes in our society. Some of the grounds of discrimination in this chapter are not regulated per se but could be implied under category "other" in the constitutional and international legal framework. This Chapter will take into consideration some of the most recent or most adequate examples of adjudication human rights and discrimination. For Montenegro, the standards of protection established by ECtHR still play a major role in developing a judicial culture of protection from discrimination and thus judiciary in Montenegro ought to take into consideration ECtHR jurisprudence when assessing discrimination claims under the national legal framework.

Discrimination based on race, colour, origin, citizenship, nationality, ethnicity, language

ECtHR: *Sejdic and Finci v. Bosnia and Herzegovina*

This case was mentioned before in this Handbook, and it represents one of the notable cases that serves as an example of the ECtHR jurisprudence in connection to the principle of equality and test of proportionality and legitimate aim that certain policy has to pass in the society to be seen as non-discriminatory. This case was one more down the line that confirms ECtHR stand on the issue of differential treatment based on ethnicity.

In their separate applications, Dervo Sejdić and Jakob Finci, took issue with their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. The applicants submitted that difference in treatment based expressly on race or ethnicity was not justified and amounted to direct discrimination. According to their complaint even though they had an experience comparable to that of the highest elected officials, the provision of the Constitution and Election Act from 2001 prevented them from being candidates for the Presidency and the House of Peoples of the Parliamentary Assembly solely on the ground of their ethnic origin. Thus rights guaranteed under Article 3, 13 and 14 of the ECHR as well as Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 to the Convention were breached.

In making assessment Court took into consideration the specific societal reality that the Constitution was made in the time of raging war and thus such provisions aimed to make peace in a war-torn country which makes it of vital interest for the country. However, ECtHR reiterated that objective and reasonable justification had to be interpreted as strictly as possible.

The Court concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1. The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law".[184] It thus introduces a general prohibition of discrimination.

CJEU: *CHEZ v. KZS*

In this case, before CJEU, Ms Nikolava, a claimant, ran a grocery shop in the Gidzdova mahala district inhabited mostly by persons of Roma origin. Electricity supply company installed new electricity meters, however, unlike in other parts of the city where they were installed at a height of about 1.7m, in this district, they were installed at a height between 6 and

184 ECtHR, Sejdić. op. cit. § 53.

7 meters. Ms Nikolova, who herself is not Roma, filed a complaint against the Commission for protection of discrimination arguing that the installation of meters at such height amounted to direct discrimination based on nationality. The Commission found that this policy actually was a violation of rights and created indirect discrimination on the grounds of nationality. The Supreme Administrative Court annulled this decision stating that the Commission did not indicate the other nationality concerning the holders of which Ms Nikolova had suffered discrimination. The case was referred back to Commission which found that CHEZ company directly discriminated against Ms Nikolova on the grounds of her "personal situation". CHEZ Company appealed and thus Administrative Court sought a preliminary ruling from the CJEU as CHEZ insisted that electrical meters installation policy does not fall under Directive 2000/43.

The CJEU held that "The concept of 'discrimination on the grounds of ethnic origin', for the purpose of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and, in particular, of Articles 1 and 2(1) thereof, must be interpreted as being intended to apply in circumstances such as those at issue before the referring court, thus amounting to the less favourable treatment or particular disadvantage resulting from that measure.[185] Amongst others, CJEU held that less favourable treatment must consist of prejudice to rights or legitimate interests.

ECSR: *European Roma Rights Centre (ERRC) v. Portugal*

The applicant, ERRC asked the ECSR to hold that the situation in Portugal in regards to the access to social housing, substandard quality of housing, lack of access to basic utilities, residential segregation of Romani communities and other systemic violations of the right to housing amounted to a violation of Articles 16, 30, 31, alone or in conjunction with Article E of the Revised Charter, for failure to ensure the provision of adequate and integrated housing solutions for Roma. In this case, the ERRC considered that the approach of the Government to the housing situation of Roma points to, at least, indirect discriminatory practices, which keep Roma excluded and marginalised through residential segregation and substandard

185 CJEU, C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* [GC], 2015.

quality re-housing. Considering relevant domestic and international law, as well as submissions of the parties, the Committee found a breach of the Revised Charter. The Committee considered that social housing offered to Roma should be, as far as possible, culturally suited to them. The Committee holds that the inability and unwillingness of central authorities to correctly oversee or coordinate the implementation of housing programmes at the local level taking into consideration the specific situation of Roma, amounting to a violation of Article E taken in conjunction with Article 30.[186]

Discrimination based on religion or belief

ECtHR: *S.A.S. v. France*

The issue at stake was the "no face cover" policy and the applicant was a French national and a Muslim. She wears the burqa (full-body covering including a mesh over the face) and niqab in accordance with her faith, culture and personal convictions. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner. The applicant complained that the ban on wearing clothing designed to conceal one's face in public places, introduced by Law no. 2010-1192 of 11 October 2010, deprived her of protected right to live following her belief. She alleged that such policy amounts to a violation of Articles 3, 8, 9, 10 and 11 of the Convention, taken separately and in conjunction with Article 14 of the Convention. A third-party interveners (Amnesty International and a non-governmental organisation Article 19) contributed signalling the risk of intersectional discrimination against Muslim women.[187] Human rights Centre of Ghent University also submitted third-party intervention and pointed that such blanket bans, in reality, do not serve the purpose they are usually created for, but they lead to isolation and the deterioration of social life and autonomy. It third-party intervener's view such policies generated indirect and intersectional discrimination on grounds of religion and sex in addition to the fact that women wearing a face cover are also members of the vulnerable minority group.[188]

186 ECSR, European Roma Rights Centre (ERRC) v. Portugal, Complaint No. 61/2010, 30 June 2011, §71.

187 ECtHR, *S.A.S. v. France*, No. 43835/11, 2014, §§89-94.

188 Ibid. §§96-97.

In the judgment, Court found unanimously that complaints concerning Article 8, 9 and 10 taken separately and together with Article 14 to be admissible but it found other claims to be inadmissible. However, in examining the fact of the case ECtHR found that relevant points to be assessed in this case are the argument of "public safety" and "respect for the minimum set of values of an open and democratic society". For ECtHR, such public policy was seeking to protect "a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society.(.). It can thus be said that the question of whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[189]

It found that there has been no violation of rights and it determined that there is no indirect discrimination at issue since it relied on its jurisprudence: a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent (see, among other authorities, *D.H. and Others v. the Czech Republic* [GC], §§ 175 and 184-85).

CJEU: *Samira Achbita*

The case concerns a Muslim female who worked as a receptionist in a private company. After refusing to comply with the internal regulation that asked for employees not to wear any clothes or visible symbols of their political, religious and philosophical views and beliefs, thus cherishing a neutral image for all employees, she was dismissed. After she complained to the national court in Belgium the case ended up with Cour de Cassation, which resorted to preliminary ruling option asking Court of Justice if such claims are admissible under EU anti-discrimination laws, especially in the context of the particular situation arising in a private company or dispute being amongst private parties. Weather the dismissal was appropriate depends whether discrimination on religious grounds in the field of employment is protected under Directive 2000/78. CJEU found that there are two legal questions here, first the scope of Article 1 of the Directive

189 Ibid. §153.

and the meaning of "religion" in connection to the Article 2(1) that defines the principle of equal treatment. And the second whether the internal rule at issue in the main proceedings gives rise to a difference in treatment of workers based on their religion or their belief and, if so, whether that difference in treatment constitutes direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78. Taking into consideration ECHR, Charter as well as constitutional traditions of member states, it held that:

> *"the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public."*[190]

The Court of Justice found that there was no direct discrimination on grounds of religion under Directive 2000/78. Accordingly, such an internal rule did not introduce a difference of treatment that is directly based on religion or belief, for the purposes of the directive. By contrast, it held that such a rule could constitute indirect discrimination if it results in putting at a particular disadvantage person adhering to a particular religion. CJEU also stressed that a rule restricting religious symbols or attire can only be seen to be appropriate when it is part of a neutrality policy that "is genuinely pursued in a consistent and systematic manner".

