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Lawyers' Committee for Human Rights

Koalicija za ravnopravnost KORAK  
Koalicioni për Barazi HAPI  
Coalition for Equality STEP

KORAK / HAPI / STEP



## VIEWS ON COMBATING DISCRIMINATION



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VIEWS ON COMBATING  
DISCRIMINATION

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Lawyers' Committee for Human Rights – YUCOM

Kneza Miloša 4, 11000 Belgrade

Tel: 011/3344 235

Fax: 011/3344 425

E-mail: office@yucom.org.rs

Web site: www.yucom.org.rs

For publisher

Milan Antonijević

Authors

Momčilo Živadinović

Jovana Spremo

Dušan Pokuševski

Petar Đukanović

YIHR KS

Proofreading

Ljiljana Korica

Translation

Ljiljana Madžarević

Design and layout

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# EXECUTIVE SUMMARY

*Policy paper - Monitoring of Discrimination Trials* refers to the improvement of monitoring of discrimination trials and establishing of *Judicial Monitoring Network* on the territory of Serbia, Kosovo and Montenegro. The Network was created as a response to low transparency of discrimination trials and insufficient public interest for them.

Despite the fact that there is an adequate legal framework in regard to the prohibition of discrimination and the right to a fair trial (especially the element that they should be open to the public), implementation of these laws is often insufficient and incomplete. Monitoring of the trials is necessary in order to organize this legal framework and enable its complete implementation, and particularly the implementation of the Anti-Discrimination Law, which would be enabled by attendance of the trials and reporting from them, mutual communication of non-governmental organizations within above mentioned network, as well as public relations. This report also includes the guidelines and recommended steps for implementation of monitoring and networking of the NGOs, with special recommendations for the media and judiciary.

# INTRODUCTION

The anti-discrimination laws<sup>1</sup> were adopted in Serbia (2009), Kosovo<sup>2</sup> (2004) and Montenegro<sup>3</sup> (2010). However, despite their existence, these laws are rarely implemented completely, i.e. they are not applied adequately during anti-discrimination trials, thus often breaching the right to a fair trial guaranteed by the constitutions and international conventions.

## LEGAL FRAMEWORK - SERBIA

The Anti-Discrimination Law was adopted in 2009, and it presents a system, umbrella law which defines discriminatory behavior as any unwarranted discrimination or unequal treatment based on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Persons accused of discrimination may be tried in civil or criminal proceedings, depending on the committed act of discrimination.

## LEGAL FRAMEWORK - KOSOVO

Discrimination is prohibited by the Constitution of the Republic of Kosovo<sup>4</sup> which guarantees equality and respects the principle of human rights. Discrimination is prohibited by Article 24 of the Constitution, which emphasizes equality before the law. The Constitution stipulates that everyone has the right to equal legal protection without discrimination, and that no one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. Kosovo is one of the first countries in the region which adopted the Anti-Discrimination Law in 2004. However, due to numerous imprecise provisions in the Law, its implementation is very slow. Since there is no body which would take over the cases of discrimination, there are problems with solving of the proceedings. Furthermore, the Anti-Discrimination Law does not offer effective protection against discrimination, since the victims face very complicated system which cannot help them in adequate way.

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- 1 Anti-Discrimination Law *Official Gazette of the RS*, No. 22/2009
  - 2 Anti-Discrimination Law No. 2004/3
  - 3 Anti-Discrimination Law *Official Gazette of Montenegro*, No. 46/2010
  - 4 Constitution of the Republic of Kosovo, *Official Gazette of the Republic of Kosovo*, No. 25/2012, No. 6/2013



## LEGAL FRAMEWORK – MONTENEGRO

Montenegrin Anti-Discrimination Law of 2010 defines discrimination as “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, color 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 organization, as well as other personal characteristics.”

## RIGHT TO A FAIR TRIAL

Right to a fair trial is guaranteed by significant international legal documents. Article 10 of the Universal Declaration of Human Rights defines the right a fair trial as “the right of the accused to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 6 gives even greater priority to public element of the trials stating that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The Constitution<sup>5</sup> of the Republic of Serbia regulates, in Article 32, the right of an accused to a fair trial as the “right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them. The public may be excluded from all or part of the court procedure only in the interest of protecting national security, public order and morals in a democratic society, interests of juveniles or the protection of private life of the parties, in accordance with the law.”

Furthermore, the Civil Procedure Law<sup>6</sup> (CPL) complies with stated provisions of the Constitution stipulating that exclusion of the public shall not refer to the parties, attorney, damaged party and their representative and plaintiff’s attorney. Provision of Article 323 of the CPL is significant for the researches monitoring the trials, which stipulates that at the main hearing, from which the public is excluded, a panel may allow attendance of certain legally authorized officials and scientists, if that is of interest for their services, i.e. scientific field.

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5 Constitution of the Republic of Serbia, *Official Gazette of the RS*, No. 98/2006

6 Civil Procedure Law, *Official Gazette of the RS*, No. 72/2011

Although monitoring of discrimination trials is not prohibited, they are rarely observed, and are even less often covered by the media (number of published judgments is negligible). For that reason, transparency of trials is low, which leads to a low level of awareness of judiciary, media and public of existence of the problem of discrimination, significance of trails for discrimination and current legal framework.

Monitoring of the trials raises significance of inclusion of the public in work of judiciary to a higher level, since these cases include some type of abuse of power, private and public interests are mixed, individuals overstep their authorizations and thus, for personal financial gain, obstruct establishing of stable democratic institutions in the country. Lack of transparency in leading of the proceedings and issued judgments causes exclusion of the public and general decrease of public trust in the judicial system, leading to a general opinion that courts are not objective, and that they do not represent the institutions where victims of discrimination may seek help.

The Anti-Discrimination Law is not entirely and adequately implemented. Furthermore, right to a fair trial (including the guarantee of a trial within a reasonable time) is not complied with in all cases. However, these critics are not directly addressed to judiciary and judicial branch, since the legal framework exists. The problem lies in the need to start the initiative in order to change the laws entirely. In that process, actions of judicial bodies would have to be monitored by stakeholders. Since the activities of judiciary are directed towards assisting of the citizens, it is necessary to enable monitoring of discrimination trials in order to secure compliance with the right to a fair trial, complete understanding and application of the provisions of the Anti-Discrimination Law. In every democratic society, independent NGO, media and citizens have significant role in supervision of stated institutions.

# SOLUTION: WHY IS IT NECESSARY TO MONITOR DISCRIMINATION TRIALS?

Adequate monitoring of discrimination trials, undertaken by the broader network of organizations, fills the existing gap between the legal framework and its implementation, because, due to close communication, useful information is exchanged more efficiently and quality of monitoring is improved.

The Civil Procedure Law of the Republic of Serbia stipulates that a trial may be fair only if it is open to public.<sup>7</sup> Naturally, public presence at discrimination trials is mostly allowed, but this provision remains only declarative if independent stakeholders and NGO are not engaged and do not initiate monitoring, considering application of national and international standards in every segment of the procedure (so that the judges and other employees of the court know their work is monitored). Presence of persons who perform monitoring, especially representatives of the organizations which promote human rights, is seen as an additional guarantee of human rights. Certain judges consider that presence of observers would present an additional protection against abuse. Persons who perform monitoring would inform the public of the results of monitoring, i.e. whether national and international legal frameworks have been complied with in the proceeding.

