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Protection from Discrimination for IDPs in Kosovo*

*A brief analysis of the legal and institutional
framework*



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Protection from Discrimination for IDPs in Kosovo*

A brief analysis of the legal and institutional framework

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The Project’s main activities are provision of legal aid/assistance to IDPs and refugees, including direct representation of IDPs before courts and other relevant institutions, as well the provision of availability of timely and accurate information necessary for realization of the rights of IDPs and refugees in Serbia. All the cases are systematically registered in the database which currently has some 2200 cases.

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EXECUTIVE SUMMARY

In different societies different groups find themselves more often victims of discrimination than others. In a post - conflict society such as Kosovo, internally displaced persons are to a greater extent exposed to discrimination taken a greater vulnerability of this group in comparison to the general population.

In 2004 a comprehensive Anti-Discrimination Law entered into force in Kosovo. Although it was drafted in accordance with the highest international and European standards in the field, the law did not take into consideration the specific position of those who were forcefully displaced during the 1999 conflict. This shortcoming spread further into the process of its implementation, as observed in the Law on Ombudsperson adopted in 2010. As a result, the legal and institutional framework established in Kosovo does not provide for the necessary level of protection of internally displaced persons from discriminatory practices affecting enjoyment of their rights in Kosovo.

1. Introduction

On 30 of July 2004 the Assembly of Kosovo adopted the Anti-discrimination Law.¹ The Law was brought with the aim of consolidating and strengthening the system of equality protection already existing in Kosovo as well to provide an efficient system of legal remedies for victims of discrimination.² Modelled after the “Race Equality Directive”³ and “Employment Equality Directive”⁴, the two main EU hard law instruments for the protection against discrimination, the Anti-Discrimination Law is comprised of an advanced set of legal norms for preventing, prohibiting and remedying discrimination. It contains an open-ended list of prohibited grounds of discrimination; it outlaws discrimination in all its forms, including indirect discrimination and segregation; it provides legal protection against discriminatory behaviour of both public bodies and private organizations and individuals;⁵ it prohibits discrimination in access to and enjoyment of any right set forth by the law in force in Kosovo; it introduces the concept of positive action measures; and finally, it provides a system for the prevention as well sanctioning of discriminatory behaviour.

Yet, however sophisticated its rules are, the Anti-Discrimination Law does not provide for the necessary level of protection of internally displaced persons (IDPs) from discriminatory practices affecting enjoyment of their rights in Kosovo. The present analysis identifies two principal sources of this limitation. The first one is to be found in the shortcomings of the text of the Anti-Discrimination Law. The second one stems from the deficiencies of the process of implementation of this Law.

¹ Anti-discrimination Law No. 2004/32. The Law entered into force on 19 of September 2004 after its promulgation by the UN Special Representative to the Secretary General (SRSG) by UNMIK Regulation No. 2004/32 On the Promulgation of the Anti-discrimination Law on 20 August 2004.

² See: Cirizzi, K., Anti-discrimination Law signed into Law by the SRSG, in «Assembly Support Initiative Newsletter», no. 3, Pristina, OSCE Mission in Kosovo, 2004.

³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000).

⁴ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L303 of 2 December 2000).

⁵ As different from its *ratione materiae* limited European Union models.

2. Ratione Personae limitations of the Anti-Discrimination Law

The violence against Serbian and other minority communities that followed the Serbian military withdrawal from Kosovo in June 1999, and its re-ignition during the March 2004 riots, were the main triggers of the continuous forced displacement of around 250,000 persons from Kosovo. After almost 13 years since the Kosovo conflict, approximately 210,000 pre-conflict inhabitants of Kosovo are displaced in Serbia proper, while there are some 20,100 internally internally displaced persons (IIPDs) in Kosovo itself.⁶ As consequence of protracted displacement, IDPs suffer human rights violations, which lead to their marginalisation, socio-economic exclusion and undermine chances of finding a durable solution to displacement.⁷