Discrimination based on political and other opinion, membership in political, trade union and other organizations

ECtHR: *Virabyan v. Armenia*

In this case, the applicant was a member of PPA - one of the main opposition parties, the People's Party of Armenia. The applicant acted as an authorised election assistant during the presidential election in February

190 CJEU, C-157/15, Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV [GC], 2017, §28.

and March 2003. The international election observation mission concluded that the overall election process fell short of international standards. After the elections mass protests followed. The PPA candidate challenged the election results in the Constitutional Court, which on 16 April 2003 recommended that a referendum of confidence in the re-elected President be held in Armenia within a year. After demonstrations held on 12 April 2004 the applicant was taken by two officers on 23 April on suspicion of carrying a firearm and for using foul language towards police officers and not obeying their lawful orders. It was noted that the applicant refused to sign the record. The applicant complained that he had been subjected to torture at the Artashat Police Department on 23 April 2004 and that the authorities had failed to carry out an effective instigation into his allegations of ill-treatment. The applicant claimed that his rights guaranteed by articles 3, 6(2) and 14 of the Convention were violated.

The Court observes at the outset that it is undisputed that the applicant sustained injuries while in police custody, namely bruises to his chest and ribs and a lacerated testicle. The parties, however, disagreed as to the circumstances in which those injuries had been sustained. The applicant was subjected to a cruel form of ill-treatment which must have caused him severe physical and mental pain and suffering. The Court concluded there has been a substantive violation. As the circumstances of the criminal case were based solely on the version of events provided by the police officers without even hearing the applicant or any other witnesses there has been a procedural violation of Article 3 of the Convention. ECtHR also determined that there was a violation of Article 6(2).

However, when it comes to Article 14, the Court found that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural limb but not in its substantive limb. This was because he was arrested during sensitive political times and that there are no doubts that the arrest was done because of his political opinion, however, ECtHR could not conclude beyond reasonable doubt this automatically means that the torture was committed against him because of his political opinions.[191] The court stated that it did not have sufficient evidence to draw such a conclusion.

191 ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2012, §214.

Recalling Nachova and others noted that when investigating violence, states have an additional duty to "take all reasonable step to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events." To treat politically motivated violence on an equal footing with cases which have no political overtones "would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" and would amount to a failure to treat distinct situations differently in a way which is unjustified under Article 14.[192]

Discrimination based on gender or sex

ECtHR: *Konstantin Markin v. Russia*

The applicant, Mr Konstantin Markin is Russian military employee divorced with the mother of his three children. Following the agreement with his ex-wife, he took responsibility and they decided that he will raise the children and she would pay maintenance for them. Mr Markin applied for three years parental leave witch is granted by the domestic law, but his request was rejected because, in accordance with the law, parental leave of that duration is only applicable to female military personnel. Initially, he was allowed to take only three months off work, but he was recalled to duty a few weeks into his leave. The decision of the military unit the applicant challenged before a Military Court which annulled the decision and upheld the applicants right to remaining 39 working days of his three months leave.

The applicant complained about differences in treatment based on gender or sexual orientation, specifically he relied on Article 14 in conjunction with Article 8 to the Convention. The ECtHR found that the differences in treatment were not reasonable and acceptable regarding the situation which is comparable as regards parental leave and that there has been a violation of Article 14 in conjunction with Article 8. The Court noted that a major goal today is the advancement of gender equality and that very weighty reasons had to be put forward for such a differ-

192 Ibid., §218-220.

ence of treatment to be regarded as compatible with the Convention. "…the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex."[193]

CJEU: *Defrenne v. Sabena*

Ms Dafrenne was employed as a crew member in the capacity of the flight attendant by the airline company Sabena registered in Brussels. Under national laws, female flight attendants were obliged to retire at the age of 40, rule that did not apply to male flight attendants. Being forced to retire she realized that she also earned lower pension rights as a consequence of such policies. In examining the law, CJEU found that Article 119 of the Treaty of the European Community has doubt aim: first, to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay and second, this provision forms part of the social objectives of the community, which is not merely an economic union (…) as is emphasized by the Preamble to the Treaty.[194] As CJEU held that this was the case of sex discrimination it also confirmed that Treaty provisions can have a direct effect on national laws.[195]

Discrimination based on gender identity, sexual orientation and appearance

ECtHR: *Taddeucci and McCall v. Italy*

The case considers Mr Taddeucii and Mr McCall homosexual partners one from Italy and other from New Zealand who had lived together as a cou-

193 ECtHR, *Konstantin Markin v. Russia*, No. 30078/06, §151.
194 CJEU, C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 1976, §§9-10.
195 Ibid., §24.

ple since 1999. They decided to settle together in Italy, Mr McCall application for a residence permit on family grounds was rejected because they were not married and he could not be considered as a family member. At that moment only heterosexual marriages were allowed in Italy. When submitting the application the couple relied on Article 14 in conjunction with Article 8 to the Convention. Mr Taddeucci and Mr McCall alleged that the refusal by the Italian authorities to grant Mr McCall a residence permit on family grounds amounted to discrimination based on their sexual orientation. Relying on Article 8 they complained about the absence of specific statutory provisions in Italy in favour of the recognition and protection of unions between same-sex partners. Even though Article 8 does not impose general family reunification obligations the ECtHR found that the State did not treat unmarried couples equally and found that lack of a right to marry for the same-sex couple under national law, which was a prerequisite for obtaining a residence permit, constituted a violation of Article 14 in combination with Article 8 of the ECHR.

The Court referred to its findings in *Schalk and Kopf v. Austria* that it was artificial to consider that a homosexual couple could not have a "family life" under Article 8 of the Convention. It had taken the view that the relationship between Mr Schalk and Mr Kopf, a gay couple living together permanently, fell within the concept of "family life".[196]

CJEU: *Leger v. Ministre des Affaires sociales*

The case in question started before the national courts of France when Mr Leger's blood donation was refused on the ground that he had had sexual relations with another man. The request for the preliminary ruling concerns the interpretation of point 2.1. of Annex III to Directive 2004/22/EC implementing the Directive 2002/98/EC in regards to technical requirements for blood and blood components. This Directive sets standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and its components. According to the recital, 24 blood and blood components should be obtained from individuals whose health status is such that no detrimental effects will ensue as a result of the donation and that any risk of transmission of infectious diseases is minimised thus every donation should be tested.

196 ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, 2016; §87 and §96.

While making an assessment of the facts and laws as well as national and European standards in the matter of blood donation, Court noticed that taking as a criterion for a permanent contraindication to blood donation the fact of being a 'man who has had sexual relations with another man', such provision determines the deferral from blood donation on the basis to the homosexuality of the male donors who, because they have had homosexual sexual relations, are treated less favourably than male heterosexual persons. And in such circumstances, it may discriminate against homosexuals on grounds of sexual orientation under Charter (Article 21).[197] Ultimately, In the absence of effective techniques for detecting infectious diseases, the national courts would have to verify whether a questionnaire and individual interview with a medical professional could establish the existence of a risk to the health of recipients.

ECSR: *Interights v. Croatia*

The complaint registered on 12 October 2007 relates to Article 11 (right to health), Article 16 (right of the family to social, legal and economic protection) and Article 17 (right of children and young persons to social, legal and economic protection) of the European Social Charter. The case of Interights v. Croatia concerns the use of homophobic language in school materials. The ECSR stated that, although states enjoy a wide margin of discretion in determining the content of national school curricula, they have an obligation to ensure through the domestic legal system that state-approved sexual and reproductive health education was objective and non-discriminatory. It is alleged that Croatian schools do not provide comprehensive or adequate sexual and reproductive health education for children and young people. According to the ECSR, equal access to education must be ensured for all children. In this respect, particular attention should be paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty, etc. The ECSR stressed, in the context of health education, that the principle of anti-discrimination covered not only the way the education was provided but also the content of educational materials. Thus, in that

197 CJEU, C-528/13, *Geoffrey Léger v. Ministre des Affaires sociales*, de la Santéet des Droits des femmes and Etablissement français du sang, 29 April 2015. §§49-50.

regard, the principle of anti-discrimination had two aims: children could not be subject to discrimination in accessing such education and the education could not be used as a tool for reinforcing demeaning stereotypes and perpetuating forms of prejudice against certain groups.[198] The Committee found that the educational material used in the ordinary curriculum described and presented people of homosexual orientation in a manifestly biased, discriminatory and demeaning way. It held that the discriminatory statements constituted a violation of the right to health education (Article 11 (2) of the ESC) in light of the anti-discrimination clause.