Serbia has not had a methodology for monitoring of trials so far, i.e. guidelines and principles which would be implemented by interested individuals. Furthermore, NGO and individuals which have interest to monitor discrimination trials have not been connected so far, so they have not had an opportunity to exchange experience, and establish closer communication and inform the public.

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7 Civil Procedure Law, *Official Gazette of the RS*, No. 72/2011

# SITUATION IN PRACTICE

The team for monitoring of the trials for establishing discrimination of the Coalition for Equality STEP was present at 25 (twenty five) trials in basic and higher<sup>8</sup> courts in Serbia. If the trial in the case Pfeiffer vs. Air Serbia which was had been monitored before is excluded, team for monitoring found out about the other trials by sending request for free access to information of public importance and received the response from the Higher Court in Belgrade. It turned out, as several times before, that the courts, due to numerous insufficiencies of the case management system, are not able to give “precise” response to the request. Namely, the trials attended by the team for monitoring on May 9, 2014 (M.P. vs. Serbian Railways), May 13, 2014 (A.K. vs. Ringier Axel Springer - Blic) and May 23, 2014 (K.M. vs. Politika A.D.) were not trials for establishing of discriminatory actions, but litigation proceedings for establishing of abuse at workplace (mobbing).

Although the project did not predict monitoring of the trials for mobbing, it is necessary to present the experiences from these trials.

In regard of the procedural rules, the Anti-Discrimination Law and the Law on the Prevention of Mobbing have the same characteristics. Urgency of the procedure and burden of proof are regulated in identical way. However, since the proceedings last for approximately four years, it is obvious that the rule of urgency is not complied with.

It is significant to direct the attention to non existence of the organized search system. In practice, that means that if someone wants to find out the exact number of discrimination cases led before a certain court, he will not find that data because that issue is not systematically solved.

Also, it should be emphasized that the plaintiffs and other legal representatives recognized the presence of professional community in these proceedings as very useful, and expressed their wish for the monitoring team to continue being present at the trials.

When it comes to criminal proceedings for determining whether there was a breach of human rights due to discrimination, the monitoring team has been trying to obtain the judgment of the First Basic Court of June 2013 for a longer period of time, based on which the guilt of Miša Vacić was established in three criminal offences,<sup>9</sup> for spreading of racial and other discrimination,<sup>10</sup>

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8 After the latest judicial reform, the jurisdiction for the discrimination cases was transferred to the higher courts.

9 Case number before the First Basic Court K-407/2010.

10 Article 387 CC (*Official Gazette of the RS*, No. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014).

unauthorized possession of weapons<sup>11</sup> and explosive materials and prevention of an official in performing of official duty.<sup>12</sup> The First Basic Court was unable to provide positive response to the request for information of public importance and deliver the judgment, stating in the explanation that the case file had been sent to the Appellate Court in Belgrade due to submitted appeal to the judgment. The request was then directed to the Appellate Court in Belgrade. However, the Appellate Court issued the decision rejecting to deliver the judgment explaining “that it is the criminal procedure which is not finally ended, as well as that the relevant document contains factual description of the criminal act for which the defendant is charged, and that some additional evidence may be presented which are significant for establishing of the facts” and that delivery of the judgment could seriously impede further course of the proceeding. On May 6, the team for monitoring sent the appeal to this decision to the Commissioner for Information of Public Importance. The appeal contains the statement that the Appellate Court groundlessly refused to deliver requested judgment, and since the Constitution and the Criminal Procedure Code guarantee that the trials are open to public, and in this case there were no exceptions due to which the public is excluded. Therefore, if the public could attend the entire course of the trial before the First Basic Court, and if the media were able to report from the trial, the argument that delivery of the judgment could impede further course of the proceeding cannot be used since all the facts are already known to public. The team for monitoring hopes that the Commissioner for Information of Public Importance will establish that the appeal is founded and order the Appellate Court in Belgrade to deliver requested judgment, as well as that the Appellate Court in Belgrade shall decide upon appeals to the judgment of the First Basic Court within the shortest period of time.

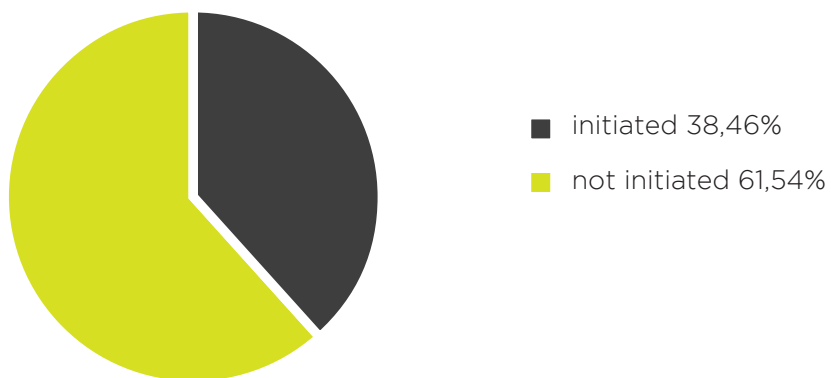
During the research intended for the collection of data on the cases for discrimination led before the Higher Courts in Serbia, as of January 1, 2014 until the moment of receipt of the request for free access to information of public importance, we have found out that the total of 260 cases for discrimination have been initiated before 10, out of the total of 26 higher courts in Serbia.

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11 Article 348 CC (Ibid).

12 Article 322 CC (Ibid).

**Ratio between the courts where the proceedings based on the Anti-Discrimination Law were initiated and those where there were not during 2014**



# SELECTED CASES

## VIOLENCE MOTIVATED BY HOMOPHOBIA: ADEQUATE PROTECTION OF INVIOABILITY OF PHYSICAL AND PSYCHOLOGICAL INTEGRITY<sup>13</sup>

In the proceeding before the Higher Court in Novi Sad against S.S. for reasonable doubt that he committed a criminal offence of violent behavior, as well as attempted murder, Lawyers' Committee for Human Rights represented the defendants, two brothers, victims of physical assault, where one of them suffered serious bodily injuries.<sup>14</sup> The main hearing in this proceeding was completed on November 12, 2013, with examining of the defendant, one of the injured parties, three witnesses and a medical expert related with the circumstances related with gravity of bodily injuries and accountability of the defendant. The next day, on November 13, the judgment was issued for the defendant S.S. who was declared guilty for criminal offences of violent behavior and attempted murder. The first instance court accepted the requests of Higher Public Prosecutor's Office and issued a prison sentence of seven years for the defendant, where six years are for attempted murder and one for violent behavior.<sup>15</sup>

The assault was made in June 2012 in the public transportation bus in Novi Sad. First, the defendant used his fists and then the knife, attacked the injured parties thinking that one of them was "coming on to him". The injured parties, young people coming home from town are victims of hate motivated attack which bears great social danger. At that occasion, one of the injured parties suffered serious bodily injuries. The motive of this attack is undoubtedly bigotry towards gay population. In his statement given to the police, the attacker stated that the motive of the attack was based on homophobia. He withdrew this statement at the time of presentation of his defense before the court, when he stated that at the moment of the attack he had been under influence of intoxicants, drastically changing his statements given in the preliminary criminal proceeding. Based on the above stated it can be concluded that this is a hate crime, which was emphasized at the trial by YUCOM's attorney. When deciding of the punishment, the court considered, as aggravating circumstance, the fact that the attack had been made in full bus of public transportation carrier, and that the injured parties had not caused these offences by their actions. Furthermore, statement of the defense that the defendant had not been accountable due to the use of alcohol and psy-