In Kosovo, IDPs face obstacles in almost any sector of social life. They are not adequately protected from the widespread instances of illegal occupation or other violations of their property rights committed by private individuals or public institutions.⁸ IDPs' access to court is hindered by a number of obstacles that prevent them from effectively protecting their rights⁹ and they are often denied access to public services.¹⁰ If they make a decision to return they face serious obstacles to access housing, employment and other socio-economic rights which would

⁶ See UNHCR, 2012 UNHCR Country Operations Profile – Serbia (and Kosovo: SC Res. 1244), p. 252, available at: <http://www.unhcr.org/4ec2310915.pdf>, accessed on 16 January 2012. See also UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia* (February 2011), p. 6. See also *National Strategy Resolving the Problems of Refugees and Internally Displaced Persons for the period 2011-2014* adopted by the Government of Serbia (GoS) in 2011, p. 1. Cf. Approximately 212,700 IDPs from Kosovo and 20,000 IIPDs in Kosovo as stated in the official Internet-presentation of the GoS at <http://www.srbija.gov.rs/kosovo-metohija/?id=20031>, accessed on 20 January 2012. Cf. also 187,000 IDPs in Serbia as of 2010 claimed by the Commissariat for Refugees, *Overview of the Number of Refugees and IDPs in the Republic of Serbia 1996-2010* (table), available at: <http://www.kirs.gov.rs/articles/navigate.php?type1=17&lang=SER&date=0>, accessed on 20 January 2012.

⁷ According to the needs assessment conducted by the UNHCR and Commissariat for Refugees, over 97,000 IDPs are still in need of assistance. The majority of IDPs live in inadequate private housing in urban areas of Central Serbia. Some 2,500 most vulnerable IDPs still live in 33 official collective centres, while an undefined number of them live in unofficial settlements throughout Serbia. Most of the IDP households with insufficient monthly income do own an apartment or a house in Kosovo (49%) yet, more than half of these persons are subtenants (48.9%) or live with relatives or friends (21.6%). An average IDP household moved three more times after the displacement from Kosovo, while 74% of all live in sheer poverty. See UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia* (February 2011) pp. 3, 4, 9.

⁸ See, for instance, figures about the multiple occupations of the immovable property of IDPs committed by the same persons, in Kosovo Property Agency, Annual Report for 2011, pp. 12 and 21, available at: <http://www.kpaonline.org/PDFs/AR2011.pdf> (last accessed on 15 May 2012). See also SCE Mission in Kosovo, Community Rights Assessment Report (Third Edition), 2012, pp. 14 -15; OSCE Mission in Kosovo, Municipal Responses to Security Incidents Affecting Communities in Kosovo and the role of Municipal Community Safety Councils, 2011, p.1 and p. 26.

⁹ See EU-funded Project "Further support to refugees and IDPs in Serbia", Access to Justice for the Internally Displaced Persons from Kosovo, June 2012, at http://www.pravnapomoc.org/web/Access_to_Justice.pdf (last accessed on 15 September 2012).

¹⁰ See EU-funded Project "Further support to refugees and IDPs in Serbia", Taxation of Immovable Property of Internally Displaced Persons in Kosovo, August 2012, to be available soon at <http://www.pravnapomoc.org>.

make their return sustainable.¹¹

Many of the obstacles to the effective realisation of their human rights in Kosovo are a consequence of direct or indirect discrimination of IDPs. These violations of IDPs rights in the place of origin are often of a systemic nature. They are usually a consequence of indirect discrimination where an apparently neutral law or institutional practice put IDPs at a particular disadvantage compared with other persons in Kosovo.¹² The discrimination they are exposed to is not solely related to their status of displaced. Given the fact that IDPs typically belong to minority communities they also face discrimination on the ground of their ethnic origin, language and/or religion.¹³

Instead of serving as an effective tool for ensuring equal treatment of displaced persons, it can be argued, the Anti-discrimination Law itself discriminates against IDPs. The very first article of the Anti-Discrimination Law, which defines its purpose, removes IDPs from the system of protection established by it:

“The purpose of this Law is prevention and combating discrimination, promotion of effective equality and putting into effect the principle of equal treatment of *the citizens of Kosovo* under the rule of Law (italic added)”.¹⁴

It is obvious that by setting the purpose of the Law to be the equal treatment of those who hold the citizenship of Kosovo several categories of individuals who do not fulfil such requirement, including the internally displaced persons, remain outside of the scope of the Anti-Discrimination Law. This is in stark contrast with other international and European equality standards which are directly applicable in Kosovo.