Discrimination based on social origin, birth, property status and financial status

ECtHR: *Biao v. Denmark*

In the case, *Biao v. Denmark* the applicants, a naturalised Danish citizen of Togolese origin living in Denmark and his Ghanaian wife, complained that their request for family reunification in Denmark was rejected for non-compliance with statutory requirements. Namely, Mr Biao was born in Togo and lived there until the age of 21. He came in Denmark, married Danish national and a few years after he was issued with a residence permit. He learnt Danish and had steady employment for the next five years and was granted Danish nationality in 2002. In the meantime, he divorced and visited Ghana four times and during his last visit he got married again with his current wife who is born and raised in Ghana. He requested a residence permit but under this circumstance was refused by the "Aliens Act" based on his noncompliance with the requirements that a couple applying for family reunion must have stronger ties with another country which is known as "attachment requirement). Ms Biao appeal to the Ministry of Refugees was refused because they could settle in Ghana as both of them lived and had family there. They alleged that the refusal by the Danish authorities to grant them family reunion in Denmark was in breach of Article 8 of the Convention, taken alone and in conjunction with Article 14. According to Danish law, the permit

198 ECSR, International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Complaint No. 45/2007, 30 March 2009, para. 48.

would be granted if they could demonstrate that their aggregate ties to Denmark were stronger than their attachment to any other country, or if they had held Danish citizenship for at least 28 years.

Chamber judgment held four votes to three, that there had been no violation of the prohibition of discrimination in conjunction with Article 8 as judges did not establish indirect ethnic discrimination and the 28 years rule does not distinguish between Danish-born nationals and those who seek for Danish nationality later in life, thus majority understood that this rule is neutrally worded.

However, the Grand Chamber held that the relevant rule constituted a difference in treatment between Danish citizens of Danish origin and those of non-Danish origin. In conclusion, the ECtHR found a violation of Article 14, read in conjunction with Article 8 of the ECHR. The refusal to grant family reunion was based on existing ties with another country and the Court found that the domestic immigration measure had had an indirect discriminatory impact in breach of Article 14 on grounds of ethnic origin and nationality. The crucial split from the Chamber judgment was in the understanding that 28 years rule "places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish."[199]

CJEU: *Zoi Chatzi v. Ypourgos Oikonomikon*

A reference for a preliminary ruling was made by the Thessaloniki Appellate Court for the proceeding in which an issue of discrimination based on birth was raised. Namely, applicant Mrs Chatzi had a dispute over the fact that she was granted only one period of parental leave even though she gave birth to twins. The CJEU was to answer whether clause 2.1 of the Framework Agreement (that is set in Annex to the Council Directive 96/34/EC) can be interpreted as meaning that it confers an individual right to parental leave on the child and that, consequently, the refusal of the second period of parental leave in the event of the birth of twins infringes the rights which twins derive from the European Union legal order and whether clause 2.1 of the Framework Agreement can be in-

199 ECtHR, *Biao v. Denmark*, No. 38590/10, 2016, §138.

terpreted as meaning that the birth of twins confers entitlement to several periods of parental leave equal to the number of children born or whether it must be interpreted as meaning that their birth confers entitlement, like the birth of a single child, to just a single period of parental leave. Ultimately does this policy contradict Article 21 of the Charter.

Court held that there is no right relating to parental leave granted to the child in either of the documents. It concluded that mentioned clause cannot be interpreted as conferring an individual right to parental leave on the child and it is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born.

However, CJEU did find that principle of equal treatment obliges national legislature to establish a parental leave regime that meets the particular needs of parents of twins.[200]

Discrimination based on age, medical condition, genetic characteristics

ECtHR: *Schwizgebel v. Switzerland*

The applicant in this case is a Swiss national from Geneva. In 1996 she applied for adoption of a child which was possible under Swiss law for single parents. Firstly she was informed that she would receive an unfavourable response so she withdrew the application. But later she filled a new one, obtained necessary authorisation from social services and adopted Vietnamese child in 2002. After the adoption of one child, she sought authorisation to adopt a second one. The social services refused to grant authorisation and their refusal was upheld by the national courts. She applied for several times as well, but every time she was rejected. Ms Schwizgebel complained to the ECtHR that the Swiss authorities had prevented her from adopting because of her age (47 and a half at the time of her last application). She claimed among other things that she had been discriminated against in comparison with other women of her age, who were able

200 CJEU, C-149/10, Zoi Chatzi v. Ypourgos Oikonomikon, 2010, §68.

to give birth to children of their own. She relied in substance on Article 14, taken together with Article 8 of the ECHR. The ECtHR found that she was treated differently from younger women applying for adoption based on her age. However, a lack of uniformity among states over acceptable age limits for adoption allowed the state a large margin of appreciation. Also, the national authority's consideration of the age difference had not been applied arbitrarily, but it was based on consideration of the best interests of the child and the financial burden that a second child might pose for the applicant, which in turn could affect the child's well-being. Accordingly, the ECtHR found that the difference in treatment was justifiable.[201]

CJEU: D*ansk Industri*

On a request for a preliminary ruling from Supreme Court of Denmark, CJEU was asked for an interpretation of: first, Article 2(1) and (2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, second, the principle prohibiting discrimination on grounds of age and the principles of legal certainty and the protection of legitimate expectations. The case arose from the dispute related to a national provision that deprived an employee of the right to receive a severance payment when they could claim an old-age pension. Since it was a matter of private dispute Directive did not have a direct effect.

First CJEU determined that Directive in questions itself does not lay down the general principle of discrimination on grounds of age as the intention was to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment. by generally excluding a whole category of workers from entitlement to the severance allowance it follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age. When it comes to the second question CJEU declared that national court must disapply the provision that constituted discrimination as an interpretation of such provision is inconsistent with the EU law.[202]

201 Schwizgebel v. Switzerland, No. 25762/07, 2010. §§92-93.

202 CJEU, C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen [GC], 2016, §25, §37.

ECSR: *Fellesforbundet for Sjøfolk (FFFS) v. Norway*

In this case, ECSR examined a national provision allowing the employers to terminate the employment contract with seafarers upon reaching the age of 62 years. The complainant argued that the contested provision was discriminatory on grounds of age. The ECSR examined the complaint under Article 24 of the ESC; which provides for the right to protection in cases of termination of employment. It stressed that employment termination solely on grounds of age may amount to a restriction of that right to protection. The ECSR reaffirmed the principle that employment termination on grounds of age is not a justified reason for dismissal, unless such termination is objectively and reasonably based on a legitimate aim and that the means of achieving that aim are appropriate and necessary. The Committee further reiterated that Article 24 of the ESC establishes exhaustively the valid grounds on which an employer can terminate an employment relationship. Only two types of grounds can be relied on, namely those connected with the capacity or conduct of the employee and those based on the operational requirements of the company (economic reasons). Therefore, the dismissal by an employer for reaching a certain age would be contrary to the ESC, given that such a dismissal would not be based on one of the two valid grounds. The government defended the contested provisions stating that these were based on considerations of employment policy and operational requirements, as well as the goal of ensuring the health and security of those at sea. The ECSR accepted those considerations as legitimate. However, in examining the proportionality, necessity and appropriateness of the measures taken, the ECSR found that the government failed to prove why it considered that health would deteriorate to such an extent that seafarers were not able to continue their work at the age of 62 years. In particular, it was evident that there were other options to ensure the safety and the operational requirements of shipping, for example through regular and sufficiently comprehensive medical examinations of seafarers.[203] In conclusion, the ECSR this constituted a violation of Article 24 of the ESC.

The ECSR also established that the age-limit provision affected the particular professional category of seafarers disproportionately:

203 ECSR, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, 2 July 2013. §92.

"Under Article 1§2 of the Charter, elderly persons cannot be excluded from the effective protection of the right to earn one's living in an occupation freely entered upon. In particular, beyond the issue of pension rights (an important element of social protection purported to ensure the decent standard of living for the elderly, even though not directly at stake in the current complaint), the Committee holds that the rights of elderly persons at the workplace cannot be dissociated from the protection against discrimination especially on the grounds of age under Article 1§2.

This aspect of the right to earn one's living in an occupation freely entered upon is also consistent with one of the primary objectives of Article 23, which is to enable elderly persons to remain full members of society and, consequently, to suffer no ostracism on account of their age."[204]

Such a difference in treatment, therefore, constituted discrimination under Article 1 (2) of the ESC.