13 YUCOM 2013 – Annual Report, pg. 19

14 <http://korak-hapi-step.eu/završen-glavni-pretres-u-postupku-za-fizicki-napad-u-novom-sadu/> accessed on December 5, 2014

15 YUCOM 2013 - Annual Report, pg. 19

choactive substance, were rejected since he was able to entirely reconstruct the event. The court did not deem as particularly aggravating circumstance the fact that the defendant had committed the offences due to presumed sexual orientation of injured parties, because the attack had occurred before introduction of the institute of hate crime in the system of criminal legal protection. At the initiative of GSA (Gay Straight Alliance) and YUCOM<sup>16</sup>, the institute of hate crime was introduced in the latest amendments to the Criminal Code,<sup>17</sup> and thus in the system of criminal legal protection in Serbia as especially aggravating circumstance which must be applied by the judge when deciding on the punishment, in case discriminatory motive is established. In its press release<sup>18</sup>, the Lawyers' Committee for Human Rights stated that the reaction of relevant authorities was timely, and that issued punishment was proportionate to committed offence. The statement also includes the claim that efficient reaction of the police and prosecutor's office and adequate response of the court are required in all cases of assaults of physical integrity of citizens, especially when it is motivated by hatred, chauvinism, homophobia and discrimination.

## GSA AGAINST DRAGAN MARKOVIĆ PALMA

Gay Straight Alliance filed a law suit before the First Basic Court in Belgrade for establishing discriminatory behavior against Dragan Marković Palma, as well as request for prohibition of reoccurrence of discrimination. The law suit was received on August 22, 2011.

The reason for initiation of the proceeding was the statement of the defendant given on August 15, 2011, to the journalists of written and electronic media related with organization of the Pride Parade, as follows: "My standpoint is well known, I am not for violence, I am for peaceful demonstrations, but I am not in favor of display on the streets of something which I consider a disease, homosexuality, so the opinion of United Serbia is also my personal opinion, we are against all gatherings where homosexuals demonstrate on the streets of Belgrade and wish to present a disease as something normal." Referring to the Anti-Discrimination Law, and based on all above stated, and after presentation of evidence, it was proposed that the court should made judgment establishing discriminatory behavior of the defendant and for the serious form of discrimination (based on sexual orientation), prohibit reoccurrence of performed discrimination, and with mandatory provision that the defendant undertook to bear all the costs of the proceeding. The First Basic

16 <http://korak-hapi-step.eu/saopstenje-doneta-presuda-u-slucaju-fizickog-napada-u-novom-sadu/> accessed on December 5, 2014

17 Criminal Code (*Official Gazette of the RS*, No. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009 and 111/2009)

18 <http://korak-hapi-step.eu/saopstenje-doneta-presuda-u-slucaju-fizickog-napada-u-novom-sadu/> accessed on December 5, 2014



Court issued a first-instance judgment rejecting the claim of GSA as unfounded. After the appeal of GSA, the Appellate Court in Belgrade modified the decision of the First Basic Court and issued a final judgment adopting the appeal of GSA and established discriminatory behavior, i.e. that Dragan Marković Palma, Member of the Parliament and President of United Serbia (JS), had committed serious form of discrimination of the LGBT population. Furthermore, the Appellate Court prohibited the defendant from recurrence of committed discrimination and ordered him to pay the plaintiff i.e. the Alliance costs of the proceeding in the amount of 57,300.00 RSD within 15 days as of receipt of the judgment.<sup>19</sup>

## GUIDELINES FOR MONITORING OF DISCRIMINATION TRIALS

After consultation with the experts in the field of judiciary, and considering the existing methodologies, the Coalition for Equality STPE defined the guidelines for monitoring of trials for discrimination (more details in brochure *Equality: regulative and reality*<sup>20</sup>):

### 1. Defining of the goals of monitoring of trials

- Determining systemic insufficiencies in work of judiciary for the purpose of providing of recommendations for achieving more effective actions in these cases;
- Providing presence of objective professionals in these proceedings;
- Objective and unbiased reporting to the public about the course of proceeding.

### 2. Selection of monitors (observers)

- It is necessary that the team which monitors the trials and undertakes the research includes the persons who are familiar with basic standards of human rights, basic terms in the field of discrimination, as well as relevant substantive and procedural law;
- Organizations for protection of human rights have the assignment to use different method to direct and educate other interested observers on legal standards and procedures, in order to enable expressing of legitimate opinions and conclusions on the monitored proceedings.

19 <http://korak-hapi-step.eu/saopstenje-za-javnost-apelacioni-sud-doneo-pravosna-znu-presudu-dragan-markovic-palma-kriv-za-diskriminaciju-lgbt-populacije/> accessed on December 5, 2014

20 The publication of the Coalition for Equality –STEP, Equality – regulative and reality, Belgrade 2013 was used for defining of the principles.

### **3. Identification and selection of cases**

- In order to monitor litigation proceedings, as of filing of a law suit until enforcement of judgment, it is necessary, primarily, to collect information on initiated proceedings;
- When selecting the proceedings, it is necessary to consider the resources of civil society organizations.

### **4. Analysis of cases**

- Before initiation of monitoring of proceedings, the observers:
  - ▶ Collect basic information about the parties and proceeding (thus, on the status of parties, facts, media image of the case, event which led to the trial);
  - ▶ Obtain law suits and responses to the law suits;
  - ▶ Study substantive and procedural law related with the case (Constitution of the Republic of Serbia, procedural norms, international law which refers to given field etc.)

### **5. Providing legitimacy and public element of the monitoring mission**

- The observer must inform judicial panel/judge about monitoring – a meeting with court president or spokesperson is advised;
- Observer must obtain written consent for monitoring of trials from the organization sending him/her, which significantly strengthens legitimacy and significance of the monitoring of proceeding with the goal to improve professional actions of the participants in the proceedings.

### **6. Implementation of the monitoring of trials**

- Check whether the court complied with the principle of transparency and whether the trial is open to public;
- In this phase of monitoring, the observers access court building and courtroom at the scheduled time of hearing.

### **7. Noting and drafting of daily reports**

- It is advisable to note the facts related with the procedure of presentation of evidence, method of their collection, court decisions, regulations the parties referred to, and special attention should be paid to procedural norms, complaints of the parties, general behavior of the participants in the proceeding and everything else which could be significant for achieving the goal of research;
- The notes include observation of the researcher on compliance with procedural rules and standards of the right to a fair trial;
- After attending of a hearing, the observers prepare daily reports on all the activities in the court, objectively presenting the facts and observations from the hearings.

## **8. Establishing contact with the parties in the proceeding**

- Depending on the possibilities and circumstances, the observers establish contact with an injured party and attorneys in order to examine their opinion on the course of the proceeding and possible complaints about it.