The Anti-Discrimination Law is not the only instrument prohibiting unequal treatment on the basis of ethnic origin, language, status or other prohibited grounds. A number of international instruments applicable in Kosovo by virtue of Article 22 of the Kosovo Constitution provide individuals with the protection against discrimination.¹⁵ This list includes the Universal

¹¹ [European Commission Staff Working Paper, Kosovo Progress Report, 2011](#), p. 21.

¹² See, for instance, EU-funded Project “Further support to refugees and IDPs in Serbia”, Access to Justice for the Internally Displaced Persons from Kosovo, June 2012, at http://www.pravnapomoc.org/web/Access_to_Justice.pdf (last accessed on 15 September 2012).

¹³ Some 80% of the overall IDP population are of Serbian nationality, while the remaining 20% are made up of the members of RAE and Gorani communities. See e.g. Table 2 at the official web-site of the Government of Serbia (GoS) at <http://www.srbija.gov.rs/kosovo-metohija/?id=20031>, accessed on 26 January 2012. Cf. 75% of Serbian nationality in the *National Strategy Resolving the Problems of Refugees and Internally Displaced Persons for the period 2011-2014*.

¹⁴ The words “citizens of Kosovo” are also contained in Article 2(c). In fact, the SRSG has promulgated the Anti-Discrimination Law provided that “[t]he words ‘citizens of Kosovo in Articles 1 and 2(c) shall be replaced by ‘persons in Kosovo’” and by ordering that these amendments “be reflected in the final official text of the Law” (UNMIK Regulation 2004/32 on the Promulgation of Anti-Discrimination Law Adopted by the Assembly of Kosovo). Yet, the problematic wording was never changed and the text of the Anti-Discrimination Law, as published on the official web site of the Kosovo Assembly, retained the problematic wording.

¹⁵ Constitution of Kosovo of 15 June 2008.

Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Prohibition of All Forms of Discrimination (CERD), the European Convention on Human Rights (ECHR), etc.

Moreover, Article 1 of the Anti-Discrimination Law is contrary to those provisions of the applicable law which spell out the obligations of the local institutions vis-à-vis the special needs of IDP population. The duty to “facilitate the safe and dignified return of refugees and internally displaced persons”, as laid down in Article 156 of the Constitution of Kosovo¹⁶ and further reiterated in the Law on the Protection and Promotion of the Rights of Communities and their Members¹⁷, cannot be fulfilled without guaranteeing equality between IDPs and those who acquired the citizenship after the unilateral declaration of independence (UDI) in 2008. The provision contained in Article 1 is also contrary to the international standards on the protection of displaced persons contained in the United Nations Guiding Principles on Internal Displacement where the prohibition of discrimination of IDPs has a central place.¹⁸

3. Limitations of the Ombudsperson’s mandate

This deficiency of Article 1 of the Anti-Discrimination Law has been also reflected in the law governing the Ombudsperson Institution, the principal body in charge of ensuring equality in Kosovo.¹⁹ According to Article 3 of the Law on Ombudsperson, the provisions of this legal act apply to all persons in Kosovo and abroad whose rights are affected by action or failure to act of the public authorities in Kosovo.²⁰ Yet, Article 15 of the Law on Ombudsperson, while enabling Ombudsperson to provide assistance even to those persons who temporarily live outside of Kosovo, in relation to cases that arise within the territory of Kosovo, limits this to persons who have the post-UDI citizenship of Kosovo:

“The competences of Ombudsperson extend to the entire territory of the Republic of Kosovo. In exercising his/her functions related to cases that arise within the territory of the Republic of Kosovo, the Ombudsperson can provide good services to the citizens of the Republic of Kosovo who temporarily live outside territory of the Republic of Kosovo.”²¹

¹⁶ On 28 March 2012, the Government of Kosovo adopted a Decision No. 02/68 with the aim of amending the Kosovo Constitution of 2008, including its Article 156. On 15 May 2012 the Constitutional Court of Kosovo decided that the proposed deletion of Article 156 could affect the individual rights and freedoms guaranteed by the Constitution (see Constitutional Court Decision in Case K038/12).

¹⁷ Article 3a of the Law on the Protection and Promotion of the Rights of Communities No. 03/L-047 and their Members as amended by the Law on Amending and Supplementing of the Laws related to the Ending of international Supervision of independence of Kosovo No. 04/L-115 of 31 August 2012.

¹⁸ See Principle 1 and Principle 29. E/CN.4/1998/53/Add.2.

¹⁹ According to text of Article 10 of the Anti-Discrimination Law. For the detailed analysis of the general deficiencies in implementation of the Anti-Discrimination Law see Youth Initiative of Human Rights Kosovo, Anti-Discrimination Law in Kosovo: Seven Years On, Pristina, 2011, accessible at <http://ks.yihr.org/en/article/111/Anti-Discrimination-Law-in-Kosovo-seven-years-on> (last accessed on 13 September 2012).

²⁰ Law on Ombudsperson No. 03/L – 195 of 27 August 2010.

²¹ Article 15.2 of the Law on Ombudsperson.

This is at odds with the other provisions of the Law on Ombudsperson and again contrary to international equality standards applicable in Kosovo as well to the duties of the local institutions concerning the return of IDPs.²²

Although being, at least nominally,²³ the principal barrier to IDPs having access to this equality enforcement body, the “citizenship” requirement, is not the only limitation of the Law on Ombudsperson vis-à-vis the realization of the principle of equal treatment of IDPs.

These limitations can be divided into two categories. The first category ensues from the deficiencies of the law itself. Those deficiencies undermine the fulfilment of the general Ombudsperson’s role in enforcing rules contained in the Anti-Discrimination Law. They have been thoroughly elaborated during the three years long process of drafting the Law on Ombudsperson by the organisations such as the Council of Europe’s European Commission for Democracy Through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights.²⁴

The second group of obstacles to the effective protection of IDPs against discrimination is a consequence of the fact that the Law on Ombudsperson does not pay adequate attention to the vulnerability and special needs of IDPs.

3.1. General deficiencies of the Ombudsperson’s competencies in the anti-discrimination field

Although the Anti-Discrimination Law in its Chapter III refers to the Ombudsperson as the body authorised “to receive and investigate complaints concerning violations of rights based on discrimination”,²⁵ the Law on Ombudsperson does not contain any explicit reference to its powers and responsibilities arising from the equality legislation. It has been stated that, since the Ombudsperson is the only equality enforcement body in Kosovo, its mandate to investigate cases involving discrimination should be clearly spelled out and elaborated in the Law on Ombudsperson.²⁶ When it comes to IDPs, given their greater vulnerability to unequal treatment, it can be claimed that the Law on Ombudsperson should also include an express reference to the powers and responsibilities of the Ombudsperson to investigate allegations of discrimination of IDPs.

²² See the previous section.

²³ There is no information in which way the Ombudsperson interprets the wording of this provision and whether in practice it presents a real obstacle to the access of IDPs to this institution.

²⁴ In 2007 the Council of Europe’s European Commission for Democracy Through Law (Venice Commission) submitted an opinion on one of the first versions of the draft Law on Ombudsperson. See, Venice Commission, *Opinion no. 434 / 2007 on the Draft Law on the People’s Advocate of Kosovo of 4 May 2007*, accessible at [http://www.venice.coe.int/docs/2007/CDL\(2007\)018-e.pdf](http://www.venice.coe.int/docs/2007/CDL(2007)018-e.pdf) (last accessed on 17 September 2012). This was followed by the OSCE Office for Democratic Institutions and Human Rights Comments on the Draft Law on the Ombudsperson in Kosovo of 13 April 2010. For this reason, the present report will very briefly deal with the deficiencies that were already identified by these organisations.