Discrimination based on disability

ECtHR: *Enver Sahin v. Turkey*

Mr Sahin is a Turkish student who during his first-year mechanics studies at the technical faculty got involved in an incident and as a consequence, his lower limbs got paralysed. He had to suspend his studies until he had recovered sufficiently to return to university. In 2007 Mr Şahin requested that the faculty adapt the university premises so that he could resume his studies. Citing budgetary reasons and time constraints, the rector's office replied that the adjustments he sought were not possible in the short term, but offered to appoint someone to assist the applicant on the premises. Mr Şahin refused, arguing, among other things, that it would interfere with his privacy. He appealed without success to the administrative courts. In his application before ECtHR, he claimed that his right to education (Article 2 of Protocol No. 1) and Article 14 were violated.

204 Ibid. §115-116.

Mr Şahin complained that due to the facts that adaption to the building never occurred, he was forced to give up his studies. Under the right to respect for private and family life read in conjunction with Article 14, Mr Şahin alleged that being assisted by another person would have made him dependent on that person and deprived him of his privacy.

The Court has considered that there was a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment which included an obligation for the States to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and a failure to do so amounted to discrimination. Court held that Article 14 must be read in light of the Convention on the Rights of Persons with Disabilities (CRPD) concerning the "reasonable accommodation" – understood as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case.[205] Concerning a failure to conduct a concrete individual assessment of a disabled student's needs regarding access to university premises, the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 on the right to education. Court also did not find it necessary to examine other parts of the claim after finding the violation as stated.

ECSR, *European Action of the Disabled (AEH) v. France*

The complainant organisation alleged that France failed to guarantee the right to education of children and adolescents with autism and the right to vocational training of young adults with autism, in breach of Articles 10 (right to vocational training) and 15 (right of persons with disabilities to vocational training, rehabilitation and social integration), read alone and/or in conjunction with Article E (non-discrimination) of the revised European Social Charter ("the Charter") because of the difference in treatment, in the education and vocational training fields, between persons with autism and persons with other disabilities.

The ECSR considered that limited funds in the state's social budget for the education of children and adolescents with autism indirectly disadvan-

205 ECtHR: *Enver Sahin v. Turkey*, No. 23065/12, 2018, §60.

taged persons with disabilities. The Committee explained that the limited public funding allocated to social protection could equally affect everyone who was supposed to be covered by this protection. However, a person with a disability is more likely to be dependent on community care, funded through the state budget, to live independently and in dignity, in comparison to other persons. Thus, budget restrictions in social policy matters are likely to place persons with disabilities at a disadvantage, which results in a difference in treatment indirectly based on disability. Consequently, the ECSR found that the state's limited social budget constituted indirect discrimination against persons with disabilities.[206]

Discrimination based on other actual or assumed personal characteristics

ECtHR, *Škorjanec v. Croatia*

This case was mentioned before in Chapter I of this Handbook, where the discrimination by the association in connection to the hate crime was explained. This case can also serve the purpose of the discrimination based on an assumed personal characteristic. In this case, the applicant was attacked because of her partner's Roma ethnicity, and although she herself is not of Roma origin. In a supermarket in Zagreb attackers insulted applicant's partner and as she tried to help her partner she was beaten as well. Although the criminal charges were brought and two attackers were convicted for the hate crime, but only towards the applicant's partner. In the judicial proceedings applicant was referred to as a witness, not a victim. In her complaint, Škorjanec invoked her rights under article 3,6 and 14 of the ECHR as Croatian authorities failed to protect her as a victim of a hate crime by association. For Government, she was not a victim of the hate crime but the collateral victim.[207] Court's assessment, however, took a different take. The Court found that it was the obligation of the authorities to seek a link between racist attitudes and an act of violence under Article 3 in conjunction with Article 14. Such violence is based on victim's actual or perceived status or characteristics but also on victim's actual or presumed association or affiliation to another person who presumably possesses a particular

206 ESCR *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 2013.
207 Škorjanec, op. cit. 74. §51.

characteristic that falls within the scope of a protected ground.[208]

Due to the failure of the State Attorney's Office to subject the case to the necessary scrutiny, as required under the Convention, the Court cannot but conclude that the domestic authorities failed to comply with their obligations under the Convention and thus ECtHR found a violation of Article 3 and Article 14 but not Article 6.

Discrimination based on 'other status'

ECtHR: *Clift v. the United Kingdom*

The applicant claimed that his rights under Article 5 in conjunction with Article 14 of the ECHR were violated due to his continued imprisonment as recommended by the Parole Board. His rights were violated in comparison to prisoners serving fixed-term sentences of less than fifteen years or even discretionary life sentences as recommended by the same Parole Board. To this, he added category of prisoners who were serving fixed-term sentences of fifteen years or more where the approval of the Secretary of State was required.

First Court noted that "Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it affects solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. However, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention and to this extent, it is autonomous"[209] In determining if the case falls within the scope of "other status":

> *"the Court recalls that the words "other status" (and a fortiori the French "tout autre situation") have generally been given a wide meaning (…) The Court observes at the outset that while a number of the specific examples relate to characteristics which can be said to be "personal" in the sense that they are innate characteristics or inherently linked to the identity or the personality of the individual, such as sex, race and religion, not*

208 Ibid. §56.

209 ECtHR, *Clift v. United Kingdom*, No. 7205/07, 2010. §41 more on this in Chapter II.

all of the grounds listed can be thus characterised. In this regard, the Court highlights the inclusion of property as one of the prohibited grounds of discrimination."[210]

The Court concluded that the applicant, in being classified as a certain type of prisoner, did enjoy 'other status' for the purposes of Article 14.

Second, the Court found that the comparator that applicant used in his claim was correct and analogous and thus Court established that the difference in treatment was not objective nor reasonably justifiable. It found that the UK violated Clift's rights as claimed in the applicant's submission.

CJEU: *Chacón Navas*

The request for preliminary reference ruling was made by the Madrid court in regards to the case of Ms Navas who was an employee of a catering company. Due to her illness, she was undergoing surgery which prevented her from working for eight months, after which she got a notice from her employer suggesting termination of the employment agreement. In the notice that she received employer admitted that the termination was unlawful however she claimed it was void and she asked to be reinstated according to the anti-discrimination legal framework. The National courts rejected her claim that she was discriminated based on protection from discrimination on the ground of disability under the Spanish law, which was in turn based on the EU Framework Equality Directive 2000/78/EC. The courts as well as her employer claimed that she cannot be discriminated in the manner she describes as she was sick and not disabled. Advocate General issued an opinion based on a medical model of disability reiterating that that sickness by itself is not enough to trigger protection under the Directive. This reasoning was adopted by the Court.[211]

There were two questions to be answered: first whether the general framework laid down by Directive 2000/78 for combating discrimination on the grounds of disability confers protection on a person who has been dis-

210 Ibid. §56.

211 CJEU, C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA* [GC], 2006, Opinion of Advocate General Geelhoed delivered on 16 March 2006, para. 4.

missed by his employer solely on account of sickness and second whether sickness can be regarded as a ground in addition to those concerning which Directive 2000/78 prohibits discrimination. CJEU stated that dismissal on the accounts of sickness does not fall within the general framework of the Directive and Sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.

CJEU was to answer and define what does constitute discrimination based on disability, more specifically since Treaty of Amsterdam and EU Framework Directive on Employment did not have a definition of disability, Court was to adopt its definition. According to Court the concept of disability as understood from the Directive is a medical model of disability, however later on EU became party to the CPRD and thus it should be a reference point to an interpretation of the EU law. Such interpretation must be made in line with the CPRD, according to which:

> *"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." (article 1)*

In this way, CJEU focused on a person's impairment thus a medical model of disability rather than social, for which criticism arose.

ECSR: *Associazione Nazionale Giudici di Pace v. Italy*

In this case, the ANGdP alleged that the Italian law discriminates Justices of the Peace (giudici di pace), a category of lay judges by not providing any social security protection and so it violated the Article 12 (the right to social security) of the Revised ESC in general, specifically in violation of Article 12(3) and 4b of the Charter. The comparator used to determine the discrimination were tenured judges. The Justices of the Peace in practice exercise same duties as tenured judges, they were treated equally for the tax purposes and the same recruitment policy applied but the difference was that Justices of Peace were denied the legal status of civil servants and workers. The government responded that difference in treatment stems from the fact that the appointment in the office is fixed term, it is

a part-time and honorary service and thus it is renumerated as such. Foe ECSR these are "The Committee considers that these arguments concern mere modalities of work organisation and do not constitute an objective and reasonable justification of the differential treatment of persons whose functional equivalence has been recognized."[212]

ECSR notes that "Considering the duties assigned, the tasks performed and their integration within the judiciary, the Committee finds that persons who perform the duties of Justice of the Peace are functionally equivalent to tenured judges concerning Article 12§1 of the Charter, regardless of whether Justices of the Peace are termed professional or lay judges under domestic law."[213] Unanimously, the ECSR found a violation of Article E in conjunction with Article 12(1).