## **9. Cooperation with the media and informing of the citizens**

- Monitoring process should be entirely and regularly available to the media, and it is advisable to establish close and direct contact with the media;
- It is recommendable that the organization establishes Internet database including the announcements and information on selected cases and update them regularly.

## **10. Analysis of court decision and issued sanction**

- At the end of the proceeding, the observers analyze merit court judgment, report on its contents, and may also give their evaluation of the course and outcome of the proceeding;
- In cases which cause media attention, it is advisable to monitor and report on judgment by the media, as well as to monitor reaction of the public.

## **11. Analysis of the results of monitoring and its use**

- The observers would, based on observed hearings, respond to certain questions related with the proceeding on impartiality and independence of court and judges, behavior of parties, compliance with human rights and freedoms guaranteed by the Constitution and international law, primarily the right to a fair trial;
- The results of the analysis of the proceeding would be the subject of discussion with the representatives of judiciary and holders of public functions, and for the purpose of implementation of the law and the protection against discrimination.

In order for the monitoring to be successful, it is crucial that the observers are independent, adequately trained and aware of the facts, since the cases of breach of prohibition of discrimination are specific, and injured persons are most often members of marginalized groups. It is particularly important that there is a broader network of non-governmental organizations which mutually exchange information and experiences and make the results of monitoring available to the public. At regulatory meeting held in Belgrade of September 27, 2013, STEP established *regional Judicial Monitoring Network*, with the goal to improve the role and visibility of civil society in monitoring of trials and connect local civil society organizations in the fight against discrimination. This network will monitor the trials for discrimination in all three countries and prepare reports which will, along with additional information, be available on the website of STEP.

## PRINCIPLES<sup>21</sup> ON WHICH THE NETWORK IS BASED ARE:

- **SOLIDARITY** – Members of the network commit to mutual cooperation, mutual assistance and understanding, including the provision of required professional and other help and support to other members of the network for the purpose of capacity building, strengthening of the role and increase of visibility of civil society in the process of monitoring of the trials.
- **TOLERANCE** – Respect, acceptance and valuing of differences. Consistent respect of human rights and principles of universality of human rights.
- **PROFESSIONALISM** – Implementation of the activities in the best possible way, in accordance with acquired knowledge, experiences, moral and ethical norms which require conscientiousness and responsibility in work.
- **IMPROVEMENT OF COMMUNICATION** – Members of the network shall exchange the information about the cases of discrimination on the local level and the results of monitoring of the trials.

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21 The publication of the Coalition for Equality –STEP, Equality – regulative and reality, Belgrade 2013 was used for defining of the principles.

# RECOMMENDATIONS TO THE MEMBERS OF THE JUDICIAL MONITORING NETWORK (SERBIA)

## RECOMMENDATIONS FOR NGO<sup>22</sup>

The observers from NGO should focus on the following areas significant for successful monitoring and analysis:

### 1. BURDEN OF PROOF

Unlike the usual litigation proceedings, the defendant bears the burden of proof. Thus, in case the plaintiff makes it probable that the defendant made the act of discrimination, the burden of proof that due to that act there was no breach of the principle of equality, i.e. the principle of equal rights and obligations, is borne by the defendant. This is introduced in order to make the procedure easier for the defendant who is the victim of discrimination and member of marginalized group. The observers must pay additional attention to this issue, because it often happens that the judges neglect this obligation.

### 2. SITUATIONAL TESTING

Situational testing, used in a right way, presents a legal and effective technique used to check whether the rights guaranteed by the law are exercised, but also a tool for strengthening of the victims of discrimination. It is an experimental method with the goal to point out to existence of practice, when, in comparable situation, a person which has certain personal characteristic is treated less favorable compared to another person which does not have such characteristic. Thus, discrimination is established “at the spot”. If it is necessary to establish the act of discrimination by transferring the burden of proof to the defendant, the “testers” may be sent in the mission to create the situa-

22 The publication of the Coalition for Equality –STEP, Equality – regulative and reality, Belgrade 2013 was used for defining of the principles.

tion analogue to the one observed or presumed for the discriminator. Then as the witnesses, the testers could, pursuant to Article 245 of the CPL, establish that the defendant committed the act of discrimination. Thus, it is possible to provide assistance to an injured person in proving of the case when it is not expected that the evidence will be collected easily.

Simultaneously, it should be kept in mind that an NGO cannot influence the witnesses. Therefore, NGO cannot be observed as a litigation party which is to condemn, but also establish the truth.

Part of the monitoring process, as well as evaluation of monitoring in case of testers as witnesses, must be sensitive in regard to the issue whether the decision of the court on the evaluation of witness credibility and his statement may be accepted or not and how that decision was rendered.

### **3. WRITTEN DISCUSSION BETWEEN THE PARTIES**

Written discussion is an important aspect of a public hearing, but it is difficult for the observers to follow. Possible way to overcome this problem is contacting a party in order to obtain the information from the written discussion, in order to be able to evaluate this part of the process as well. In case that is not possible, it should be stated that part of the process was in a form of written discussion and access to it was not possible. The reactions of the parties will so be obvious in court and the hearing shall more frequently be organized in oral form. Thus, it would be possible to achieve sufficient analysis.

### **4. DURATION OF THE PROCESS AS OF FILING OF LAW SUIT UNTIL COURT JUDGMENT - URGENCY**

An important issue for the efficiency of the court system and protection against discrimination in monitoring is duration of the proceeding, considering the fact that pursuant to Article 41 paragraph 3 of the CPL the proceeding is always urgent.

This means that the evaluation should include the information about not only when the discrimination was done, but also how much time has passed until the beginning of the trial, and how long it lasted.

### **5. COSTS OF THE PROCEEDING**

The decision of the court about the party which is to bear the costs of court proceeding should be kept in mind as well. In accordance with Article 153 paragraph 1 of the CPL, the party which loses the litigation in its entirety shall reimburse the costs of another party. Partial success of a party in litigation may be, pursuant to paragraph 2 of this Article, the reason for the court to decide that the party is to bear part of the costs of another party or that each party should bear its own costs. That decision is important because it opens the question whether the decision on the costs could prevent implementation of the law in case even after established discrimination the petitioner would have to bear part of the costs.

This opens the question whether the party is able to bear the costs of a litigation proceeding. Therefore, essentially, the question is whether protection against discrimination could be obtained at all. Financial measures present a necessary link in accomplishing protection against discrimination. Pursuant to Article 168 of the CPL, the court shall exempt from paying of the costs of proceeding the party which, pursuant to general property status is not capable to bear all the costs. This provision is significant during the wait of the law which will provide general regulation of use of free legal aid in Serbia.

## RECOMMENDATIONS FOR THE MEDIA

The media have a great role in encouraging monitoring of the discrimination trials, by increasing of visibility and transparency of these trials, and awareness of the public on existence of this problem. In cooperation with the NGO, the representatives of the media may learn additionally about human rights and the problem of discrimination, in order to monitor the trials with more understanding and report to the public about them. It is recommended that the media use gender sensitive vocabulary in the reports and avoid use of stereotypes.

## RECOMMENDATIONS FOR JUDICIARY AND RELEVANT STATE BODIES

During consultations with relevant judicial experts, it was noticed that the judges and other participants in these trials had to apply current legal framework more precisely, especially the Anti-Discrimination Law (provision on the burden of proof), as well as to comply with the principle of a fair trial. It is recommended that they accept and enable monitoring of the discrimination trials, and cooperate with the NGO with the goal of full application of the laws and respect of human rights.