²⁵ Article 10.

²⁶ See footnote 24.

Another obstacle lays in the fact that its competencies in protecting human rights in Kosovo are limited only to the violations that are attributable to public authorities.²⁷ In the light of the fact that the Ombudsperson is the only extra-judicial body established in Kosovo with the mandate to investigate equality cases, this means that those who have been discriminated by a private entity or natural person can seek protection only before the local courts.²⁸ This is in itself a significant gap in the system of equality protection in Kosovo.²⁹ Moreover, given the number and gravity of obstacles faced by IDPs in accessing the courts in Kosovo, this gap has even greater repercussions for their protection against discrimination.

3.2. Limitations of the Ombudsperson's competencies with regard to the special needs of IDPs

It is important to mention also those limitations to the Ombudsperson's competencies in the equality sphere that disproportionately affect IDPs given their greater vulnerability in comparison with the rest of population in Kosovo. Two of them will be singled out because of their importance for an efficient realisation of the Ombudsperson's responsibilities in ensuring adequate protection of IDPs against discrimination.

The first deficiency of this kind relates to the fact that the Law on Ombudsperson does not authorise civil society organisations to bring a case on behalf of a victim.³⁰ This is in general a significant limitation of the existing system since civil society organisations, operating in the equality field, are often better placed to identify and initiate anti-discrimination cases of strategic importance, such as those involving instances of systemic discrimination and/or discrimination affecting greater number of persons.³¹ When it comes to IDPs, the advantage of granting to civil society organisations the possibility to initiate cases on behalf of victims becomes even more important due to the obstacles faced by IDPs in accessing the Ombudsperson such as: the remoteness of IDP victims from the Ombudsperson's offices; travel expenses to be incurred for the participation in the proceedings before the Ombudsperson; the non-existence of a postal service between Kosovo and Serbia proper; frequent changes of

²⁷ Including institutions and organizations exercising public functions. Article 1 and Article 3 of the Law on Ombudsperson.

²⁸ With the exception of certain types of claims related to the use of the official languages in Kosovo, which can be lodged before the Kosovo Language Commission.

²⁹ The efficiency of the Kosovo judiciary is low due to a number of reasons, one of them being a backlog of cases. By July last year the total number of pending cases was 211,588. See [European Commission Staff Working Paper, Kosovo Progress Report, 2011](#), p. 11.

³⁰ See OSCE Office for Democratic Institutions and Human Rights, Comments on the Draft Law on the Ombudsperson in Kosovo, para. 54.

³¹ See on this "Additional principles concerning the status of commissions with quasi-judicial competence" of Principles relating to the Status of National Institutions (The Paris Principles) A/RES/48/134, of 20 December 1993. See also Article 7(2) of the "Race Directive" and Article 9(2) of the "Employment Equality Directive".

address of IDPs³²; the general lack of awareness among IDPs about the mechanisms for the protection of their rights in Kosovo³³, etc.

The second limitation arises in relation to the Ombudsperson's power to initiate *ex officio* investigations of human rights violations, including unequal treatment of individuals. According to Article 15.4, even if the Ombudsperson starts a procedure on his/her own initiative, he/she needs to obtain an explicit consent from the person whose rights and freedoms have been violated. As noted by ODIHR, "it may at times be difficult or inappropriate to obtain such consent, e.g. if the individual concerned has changed address or is otherwise difficult to reach, or if the continuation of a case may be in the general interest".³⁴ Placing such conditions to *ex officio* investigations by the Ombudsperson could indeed limit his/her capacity to investigate potentially serious human rights violations. This appears to be even more problematic in the cases of IDP victims where the consent might be lacking due to a number of practical barriers to the effective access of IDPs to the Ombudsperson's offices.