Discrimination in social media

ECtHR, *Beizaras and Levickas v. Lithuania*

In Chapter I, under discussion on online hate speech the case of Beizaras and Levickas v. Lithuania was mentioned. The case follows the ordeal of a young gay couple that on their Facebook page posted a photo of the couple kissing. According to the applicants, "the picture went viral online and it received more than 2,400 'likes' and more than 800 comments". They also submitted that the majority of online comments had been aimed at inciting hatred and violence against LGBT people in general, while numerous comments had directly threatened the applicants personally. After reporting the case to the police and doing so via LGL Association in December 2014, a few weeks later prosecutor at the Klaipėda district prosecutor's office took the decision not to initiate a pre-trial investigation regarding the LGL Association's complaint. On 9 January 2015, the LGL Association appealed against the prosecutor's decision with the Klaipėda City District Court. The LGL Association pointed out that the prosecutor had taken the decision not to prosecute on two grounds: firstly, that the actions of the people who had commented on the above-mentioned Facebook post had not been systematic, and

212 ECSR, *Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, 5 July 2016, §82.
213 Ibid., §75.

secondly, that in respect of cases concerning similar situations (that is to say comments of a similar nature) the authorities routinely considered that no crime had been committed. The First Instance Court held that the one who posted such a picture should have and must have foreseen that society had different views on what picture was depicting. Even Klaipėda Regional Court dismissed the LGL Association's appeal, upholding the prosecutor's and the district court's reasoning, including that court's arguments regarding the applicants' "eccentric behaviour". The couple claimed that they have been discriminated as the authorities refused to launch a pre-trial investigation into the hate comments. ECtHR unanimously held that there had been a violation of the Article 14 in conjunction with Article 8 (right to respect for private and family life) and a violation of the Article 13 (right to an effective remedy). Lithuanian government failed to justify the different treatment they had towards applicants and thus left them unprotected from the undisguised calls for an attack on their physical and mental integrity. Also, the state failed to provide an effective domestic remedy before national institutions.[214]

Discrimination in the private sector

ECtHR: *Pla and Puncernau v. Andorra*

In this case, the applicants claimed that in determining inheritance rights, the High Court of Justice and the Constitutional Court had discriminated against the first applicant on grounds of filiation. In their submission, that had amounted to a violation of Article 8 of the Convention taken alone and in conjunction with Article 14. The first applicant, Mr Antoni Pla Puncernau, who was born in 1966, is the adopted son of the second applicant, Mrs Roser Puncernau Pedro. The second applicant was the first applicant's supervisor, as Mr Pla Puncernau is mentally disabled. As described before in this Handbook, Article 14 has a "horizontal effect" meaning that the anti-discriminationprinciple is applied to private situations as well. When it comes to the Article 8, Government claimed that there was no genuine relationship between the grandmother and the adopted son since she died two decades prior to adoption and thus national courts interpreted a person's will and considered that the testator

214 ECtHR, *Beizaras and Levickas v. Lithuania*, No. 41288/15, 2020, §156.

had not wished to include adopted children as beneficiaries of the estate. However, ECtHR considered that, in conjunction with Article 8, Article 14 did not merely compel State to abstain from any arbitrary interference with an individual's private and family life.[215] It held in this context that, in addition to this negative undertaking, there may be positive obligations inherent in an effective "respect" for private or family life. The Court reiterated that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised", and thus it found a violation of Article 14. Based on its finding it also found no need to examine the application separately under Article 8.

Key points

- It should be noted that ECtHR found that category "other" under Article 14 covers many areas.
- Besides selected examples in this Chapter, should a reader want to enquire more about the expansion of the category "other", they can look for cases concerning: employment (*Sidabras and Džiautas v. Lithuania*, 2004; *Bigaeva v. Greece*, 2009); membership of a trade union (*Danilenkov and Others v. Russia*, 2009); social security (*Andrejeva v. Latvia* [GC], 2009; *Gaygusuz v. Austria*, 1996; *Koua Poirrez v. France,* 2003; *Stummer v. Austria* [GC], 2011); education (*D.H. and Others v. the Czech Republic* [GC], 2007; *Oršuš and Others v. Croatia* [GC], 2010; *Ponomaryovi v. Bulgaria*, 2011); right to respect for home (*Buckley v. the United Kingdom*, 1996; *Karner v. Austria*, 2003); access to justice (*Paraskeva Todorova v. Bulgaria*, 2010; *Moldovan and Others v. Romania* (no. 2), 2005; *Anakomba Yula v. Belgium*, 2009); inheritance rights (*Fabris v. France* [GC], 2013); access to children (*Sommerfeld v. Germany* [GC], 2003); paternity (*Rasmussen v. Denmark*, 1984); freedom of expression, assembly and association (*Bączkowski and Others v. Poland*, 2007); right to an effective investigation (*Nachova and Others v. Bulgaria* [GC], 2005; *Opuz v. Turkey*, 2009; *B.S. v. Spain*, 2012); eligibility to life sentences (*Khamtokhu and Aksenchik v. Russia* [GC], 2017) and eligibility for tax relief (*Guberina v. Croatia*, 2016).

215 ECtHR, *Pla and Puncernau v. Andorra*, No. 69498/01, 2004. § 59.

CHAPTER SIX -
FROM THEORY TO PRACTICE: CASE STUDIES AND GOOD PRACTICES IN PROMOTING EQUALITY AND PREVENTING DISCRIMINATION

As the road to the EU accession continues for Montenegro, its legislative and political transformation reflects on the policies adopted. Previous chapters offered the overview of the normative and institutional mechanisms put in place to guarantee the protection of equality and anti-discriminationprinciples. However, having a set of rules or institutions implementing the rules is not enough. In safeguarding constitutional principles and achieving respect for human rights and non-discrimination, civil servants, CSOs and media play a crucial role. In addition, national human rights institution need support and cooperation of these stakeholders. This chapter examines their roles and outlines certain recommendations and examples of the best practices.

How to prevent discrimination?

As the chapters of this Handbook progressed it is noted that there are two main occurrences of discrimination in which non-discrimination principle equally apply. The first one is discrimination done by State authorities and the second one is discrimination occurred between private parties. The jurisprudence showed that combating discrimination is not only on the State authorities but also private entities, be it in the realm of the workspace, education, courts, or any day by day situation. The perils of discrimination are the gravest for the victim of a violation of the rights, but such acts also reflect on the society and institutional mechanism set to protect the principle of equality. Thus, creating inclusive societies comes as a basic precondition to ensure the protection of the principle of equality. In that respect different actors in society have different roles but the same aim: applying non-discriminatory policies in each area.

The very basic notion of prevention means to keep from occurring or to stop from doing something. As it was demonstrated in various court cases, the rules exist but the effective implementation is the key. It is in reason to argue that societal constructs are evolving and changing and thus sometimes certain rules are either not applicable or authorities have a different understanding of the application. At the example of *Sonia Chacón Navas case*, we have seen how that looks like in practice. Or ECRI Recommendation No. 15, that points out that the mechanisms to combat online discrimination and hate speech exists, but it is on state authorities to implement them in a way suitable for their respective legal cultures. The Recommendation does not stop there, it also calls on the social apps providers to adopt policies in accordance with the international standards.

Other ways of preventing discrimination would also mean training it from a very early age of human development and education. By excluding and segregating children of different race or origin from the general school population reflects badly for the overall inclusive society but also it backfires in the more mature stage of our lives. Once we are taught about difference, we embrace it as a way of living and thinking. In a homogenous society there are not many opportunities to learn about diversity, thus excluding someone because of certain protected ground teaches the bad example, as seen in *D.H. and Others v. the Czech Republic*. While Governments might have different definitions of disability, it is more worrisome when they do not. The fact that countries in east-central and south-east Europe typically lacked national definitions of "disability" (related to the placement of students in special schools) and used them in connection to the socio-cultural background of the child opened discriminatory practices that excluded children from regular educational programs.[216] The preconceived prejudices and turbulent history of Roma in Europe led this population to become a specific type of the disadvantaged and vulnerable minority. Creating specific polices within mind would prevent future generations from the exclusion of Roma but also from attacking them as presented in Škorjanec v. Croatia or Alković v. Montenegro.