# CONCLUSIONS

- Legal framework which prohibits discrimination and guarantees the right to a fair trial exists in all three countries, but the problem was identified related with its implementation.
- Discrimination trials are rarely completely open to public and there are no reports from them, which leads to insufficient transparency and visibility, as well as lower awareness of the public about this problem.
- Independent monitoring of the trials, which would be performed by the individuals or NGO, would enable better visibility of these trials, and the facts that the procedure is led entirely in compliance with the laws.
- Adequate guidelines for monitoring of the discrimination trials are required, and the network which will connect all the NGOs which monitor the trials.
- It is important to establish close contact with the media in order to forward correct facts and information about the trials for discrimination, and enable public access to the reports.
- It would be ideal if the judges and other employees in judiciary supported the idea of monitoring of discrimination trials and thus increase their transparency, as well as invest additional efforts in order to fully implement the laws which prohibit discrimination.
- The goal is to increase visibility of these trials through organized monitoring, which will make the problem of discrimination closer to the public and enable full implementation of the current legal framework (national and international).
- In case this planned monitoring of the trials by the *Judicial Monitoring Network* is successfully implemented in all three countries, proposed guidelines and recommendations could be useful for other countries in the region which face similar problems.



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# FROM MARGIN TO EQUALITY

STEPS TOWARDS IMPROVEMENT OF THE  
PARTICIPATION OF WOMEN IN POLITICAL LIFE  
OF MONTENEGRO

*“A SOCIETY THAT IS WITHOUT THE VOICE  
OF WOMEN IS NOT LESS FEMININE.  
IT IS LESS HUMAN”*

**MARY ROBINSON<sup>23</sup>**

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23 Mary Robinson is the first women President of Ireland in the mandate from 1990 to 1997 and the UN Commissioner for Human Rights 1997-2002.

# EXECUTIVE SUMMARY

Women constitute numerical majority of the population in Montenegro, and based on the latest statistics, they constitute majority in the categories of success and education. However, there are definitely a minority at the positions where the decisions significant for the society are made.

After the parliamentary elections of 2012, women constitute 14.8 percent of the Members of the Parliament of Montenegro. There are three female ministers in the Government or 17.6 percent of women, and there are 14 percent of women in local parliaments, while only two perform the function of municipal presidents. Women are rarely on the top of managing structures of political parties, and even more rarely do they have real impact on the decision making processes in the parties.

The efforts to increase the number of women in all the branches of power have not succeeded due to failure to adopt amendments to the Law on Election of Councilors and Members of the Parliament in 2014, which provided for the quotas of 30 percent, i.e., every third place on electoral lists are women candidates. Thus, the recommendations of the European Commission, CEDAW, Council of Europe, Venice Commission, and national and international civil society organizations, as well as the amendments of several political parties were not understood by the majority which voted for this Law. Failure to adopt a legal solution which would significantly increase a number of women at the positions where political decisions are made happens for the second time in the last three years, therefore, it is obvious that political structures are not ready to create more favorable ambience for the higher level of participation of women in politics.

Based on the analyses of the electoral lists and statutes of the political parties from the last local elections held in 2014 in several municipalities in Montenegro, it could be concluded that the parties did not recognize the needs for establishing gender equality, failing to comply with minimum requirements defined by the law.

Democratic development of Montenegro as stipulated by the Constitution, cannot be achieved if half of the society is excluded from the decision making processes. Therefore, it is necessary to make additional efforts in order to achieve gender equality in the processes of political decision making, through compliance with the existing legal solutions and efforts to improve them, raising awareness of the political parties of the need to establish authentic gender equality in party structures, through strengthening of women in order to exercise the right to participate in political decision making processes.

Besides the legal obstacles, lack of political will and inability of institutions to fully implement relevant laws, the efforts should be invested to improve unfavorable social and economic ambient which most frequently impacts women, as well as the influence of autoritary political culture characterized by traditional understanding that jobs in politics belong exclusively to men, which is additionally strengthened by listed weaknesses of the system.

# INTRODUCTION

Equal participation of women in the decision making processes in political and public life, as one of nine strategic goals of the National Action Plan for Gender Equality 2013-2017, presents a significant parameter for evaluation of general democratic improvement of the society. Absence of women in decision making processes contributes to the fact that strategic goals of the plan are not supported or accomplished.

The rights of male and female citizens to elect and be elected and actively participate in creating and implementation of political decisions, or political life in general, are guaranteed by the series of legal and institutional decisions in Montenegro. However, in case of political participation of women, application of proscribed rights and freedoms is faced with numerous obstacles and broader political action is needed in order to overcome them.

This proposal of practical politics includes the analysis of political participation of women through participation in political decision making processes within political parties and state institutions, patterns than shape it and influence it, as well as social limitations of female participation in politics.

There are several factors that lead to absence of women in the field of political decision making in Montenegro, ranging from normative framework which is still not sufficiently complied with, to weaknesses of institutions to provide its application. Those are so called institutional factors which do not include only political institutions in a narrow sense, such as electoral legislation, but also informal models for advancement in politics, methods for nominations within parties, functioning of party systems etc. Furthermore, there are social and cultural facts which influence status of women (education, economic status, earnings, career advancement etc.), and the factor of political culture which entwines both of stated factors and influences the values, norms, stereotypes and prejudice related with participation of women in politics.

Besides assessment of the current situation and identifying of problems in the context of participation of women in political decision making, the recommendations have been given which could contribute to greater inclusion of women in work of political organizations (parties and institutions), their more equal positioning, as well as establishing of more favorable social climate for political engagement of women.

The analysis of the situation and identifying of key challenges and possible solutions were done through research of the existing normative framework and its application, and partially through conversations, exchange of ideas and opinions on female participation in politics with representatives of institutions, political parties and civil sectors, within the activities of the project *Civil Society Networking on Critical Human Rights Values in Serbia, Montenegro and Kosovo*, implemented in the period 2012- 2014 by the Coalition for Equality STEP.<sup>24</sup>

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24 Coalition for Equality STEP consists of: Lawyers' Committee for Human Rights - YU-COM, Belgrade Centre for Human Rights, Network of the Committees for Human Rights in Serbia CHRIS and Gay Straight Alliance GSA (from Serbia); Humanitarian Law Center Kosovo and Youth Initiative for Human Rights (from Kosovo); Centre for Civic Education (CCE) and LGBT Forum Progress (from Montenegro).



# MORE THAN HALF A CENTURY OF ACCOMPLISHMENT OF THE RIGHT TO VOTE FOR WOMEN IN MONTENEGRO – MODEST PROGRESS IN THE FIELD OF PARTICIPATION IN POLITICS

Democracy includes equal participation of male and female citizens in political decision making processes which direct functioning of the entire community, or through direct participation or election of representatives who will make decisions on their behalf. Although the concept of democratic decision making has been known since the ancient times, the definition of citizens as the holders of this concept has changed through history, and only in the 20<sup>th</sup> century did it include both women and men, at least in majority of the countries worldwide. This significant achievement of the 20<sup>th</sup> century did not also bring equal participation of all the citizens in political decision making processes, which primarily refers to women who are *de facto* still less present in the institutions where the most significant decisions for a society are made.