4. Conclusion and recommendations

The existing legal and institutional framework for combating discrimination in Kosovo does not provide for a sufficient level of protection of IDPs. The deficiencies described above and limitations of the Anti-Discrimination law and the Law on Ombudsperson are not compatible with the constitutional protection afforded to IDPs neither with the international human rights standards applicable in Kosovo. At the same time, the weak judicial structures existing in Kosovo, typical of places in transition, are of a little avail in providing protection from unequal treatment and in some instances they even facilitate discrimination.³⁵

With the aim of enabling an adequate level of protection for IDPs from discrimination in Kosovo and of enhancing the efficiency of the existing equality protection mechanisms, this report puts forward the following recommendations:³⁶:

³² For instance, according to the recent needs assessment conducted by the UNHCR and the Serbian Commissariat for Refugees, an average IDP household moved three more times after the displacement from Kosovo. See UNHCR and Commissariat for Refugees, *Assessment of the Needs of Internally Displaced Persons in Serbia* (February 2011) p. 4.

³³ As observed by the Legal Aid Project Staff.

³⁴ OSCE Office for Democratic Institutions and Human Rights, Comments on the Draft Law on the Ombudsperson in Kosovo, para. 49.

³⁵ See Ombudsperson Institution in Kosovo, Seventh Annual Report, July 2007, p. 67. See also EU-funded Project "Further support to refugees and IDPs in Serbia", On Certain Aspect of the Right of Access to Courts in Kosovo for the Internally Displaced Persons, April 2012, at http://www.pravnapomoc.org/web/statistical_analysis.pdf (last accessed on 15 September 2012).

³⁶ After the unilateral declaration of independence (UDI) in February 2008, numerous laws and other legislative acts have been adopted in Kosovo that are substituting, in effect, the previous legislation. No legislation passed by the Kosovo Assembly after the UDI has been promulgated by the SRSG which is contrary to the UN SC Resolution 1244 and to the related legal framework created by UNMIK (see Section 1.1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo and Section 9.1.45 of UNMIK Regulation No. 2001/9 on Constitutional Framework for Provisional Self-Government in Kosovo). Given this, the recommended amendments to the Law on Ombudsperson

1. The wording “citizens” contained in the Anti-Discrimination Law and the Law on Ombudsperson should be replaced with the wording “natural or legal persons” and other appropriate terms, which would include IDPs and other groups of individuals who do not hold post-UDI citizenship yet need protection against unequal treatment in Kosovo.
2. The Law on Ombudsperson should make explicit reference to the Ombudsperson’s powers and responsibilities for the protection against discrimination of particularly vulnerable groups, including internally displaced persons.
3. The Law on Ombudsperson should be amended in order to enable that third parties, such as NGOs and other civil society organisations, be permitted to bring cases before the Ombudsperson on the victim’s behalf.
4. In order to strengthen the Ombudsperson’s power to address discrimination against IDPs more consistently, he/she should be allowed to initiate ex officio investigation without the prior consent of the victim of discrimination by amending the relevant provisions of the Law on Ombudsperson.
5. Given the general lack of anti-discrimination cases before the local judiciary, the Ombudsperson’s mandate should be further developed by empowering him/her to intervene in matters before courts which are of strategic importance for combating discrimination in Kosovo, especially discrimination of IDPs and other vulnerable groups.³⁷

should not be taken to imply any recognition of the legitimacy of legislation adopted after the UDI. It is believed that the resolution of this issue shall be endorsed through a mutually agreed settlement between the authorities in Kosovo and the authorities of the Republic of Serbia.

³⁷ Rather than supporting any particular argument presented by the parties before the court, in this way the Ombudsperson would be given the possibility of making submission as to how the law should be developed. This practice is characteristic for the mandate of the equality bodies in USA, Australia, Canada and recently has been more and more used by the equality bodies in UK, Belgium, Ireland and France. See more in Schiek D, Waddington L, Bell M, (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007), pp. 903 – 905.