An important segment of discrimination prevention is raising awareness about anti-harassment policy. Harassment as discrimination is im-

216 ECtHR, *D. H. and Others v. the Czech Republic*, No. 57325/00, November 2007, §44.

manent to the entire society and has no specific national boundaries, it is happening constantly. The anti-harassment policies should not only be developed at workplaces but should become a general cultural etiquette of society. According to the ECRI's country monitoring findings failure to tackle issues stemming from hate speech has adverse consequences for those to whom it is specifically addressed and for society as a whole.[217] First, those suffering distress also suffer and assault upon their dignity and sense of identity. It was indicated before those mechanisms of reporting of such cases are not well developed and the low statistical data from Montenegro indicates at least two predominant issues: distrust in the institutions as well as lack of awareness about hate speech and harassment. People suffering assaults such as this do not feel like part of the society and thus they can withdraw from schools, workplace, labour market etc. In turn, the entire society is being damaged by such negative consequences without us even knowing. First, as these cases keep occurring our aptitude to accept discrimination is greater. And second, once we are accustomed to such behaviours mutual respect and peaceful co-existence is at peril as the very concept of pluralism and inclusion is virtually non-existent.

Education programs starting from kindergartens to university levels should embrace the principle of equality, inclusiveness and non-discrimination. While indeed useful and important, training and workshops are not enough, non-discrimination should be a standard without which new generations will not know how to differentiate subtle forms of discrimination either in every day private relations, labour markets, or before governmental institutions.

Governmental institutions should work closely with discrimination protection mechanisms to create policies and strategic plans that will address discrimination issues in regards to citizens and users of their services but also regarding their own employees.

Private entities should embrace international legal standards irrespective of the national framework should the national framework lack conformity thereof.

217 ECRI Recommendation, para. 28.

How to combat discrimination?

According to the ECRI Recommendation No. 2, the first step would be the establishment of strong equality bodies that would be guaranteed by constitutional provisions. Their mandate should be to promote and also achieve equality, work on prevention and elimination of discrimination and intolerance but also undertake activities in promoting diversity and good relations within society and different groups in it.

Establishment of independent bodies is paramount for the achievement of the goals they were mandated with. Not only that their independence is secured by being separated on the institutional level from other state authorities that are not to interfere with their work, but their capacities and financial resources must also be granted and not subjected to changes within the governments or political parties. To effectively support citizens as well as other authorities, human rights protection mechanism bodies need to have resources.

In line with UN Paris Principles on the national equality bodies, it is suggested that these bodies should also be organized in a manner that provides for clear leadership, promotion and visibility. For equality bodies with quasi-jurisdictional competences, they must promote and seek amicable settlements within the boundaries of laws, have a transparent approach towards parties filing complaints and petitions which includes promoting remedies and access to them, hearing those petitions and communicating grievances to competent authorities, and finally making recommendations, especially in the domain of amending laws, policies and administrative procedures.[218] These bodies also are requested to make comprehensive reports following established methodology as provided by the minimum standards.[219]

These bodies should first in line be consulted in creating strategic plans and equality policies. It is necessary to have a list of priorities for the

218 UN Principles relating to the Status of National Institutions: https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

219 Equinet European network of equality bodies: https://equineteurope.org/wp-content/uploads/2019/07/equinet_workingpaper_standardsnebs.pdf

national authorities in addressing the most pressing issues in eradicating discrimination. The good start for making such plans in combating discrimination on the national level is to follow the recommendations, remarks and conclusions presented in the annual reports of bodies such as Ombudsperson.

As ECRI Recommendation No. 7 explains, appropriate legislation to combat discrimination should include anti-discriminationprovisions in all branches of law. Such an integrated approach would enable States to combat discrimination and remedy violations of human rights in a more exhaustive, effective and satisfactory manner. In that respect, it also reminds that while it is important to have rights and freedoms embedded in constitutions it is also advisable that to fight racism, provisions are made that some of those freedoms might be restricted in cases when racism is promoted. For example, someone's right to freedom of expression should be prohibited on the account of the hate speech, as it was shown in the first part of this Handbook.

The international standards for the elimination of discrimination offer a wide range of provisions that national legislators should incorporate in the national legal frameworks and policies and relevant penalties for crimes involving discrimination. Having ratified those standards means having to comply and conform to the national legal framework to it. However, this also includes enforcing those standards at all times. As stated in Alković v Montenegro the existing legal framework provides sufficient protection, alas the manner that protection was exercised or better said, the lack of it, constituted a violation of rights of the applicant.[220]

In fighting discrimination it is important to keep record and register all instances of discrimination. The public authorities must also appropriately report to the equality bodies. In the latest ECRI country monitoring report it was indicated that struggle with collecting data on discrimination and hate crime as well as hate-motivated violence. This data collection should be organized on a national and local level and would make an important impact on monitoring if and to what extent anti-discrimination measures are applied in reality.

220 ECtHR, *Alković v. Montenegro*, No. 66895/10, 2018

One of the examples of good ways to combat discrimination is by establishing regional or local anti-discrimination services in partnership with educational centres and CSOs. By creating these kinds of hubs to promote the non-discrimination principle, the very core of equality would be reaffirmed especially in the less accessible communities and communities comprised of various ethnic groups. In that sense, educational centres and schools can be employed in the promotion of inter-community dialogues, fight prejudices and live up to the constitutional values of multiculturalism.

The standard way of employing young lawyers and students working human rights is by organizing free legal aid via so-called 'legal clinics'. These clinics do not necessarily have to be comprised of students of law, but also student volunteers studying education, languages, psychology etc. This method proved to be one of how students gain necessary experience but also society, and especially those members of vulnerable groups that are predominantly marginalized get to receive certain advice, support, help and recommendation on how to report discrimination.

Roles and duties of the civil servants

The initial stage in combating discrimination would be accepting that discrimination exist and laws alone are not sufficient to eradicate it. While having a broad definition of what constitutes discrimination and the elements of it, including categories of discrimination in our society this means nothing without public awareness of the importance of respecting pluralism and equality. This is an underlining motive in the ECRI recommendations. Civil servants have the role to promote non-discrimination, first and foremost.

ECRI Recommendation No. 7 specifies that the national legal framework should provide for the prohibition of discrimination to be applied to all authorities, including all-natural and legal persons, in public and private sector in virtually all areas of rights. More specifically the national legal order relies on public authorities first in prevention from discrimination, promotion of equality and more importantly it depends on the work of

civil servants in ensuring that those principles they promote are equally respected for everyone. This implies respecting those principles at the workplace of their own as well.

The recommendation goes as far to prescribe that:

> *"The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of anti-discriminationbe respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits."*[221]

Let us not forget that access to justice, equal treatment, rule of law, respect to human dignity depend on people employed in public authorities but also those working with public authorities.

Civil servants are responsible for carrying out administrative duties that any state relies on upon constantly but also they are in charge of creating public policies. Public policies as a process in which governments are exercising particular political vision to deliver certain change in society are also the very first benchmarks that courts assess when determining violation of certain rights. They thus have to be aware of all the standards in the protection of human rights and more specifically to the field, they are employed in. It is worth mentioning that regular courts do not examine or they do it rarely if the certain public policy passes tests set up by the ECtHR.[222] According to the authors, it is virtually impossible to find Constitutional court judgment in which judges examined the proportionality test.

Civil servants are carrying heavy-duty on making analysis which impacts the way certain policy is shaped. Thus, they are the ones to have im-

221 See point 10 of the ECRI Recommendation No. 7

222 *I. Vukčević i M. Marković*, op. cit. 155, p. 27.

mediate training in shaping public policies so that they do not infringe on rights. In that respect being able to make adequate risk assessments and know the ECtHR and other courts methods such as evaluation of legitimate aim, fair balance, proportionality etc. Also, civil servants are responsible to deliver administrative support to all victims of discrimination in a professional manner, thus not discriminating themselves.