After the World War II, the Constitution of the Federal People's Republic of Yugoslavia of 1946 stipulated the general right to vote for Montenegro. Today, after more than fifty years, there has been a step further so the gender

equality was placed as one of the highest social values and a constitutional category in the Constitution of 2007. The Constitution stipulates the obligation of the country to guarantee equality of women and men and develop equal opportunity policy, and prohibit all types of direct or indirect discrimination.<sup>25</sup>

Montenegro has also ratified numerous international documents which are directed towards encouraging of political participation of women, such as the United Nations Convention on the Elimination of All Forms of *Discrimination against Women*, *Beijing Declaration and Platform for Action*, European Commission *Strategy for Equality Between Women and Men*, numerous documents of the Council of Europe etc.

The Law on Gender Equality adopted in 2007 also stipulates the obligation of the Parliament and the Government of Montenegro to, within their competencies, apply the principle of gender equality, and particularly gender balanced representation during election and nomination for certain functions, establishing of working bodies and establishing of the composition of official delegations.<sup>26</sup> Furthermore, local self-government units are legally obligated to, within their competencies, encourage and achieve gender equality, i.e. undertake measures and activities which are significant for achieving of gender equality.<sup>27</sup> Also, political parties are under obligation to use their acts to define the manner and measures for achievement of gender balanced participation of women and men in all the bodies, on the electoral lists for election of councilors and members of the parliament, in elected clubs of councilors and members of the parliament and in elections for public positions on all the levels.<sup>28</sup>

Legislation which regulates activities and organization of political parties and electoral legislation has been changed several times from 1998 to 2014. This is significant for the improvement of equal participation of women and men in political life, although the results of changes in that context are still modest.

The National Action Plan for Gender Equality 2013-2017 also defines the guidelines for achieving balanced presence of men and women in the bodies of representative and executive branch on all the levels.<sup>29</sup> However, there have been numerous problems in implementation of this document, ranging from lack of financial means to lack of human resources and insufficiently developed capacities of competent Gender Equality Department, to implement it.<sup>30</sup>

Gender Equality Department of the Parliament, Protector of *Human Rights and Freedoms*, as well as the network of coordinators for gender equality in

25 Constitution of Montenegro, *Official Gazette of Montenegro*, No. 1/2007

26 Law, Article 10, *Official Gazette of Montenegro*, No. 46/2007

27 Ibid, Article 11.

28 Ibid, Article 12.

29 National Action Plan for Gender Equality in Montenegro 2013-2017, Ministry for Human and Minority Rights, Podgorica, January 2013.

30 <http://www.cedem.me/sr/publikacije/finish/13-publikacije/513-koalicija-23-trei-iz-vjetaj-o-stanju-u-oblasti-reforme-pravosua-i-ljudskih-prava.html>

the state administration bodies, are some of the existing mechanisms which are formed to work on establishing of the concept of gender equality. Unfortunately, all listed legislative and institutional mechanisms do not lead to equal participation of men and women in politics and decision making processes, but to distrust of women in electoral process and general interests in politics.

The role of women and their presence in political decision making today is unproportionately small compared to the challenges faced by Montenegro in the process of the European integrations. Despite the increasing number of educated women, their influence on creating and implementing of the policies is still limited.

Based on the census of 2011, the total number of citizens of Montenegro is 620,029, more precisely, 313,793 women and 306,236 men, i.e. 50.60 percent of citizens are women.<sup>31</sup> Women also achieve better results in educations than men. Namely, every fifth woman and every seventh man who enrolled at faculty in 2007/2008 completed it within deadline. Furthermore, women dominate in the structure of those enrolled in undergraduate, graduate and specialist studies: in 2010/2011, out of the total number of persons enrolled in undergraduate studies 53 percent are women, while in 2010/2011 women made 59.3 percent of the students enrolled in graduate studies.<sup>32</sup>

Due to generally insufficient presence of women in public and political life, Montenegro is often subject to critics, not only by the European Commission, which stated in its Progress reports that the situation should be improved, but by other international organizations such as OSCE, Council of Europe, European Parliament and United Nations Committee on the Elimination of All Forms of Discrimination against Women. Those institutions requested that Montenegro used amendments to the laws to stipulate greater presence of women on electoral lists of political parties, ensuring their access to political life by the norm which will secure 30 percent of women on electoral lists and that every third candidate is a member of less represented gender.

A group of Montenegrin non-governmental organizations joined the calls of international institutions and organizations and initiated that the new Law on Election of Councilors and Members of the Parliament should include the provision based on which every third place on the electoral list should belong to a woman. This would enable that a greater number of women become members of the Parliament based on the principle of distribution of mandates based on the order of male and female candidates from the electoral list. Based on the same initiative, in case of termination of the mandate, the position in the Parliament which belonged to the representative of less represented gender shall be replaced by the following female candidate and not a male candidate from the electoral list.

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31 <http://monstat.org/userfiles/file/publikacije/ZENE%20I%20MUSKARCI%20U%20CRNOJ%20GORI%202012.pdf>

32 [http://iper.org.me/wp-content/uploads/2014/06/Zensko-preduzetnistvo-u-CG\\_policiy-paper\\_Vesna-Bojanovic\\_2014.pdf](http://iper.org.me/wp-content/uploads/2014/06/Zensko-preduzetnistvo-u-CG_policiy-paper_Vesna-Bojanovic_2014.pdf)

This initiative should be an amendment and improvement of the existing legal solution of 2011 which stipulated the norm that there should be at least 30 percent of women on electoral lists, but without giving precise order of male and female candidates, which gave broad space to members of the parties to manipulate when creating lists and clubs of the Members of the Parliament. Due to this “imprecise” provision, at the parliamentary elections of 2012, certain parties had 30 percent of women on their lists but most of female candidates were at the bottom of the list, which led to the current situation where there are only 14.8% female Members of the Parliament in the Parliament of Montenegro, which is the lowest percentage in the European Union. The proposal of the non-governmental organizations was supported by the amendments of the Socialist People’s Party (SNP), Bosniak Party and Positive Montenegro. However, that was not enough so they were not elected at the session of the Parliament on 18 February 2012, while the amendments of SNP that every fourth place on the electoral list should belong to a woman was adopted.<sup>33</sup> Although adopted amendment of SNP presents a certain improvement in creating conditions for greater political participation of women, it is not in accordance with the recommendations of the experts’ team of TA-LEX and CEDAW,<sup>34</sup> because it does not provide for a minimum standard of 30 percent of women in the Parliament and local authorities.