In some countries, additional bodies have been created that act as quasi-judicial units (see ECSR, *Associazione Nazionale Giudici di Pace v. Italy* in Chapter V) that could be responsible in deciding on complaints of victims of discrimination. In such cases, it is necessary that there is a clear demarcation of their functions as well as financial resources to support their function.[223]

A valuable asset for administration in transitions is the cooperation with relevant CSOs, intergovernmental cooperation, as well as the exchange of data and know-how in dealing with cases of discrimination.

In performing their duties civil servants are obliged to follow code of conduct or code of ethics that should be specifically designed for the authority they work for. Such document lays down principles that are generally accepted moral rules and values of the society we live in. These principles in general should provide for a more professional standard of services, provide for the integrity of administration, respect to the positive laws, impartiality and transparency. It requires officers in all their conduct not to discriminate and to show professional attitude to all parties, and not to abuse their position.

Roles and duties of the CSOs

The national legal framework recognizes the importance of the CSOs contribution to the overall combat against discrimination, intolerance and racism. As a 'third sector' of the society to a certain extent, they are involved in the monitoring of the policies and measures that policies are bringing, which is why they are usually perceived as those who will hold government accountable in public eyes and pass the message to the

223 ECRI Recommendation No. 2, III

citizens. The values of an open society are immanent to uphold human rights, and thus CSOs in Montenegro play important role in providing for support in creating policies, reporting on violation of rights, preparing analysis and gathering data, being involved in strategic planning etc.

In the context of Montenegrin society, CSOs working in the domain of human rights usually embody the three attributes of organizations: they provide service (working with marginalized groups like assisting people with disabilities), they empower certain category of people (for example minorities), they are campaigning towards achieving a certain wider societal goal (transparency of the public authorities).

According to the ECRI Recommendation No. 2, equality bodies are expected to establish cooperation with CSOs. They are in particular encouraged to participate in the development of strategic planning and action plans. It is further noted that in supporting the work of authorities, via monitoring, reporting and analysis, CSOs are also one of the first points that victims of human rights violation turn to. It is a general understanding that CSOs can guarantee protection and guidance and help them contact the equality body. The ECRI indicates that the aim of the cooperation between authorities and CSOs leads "to finding the best solution to enforce the rights of people exposed to discrimination and intolerance and coordinating their efforts."[224]

It is particularly important to be aware of the role that CSOs have in maintaining the relationship with persons and groups experiencing discrimination and intolerance, as it provides for resources in planning and successfully implementing the promotion and prevention function. By having a regular in-depth dialogue with persons, groups or communities that are being victims of discrimination and intolerance, ECRI finds this to be an important tool to identify successful ways to break the patterns of individual and structural discrimination. It is recommended that such relationship and dialogue should be maintained with a broad variety of organizations, different groups, religious communities, trade unions and professional organizations.

224 Ibid. para. 42

It is of paramount importance not only to acknowledge and remedy certain patterns of discrimination and intolerance, it is very important to involve groups and their representatives in the activities of the authority for the protection of human rights, this also means to maintain a relationship which will encourage sharing knowledge but also the presence of these bodies within the community. For example, Ombudsman visited the city of Pljevlja after the events in May when escalation of violence during citizens protests occurred. He met with city officials, CSOs as well as minority community representatives and shared his concerns but also advice on the improvement of dialogue especially in the context of the tense political situation.[225] Or his presence and involvement in events and public discussion with LGBT community at their premises is an example of providing support and maintaining a good relationship.[226]

As stated comes to support in data gathering and analysis of public opinions in the context of a certain minority, CSOs important role. At certain extent data that CSOs gather are either complementing the ones that equality bodies have or even provide for new information that equality bodies might not have. So, for example, the NGO Centre for Civic Education researched public opinion and public perceptions of the LGBT population. The results were compared with the opinions gathered in 2016 and there was a significant improvement in public support for LGBT rights in 2019 in comparison. As the main body in charge to support LGBT, the Ministry of human rights and educational institutions were predominantly chosen by survey respondents.[227]

225 Ombudsman's visit to Pljevlja, official press clipping: https://www.ombudsman.co.me/article.php?id=34419

226 Confirmed cooperation between Ombudsman and LGBT community, official press clipping: https://www.ombudsman.co.me/article.php?id=34447

227 "Ne diskriminacija, da različitosti" public survey by CCE Montenegro, available at: http://media.cgo-cce.org/2019/02/cgo-istrazivanje-stavova-javnog-mnjenja-o-lgbt-osobama.pdf?fbclid=IwAR31GRcB51PFo_9WVOI_3V07D0DRezNz07581wKmdPLRUuVKwlbNko8Pt9o

Roles and duties of the Equality Bodies/Ombudspersons and National Human Rights Institutes (NHRI)

As mentioned before equality bodies are to be independent and set up as a separate legal entity. In Yugoslavian legal terminology, the word to describe such body indicates someone or something that stands alone, is alone or separated from others.[228] This term implies the level of independence that such bodies have in society. Such is the word that describes Ombudsperson.

ECRI recognizes that different national systems have different ways in which the position of Ombudsperson is regulated. Some countries do not have one national office for human rights protection but more. In case of Montenegro, as we have seen in Chapter IV, most of the human rights protection functions are assigned to Ombudsperson, especially with the latest changes of the legal framework when gender equality issues were added to the Ombudsperson jurisdiction. While Ministry of Human and Minority Rights can be seen as the executive body that is in charge to develop policies, measures and implementation of strategies, supporting other offices in executive branches in developing mechanisms for the protection of human rights and above all to make sure that human rights standards are aligned within the legal and political system of Montenegro, Ombudsperson has more investigative role.

Some countries such as Bulgaria, for example, has Ombudsperson that is a supreme independent constitutional body whose role is to advocate for the rights of people another important body is Commission for Protection against Discrimination.[229] It is a national equality body that was established by Law on Protection from Discrimination to prevent discrimination, protect against discrimination and to ensure equal opportunities. The Commission itself is in compliance with the Paris Principles and it is issuing a legally binding decision. In essence, this is a quasi-judicial body that can impose fines and legally binding administrative measures. Anyone can lodge a complaint and the decision on the com-

228 The word is inokosan, which is rooted in old Slavic word: *inokostьnъ; *inokъ or in latin unicus

229 Official website of the Commission: https://www.kzd-nondiscrimination.com/layout/

plaint has inter partes effect. It has the authority to examine cases from disputes in the public and private sector. It covers areas such as gender, gender identity, race and ethnic origin, age, disability, sexual orientation, religion and belief. It also has the authority to hear cases in connection to the hate speech. The Commission is accountable to Parliament. As shown in this Handbook (Chapter V) one of the cases discussed was in connection to the decision made by this body.[230] Details of the case reveal that it is possible to appeal against this court to the Administrative Court, which initiated the preliminary ruling under Article 267 TFEU before CJEU.

While Ombudsperson can submit 3rd party intervention, and now even file a complaint before the court of law on the behalf of the victim of discrimination, Ministry's role is to support, promote, prevent, monitor and suggest policy changes. Ministry is also in charge o keep administrative records on the religious communities, projects etc. As indicated in the ECRI recommendations, so is the case with the Ministry, it is involved in the development of anti-discrimination policies and training of other bodies and officials, civil servants, police, media etc.

Some of the key recommendation set forth by ECRI is to establish equality bodies that are independent but also effective in their work. That efficiency relies on mechanisms that should support Ombudsperson in obtaining evidence as explained in Chapter IV. The latest amendments to the Law on Human rights Protector reflect those key recommendations such as the transparency and election of the Ombudsperson. Such an institution needs to have better financial stability, strengthen capacity and independent internal structure. With the latest amendments to the law, it does seem that the national legal framework is in line with ECRI recommendations, although in the Ombudsperson in its last Annual Report stated that the office worked in the conditions of the significantly reduced capacities, due to the end of the mandate of the previous Ombudsperson. Until the election of Mr Bijeković, the Deputy for National Prevention Mechanisms Perović carried the task of Ombudsperson. To this, it should be added that the Act of Systematization waited for

230 See: CJEU, C-83/14, "CHEZ Razpredelenie Bulgaria" in Chapter V

a long time. The report indicates that main obstacles were incomplete personnel structure and the lack of overall capacity, lack of financial resources for the implementation of all activities within the mandate of the office, partially ignored requests and repletion of urgencies to the authorities. The report reiterates what has been observed in the ECRI country monitoring report: there is no appropriate statistical data gathering or prescribed methodology on reporting discrimination before other states bodies and especially in the case of judiciary and inspection bodies. Misunderstanding and ignoring the mandate of the office by public authorities who are obliged to know and apply regulations, which at a certain point indicated the obvious motive of denial of the Ombudsperson's decisions as non-binding. What is additionally worrisome is the termination of donor initiatives arising from membership in associations and implementation projects.[231]

Finally, the ECRI recommendation holds that equality body should serve as a model with regards to diversity and gender balance in all areas especially in the leadership of the equality bodies. The composition of the body should reflect societal structure. We have seen in Chapter 4 that Police is being assisted by the Ministry of Human and Minority Rights in developing mechanisms that will push forward gender balance, as statists indicate that even compared with the region, work in Police forces is predominantly seen as a male profession. On the other hand in the Ministry of Human and Minority Rights, there is one woman covering deputy position and the minister position was always occupied by man. Additionally, equality bodies should not only employ coming from predominantly assumed backgrounds such as law and political science, but also social studies, humanities, languages, cultural studies, education, psychology, sociology etc. It is also a matter of principle that within the ethnic and other diversity of these bodies the language diversity is respected so that victims of discrimination can have a more assessable and friendly environment.[232]

231 Ombudsperson's Annual Report op.cit. 165. pp. 226-227.
232 See ECRI Recommendation No. 2, para 122.

Roles and duties of the media

An important part of the promotion of prevention and fight discrimination activities of the equality bodies is played by media. The beforementioned dialogue between equality bodies, them and CSOs as well as equality bodies, CSOs and victims of discrimination need to include media. This thus not only includes media's job in reporting but also in promotion and prevention of discrimination via educative programmes that would target the general population. Also, it is the responsibility of media to report adequately and professionally, refraining from hate speech and also fighting hate speech on their portals. Media are also responsible to include marginalized and vulnerable groups in their content.

For equality bodies to achieve their goals and strategies in raising awareness and empowering and helping marginalized and vulnerable groups it is necessary to do so in the partnership with media outlets. One of the first steps is to support and educate and train media when needed, but also to work together in the fight against hate speech, hate crime, and overall discrimination and intolerance. The media content by default needs to go through an editorial process which should follow methods that would eliminate any segments that incite hate, discriminate or promote intolerance. When needed, equality bodies should also offer professional help to media outlets in creating necessary policies and codes of conduct and being involved in "media professionals to foster ethical journalism."[233]

As mentioned in Chapter III new media laws follow the international standards in the prohibition of hate speech as well as in terms of creating content that addresses human rights, equality and fights against discrimination and intolerance. Media literacy in this area is of paramount importance as media are to report on outcomes of litigation or processes before the relevant institutions, especially in cases of protection of vulnerable groups. It was indicated before that new set of laws are aligned with the international standards and are following the ECRI Recommendation No.

233 ECRI Recommendation No. 15, p. 7G.

15 in regulating media, internet providers and social media to promote action to combat the use of hate speech. The set of laws also impose to media houses and internet providers to impose self-regulating measures that will be aligned with the current regulations in power. And indeed, while media are seen as partners in the promotion of anti-discrimination policies they are in the same potential channel of hate speech that comes from the users of their content, thus media have a double role: promotion of the activities of equality bodies and champions creating content to support anti-discrimination policies they are also first in the line to restrict their users' rights to freedom of expression. Thus authorities rely on media capacity to self-regulate in line with standards set by laws. It was also stipulated in this Handbook that when in doubt, medial and internet providers should resort to incorporating international standards of protection from hate speech and discrimination, as after all, it is a minimum of safeguard adopted by the international community.

Creating policies that will be in line with national legislation, and especially for the new media that is about to request national licenses to work might be a challenging task as restriction of freedom of expression as a constitutional right is a delicate issue. It is of utmost importance that experts in the field are involved, but also equality bodies and universities researchers and legal practitioners. Creating policies is only one first step, media stuff needs to be trained and educated on how to apply those policies and how to deal with different situations that can challenge those policies.

An important part of this process is monitoring. Besides making sure that monitoring mechanisms and authorities are established within media, it is recommended that systematic monitoring outside of the media is performed. Professional media organizations, ethics committees, independent agencies etc. should be involved in making sure that policies adopted in line with prescribed regulation are being implemented. Also, media users should be encouraged to report on any misuse of rights or to report on online hate speech, either by other users or the content published by the media. Another important segment of this process is the role of the CSOs, especially those that are active in the field of freedom of expression.

For example, after the political leader was a guest in a live TV show, the following day on 18 September 2020, IN4S news portal published a text about the host of the TV show and their view on her unprofessional conduct. Comments published under the text were unlawful under the new Law on Media, Articles 26 and 36. NGO Human Rights Action reported the comments and warned the editors of the portal about their legal responsibility to filter such comments and remove them. According to the Press Release, the editorial board acted promptly and removed comments inciting hate and prejudice.[234]

'Safer journalist' reports that the media coverage of the LGBTIQ+ related news is mostly respecting journalistic standards although hate speech in comments section follows. With new Media laws, this should be eradicated as there is no excuse for not removing speech that incites intolerance and hate.[235]

Another good example of relevant stakeholders working together is Ministry of Human and Minority Rights is conducting a media campaign on the prohibition of discrimination and affirmation of anti-discriminatory behaviour raising the level of awareness of the general population towards discrimination, creating a tolerant environment and a public awareness, especially towards people with disabilities, LGBTI populations, Roma, then, gender identity discrimination and other most frequently discriminated groups.

Key points

- The involvement of the relevant stakeholders presented in this chapter in the building of the society of tolerance and respect for equality is imperative in any democratic state. This involvement can be either via joint projects and training of a large number of sectors across the

234 See more: http://www.hraction.org/2020/09/18/portal-in4s-po-prijavi-hra-uklonio-nezakonite-komentare-ispod-teksta-o-emisiji-novinarke-duske-pejovic/

235 Kristina Ćetković, 'Correctness and interest should be in conjuction", https://safejournalists.net/crnogorski-mediji-lgbtiq-populacija-korektnost-zainteresovanost-treba-da-budu-u-sprezi/?fbclid=IwAR1AvYZNbcmZQXx5_ARqHX4R5x44y1tdFR4OdDs_o4fcqzM-_XH9AtOlQfo

institutional and societal setting, including media officers and civil servants.

- Necessary curriculum adjustment that would teach students about values of tolerance, especially in the multicultural municipalities at all educational levels could potentially raise pupils that would themselves become intolerant to injustice, inequality and discrimination.
- Media and media editors, especially online media should be mindful of a gender-sensitive language and keeping codes of ethics in check and respected at all times. In this way, the news outlets would provide for a greater level of respect of differences, and when it is not necessary, media should not disclose ethnical, racial, and other personal characteristics when reporting on certain events. Media should follow strict rules and guidelines in combating online hate speech.
- Civil servants should maintain a professional relationship with all stakeholders, and especially CSOs officers and media workers who can be of greatest asset and value to the implementation of various projects in relation to the promotion of equality and combat against discrimination.

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ANNEX
Answers to the examples

Example No. 1:

N.P. was not discriminated against, as this was the clear example of the affirmative measures that aimed in achieving more gender-balanced and gender equality police forces.

Example No. 2:

D.B.P. was a victim of discrimination and it is the case of direct discrimination. The fact that another colleague is female and unlikely to ask for maternal leave. Thus, being pregnant puts D.B.P. in a different position in comparison.

Example No. 3:

P.K. was a victim of indirect discrimination. It is clear that job description in the advertisement and the reasons he was informed of do not coincide. In addition, the majority of persons with disabilities suffer the negative impact of unemployment and treatment such as this accumulate social stigma. Even if the employer is unable to make the necessary adaptation to the facilities, that does not preclude him from his role in building a tolerant society and provide for equal opportunities.

Example No. 4:

B. is a victim of multiple discrimination. Although she was hired due to the affirmative action policy she could make a claim that she was discriminated against due to her disability and the fact that as the transgender person she is never asked to work in a showroom due to her gender identity and appearance.

Example No. 5:

Even during the political campaign, slurring someone's name is a foul play especially given that fact that political speeches can be very nationalistic. Those who give speeches should always be aware of the consequences that can occur as a result of it.

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