Montenegro is also at the last place in the region based on the women in the Parliament. Namely, Bosnia and Herzegovina has 21.4 percent, Croatia 23.8 percent, Macedonia 30.9 percent, Slovenia 33.2 percent and Serbia 32.4 percent of women.<sup>35</sup> Montenegro with 12 women out of 81 Members of the Parliament is in 119<sup>th</sup> place based on the number of women in the Parliament out of 186 countries in the world where these parameters are measured. Pursuant to the data of Inter-Parliamentary Union, there is 21.9 percent of women in the parliaments worldwide.<sup>36</sup>

Women lead only two parliamentary committees, and those are Gender Equality Department and Department for Education and Science, which fits into the stereotype on male and female topics. In the Department for Safety and Defense, a woman was first elected at the end of last year, and recently she was elected Vice President of this Department, while the Department for Budget, Economy and Finance still has no female members.<sup>37</sup>

There is the total of 14 positions for ministers in the Government of Montenegro, and only three are held by women (Minister of Defense, Minister of

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33 Law on amendments to the Law on Election of Councilors and Members of the Parliament, *Official Gazette of Montenegro*, no. 14/14

34 <http://www.cedem.me/sr/publikacije/finish/13-publikacije/513-koalicija-23-trei-izvještaj-o-stanju-u-oblasti-reforme-pravosua-i-ljudskih-prava.html>

35 [http://www.monitor.co.me/index.php?option=com\\_content&view=article&id=5362:zastupljenost-ena-u-dravnim-institucijama-kad-procenti-padaju&catid=3697:broj-1243&Itemid=4966](http://www.monitor.co.me/index.php?option=com_content&view=article&id=5362:zastupljenost-ena-u-dravnim-institucijama-kad-procenti-padaju&catid=3697:broj-1243&Itemid=4966)

36 Ibid.

37 [www.skupština.me](http://www.skupština.me)

Science and Minister Without Portfolio) which makes the total of 17.6 per cent.<sup>38</sup> Number of women at lower positions increases, including managing administrative positions in the bodies of executive branch such as directors of administrative bodies, secretaries of state, secretaries, directors of directorates in ministries, assistants in administrative bodies, up to 38.60 percent.<sup>39</sup>

It is not likely that the described situation will change after the next elections, considering the latest amendments to the Law on Election of Councilors and Members of the Parliament. Failure to adopt the amendments initiated by the NGOs and certain political parties caused the damage to creation of the conditions for stronger political participation of women. As a consequence, the entire democratic process is limited, as well as more rational use of all the capacities of the society for the purpose of achieving quality political decisions and limitation of the possibilities of comprehensive development.

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38 [www.vlada.me](http://www.vlada.me)

39 [http://www.monitor.co.me/index.php?option=com\\_content&view=article&id=5362:zastupljenost-ena-u-dravnim-institucijama-kad-procenti-padaju&catid=3697:broj-1243&Itemid=4966](http://www.monitor.co.me/index.php?option=com_content&view=article&id=5362:zastupljenost-ena-u-dravnim-institucijama-kad-procenti-padaju&catid=3697:broj-1243&Itemid=4966)

# ONLY ONE POLITICAL PARTY IN MONTENEGRO IS LED BY A WOMAN

Low presence of women at managing positions in the parties is one of the key reasons why they are not present in parliamentary and executive branch.

The Law on Gender Equality stipulates the measures for achieving of gender balance in political parties.<sup>40</sup> However, women are almost completely not present in the managing structures of the political parties. Croatian Civic Initiative (HGI) is the only parliamentary party led by a woman.

Except for low level of presence of women on the highest positions in the parties, internal party and program documents are rarely in compliance with the Law on Gender Equality. Statutes of the parties mostly contain declarative commitment to gender equality, and rarely do the party documents contain the quotas of 30 percent of women in managing bodies, there are no clear definitions of mechanisms for accomplishment of that quota, nor the sanctions in case failure to comply with it.<sup>41</sup>

Out of 14 members of the Executive Board of the Democratic Party of Socialists (DPS), only two are women, or 14 percent. There are more women in the Main Board and they constitute a quarter of that body (51 out of 206 members).<sup>42</sup> Social Democratic Party (SDP) has approximately 16 percent of women in the Main Board, while out of 16 members of Presidency only 3 are women, which is 18 percent.<sup>43</sup> The lowest number of women is in New Serbian Democracy (Nova). There are no women in the Presidency and Executive Board of this party, while the Main Board of the party has 11 women out of the total of 109 members, or less than 10 percent.<sup>44</sup> The Presidency of Positive Montenegro (PCG) which has 15 members out of which is only one woman, while the

40 Law on Gender Equality, *Official Gazette of Montenegro* No. 46/2007

41 [http://www.monitor.co.me/index.php?option=com\\_content&view=article&id=5272:ene-u-upravljakim-tijelima-politikih-partija-samo-deklarativno-&catid=3634:broj-1237&Itemid=4902](http://www.monitor.co.me/index.php?option=com_content&view=article&id=5272:ene-u-upravljakim-tijelima-politikih-partija-samo-deklarativno-&catid=3634:broj-1237&Itemid=4902)

42 <http://www.dps.me/nasa-partija/izvrnsni-odbor>; <http://www.dps.me/nasa-partija/glavni-odbor>

43 <http://www.sdp.co.me/GlavniOdbor>; <http://www.sdp.co.me/Predsjednistvo>

44 <http://www.nova.org.me/node/24>; <http://www.nova.org.me/node/18>; <http://www.nova.org.me/node/19>

Main Board has 12 women out of the total of 52 members.<sup>45</sup> A rare example of high presence of women in the bodies of the parties is Socialist People's Party (SNP) which has 30 percent of women in its Main and in Executive Board.<sup>46</sup>

Political parties have great social power in creating public policies, therefore are particularly responsible for introduction of the principle of gender equality and accomplishment of human rights of women. Whether and how certain political parties adopt the concept of gender equality will influence to the great extent the social presence of women and social status of the concept of gender equality.

Furthermore, political parties have special responsibility to comply with the existing system of quotas and act in the direction of constant development of the quota system and other mechanisms which will enable more efficient participation of women in political decision making processes within the parties, and later outside of them, because that is the only way to change traditional opinion on engagement of women in politics and pave the way towards faster democratic development.

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45 <http://www.pozitivnacrnagora.me/predsjednistvo/>; <http://www.pozitivnacrnagora.me/glavni-odbor-pozitivne/>

46 <http://www.snp.co.me/strana.asp?kat=1&id=6790>; <http://www.snp.co.me/strana.asp?kat=1&id=6794>

# AMENDMENTS TO THE ELECTORAL LAW FAILED AT THE EXAM AT THE LOCAL ELECTIONS IN 2014 – ELECTORAL LIST OF CERTAIN PARTIES DO NOT HAVE EVEN MINIMUM FEMALE QUOTAS

The challenge for greater political participation of women is not only demonstrated in lack of political will to adopt new, more progressive legal solutions which would encourage it, but also in failure to comply with the existing ones.

Although the latest amendments to the Law on Election of Councilors and Members of the Parliament stipulate that electoral lists must have total of 30 percent of women, as well as that they should be on every fourth position on the lists,<sup>47</sup> this was not the case during local elections held in May 2014 in 12 of Montenegrin municipalities.

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<sup>47</sup> Law on amendments to the Law on Election of Councilors and Members of the Parliament, *Official Gazette of Montenegro*, No. 14/14



Analysis of the segment of these electoral lists shows that some lists which participated at the elections in certain municipalities did not comply with the law.

For example, none of the electoral lists in Kolašin complied with the legal norms. The lists Šule and Mikan with citizens for Kolašin, SNP- Youth, wisdom, bravery -Đuro Milošević and Democratic Front - Miodrag Lekić have 29.03 percent of women each. Also, in the same town, electoral list European Face (Positive and SDP) and the list of DPS exceeded legally prescribed quota of 30 percent of women, but their lists did not comply with prescribed order of women. The list European Face for Kolašin has as many as 41.9 percent of women, but the obligation that each fourth candidate should be a woman was not complied with, which is also the case with the list of DPS which has 32.25 percent of women.<sup>48</sup> Unfortunately, Kolašin was not the only case. Municipal electoral commissions were legally obliged to supervise whether the lists complied with all legal criteria. However, that did not happen, and none of the lists was suspended due to a breach of law.

Most of the analyzed electoral lists show that this legal provision was barely complied with. Women are at each fourth place, and the end of the list contains more female names in order to achieve the quota of 30 percent. That is the best illustration of the lack of political will, both in the governing and opposing parties, to interpret the quota as a minimum number, rather than to strive for a higher percentage than 30 percent.

So far, the parties and their managing structures have declaratively been in favor of the European standards in regard to presence of women in politics. The practice shows that the resistance exists in the segment of application of standards which are included in electoral laws as minimum solutions. That is certainly the segment which should be specially analyzed and monitored for the purpose of pressuring the introduction of electoral process in the legal frameworks.

Amendments to the electoral laws presents the chance to achieve certain positive influence on the composition and structure of electoral lists, under condition that they are established in compliance with the law, but that step forward shall be modest and is still far away from 30 percent.

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48 [http://monitor.co.me/~monitorc/index.php?option=com\\_content&view=article&id=5274:enske-kvote-na-izbornim-listama-i-lokalni-izbori-minimalne-a-prekrene-&catid=3634:broj-1233&Itemid=4902](http://monitor.co.me/~monitorc/index.php?option=com_content&view=article&id=5274:enske-kvote-na-izbornim-listama-i-lokalni-izbori-minimalne-a-prekrene-&catid=3634:broj-1233&Itemid=4902)

# PATRIARCHY SURVIVES AS A STRONG OBSTACLE TO THE ENGAGEMENT OF WOMEN IN POLITICS

One of the strongest characteristics of Montenegrin society, which changes extremely slowly, is division to male and female jobs, or fields of activities, caused by deeply rooted patriarchy. The belief that the politics belong to men has double impact – on women who believe that they do not belong in politics and do not consider political engagement, and to the environment which does not encourage women to become active in politics, if they decide to do so. One of the recent researches of the opinions of the citizens shows that more than 60 percent of the respondents agreed with the statement that the main role of a woman in the society is to be a good wife and mother,<sup>49</sup> which best illustrates the nature of the challenges lying on the road to greater involvement of women in political activities.

On the other hand, due to such social definition of gender roles mixed with growing trend of employed women and bad economic situation in Montenegrin society, women are often burdened by double obligations – work outside the house and house work. Discrepancies in distribution of family and house obligations between men and women mostly causes other differences between them: different opportunities on the labor market, different positions in society, differences in distribution of power and reputation.<sup>50</sup>

Thus, although it cannot be said that they are formally prevented from being in politics, women still have to overcome too many in(visible) obstacles in order to decide to start a career in politics.

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49 <http://media.cgo-ccc.org/2013/05/Stavovi-o-LGBT-u-Crnoj-Gori-za-PRE-SS-20022012.pdf>

50 <http://emim.org/files/socio-ekonomski%20polozaj%20zena%20u%20crnoj%20gori.pdf>

Improvement of participation of women in politics requires broader social action. Along with the adoption of legal solutions and quotas in the field of electoral legislation and functioning of political parties, the strategy for encouragement of greater participation of women in politics must include development of state measures which will be used to deal efficiently with the problems caused by traditional definition of gender roles in society, for the purpose of contributing to more equal distribution of work and family related responsibilities, as well as equal opportunities for career success.

# IMPORTANCE OF INSISTING ON STRENGTHENING OF FEMALE PARTICIPATION IN POLITICAL LIFE OF MONTENEGRO

Gender equality means that both men and women have equal status and equal conditions to develop their potentials so that they contribute to political, social and cultural development of societies/countries and economies, in order to equally enjoy the benefits from the results of social development.

Despite significant improvements in the field of gender equality and female human rights, upon adoption of international documents, state, regional and local regulations, strategic frameworks and action plans, as well as activities of the civil society organizations and female groups, unequal position of women in political decision making still presents the root of all other breaches of female rights and their poor financial status, violence, jeopardizing rights of women based on gender, marital and family status and motherhood in Montenegro. The policies of equality which should be entwined in the entire system cannot be successfully created and implemented without participation of women.

Usually the arguments for greater participation of women in politics are three key reasons: democratic justice, rational use of resources and interest representation. Women make the half of the entire population and are entitled to be represented proportionately to their number in legislative, executive and judicial bodies of all countries. With exclusion of the women from democratic political processes, they are deprived of significant values, skills and knowledge of women. Furthermore, women have certain special interests which are usually not recognized as significant by men, and with exclusion of women from the decision making process those interests are insufficiently represented in political decision making. Since women make more than 50 percent of citizens in Montenegro, and based on the data, they are more educated because percentually more women graduates from the faculties, it is irrational and non democratic to exclude such significant social potential from the most significant political processes and decisions.

# RECOMMEN- DATIONS:

1. continue lobbying with the goal of considering new amendments to the Law on Election of Councilors and Members of the Parliament in the segment which refers to accomplishment of gender balance of political participation in accordance with recommendations and international obligations of Montenegro;
2. examine the possibility of introducing provisions in the Law on Financing of Political Parties and Law on Gender Equality which require that the political parties should clearly define mechanisms for establishing gender equality in party related documents, with clearly stipulated quota of 30 percent of women in the bodies and managing structures, mechanisms and deadlines for their accomplishment and sanctions in case of failure to comply with these requests;
3. women in political parties, non-governmental organizations, media, experts in the field of human rights and gender equality, should continue with the pressures which will enable women candidates in political parties favorable distribution on electoral lists;
4. women in political parties, non-governmental organizations, media, experts in the field of human rights and gender equality, should continue with the monitoring and pressure on competent institutions to consistently apply the existing norms of the Law on Election of Councilors and Members of the Parliament and sanction those who do not comply with them;
5. encourage establishing, strengthening and actions of organizations of women on all the levels of political parties in order to enable interest representation, strengthening of female voice and prevent informal male networking and monopolizing of decision making in work of the parties. Furthermore, party organizations of women may be a quality forum for planning of the policies of gender equality and additional quality in formulating party programs;
6. support programs for education of women and men in political parties in the field of human rights, basic skills of political activities, skill of analyzing gender perspective in the activities of a party, as well as specialized training on certain fields and politics;
7. at the local level, motivate and encourage women through different types of activities and campaigns to submit candidacies for the positions in local companies, services etc., because they send faster and more efficient message to the public that they are capable to perform managing functions, which may have positive impact at a later time on their promotion to higher managing positions in the parties and in social and state structures;

8. work on raising awareness and strengthening of knowledge of the citizens on women rights through different campaigns on gender equality;
9. support the programs of political education, with the special emphasis on training of women from marginalized and vulnerable groups, with the goal of including them in political processes;
10. lobby with the state to secure social services and support for women in general, and especially members of marginalized and vulnerable groups, in order to create space for their engagement on improvement of the status of women in all communities;
11. lobby that state institutions and bodies which specialize in implementation of policies of gender equality have adequate conditions and means for work on implementation of activities which are planned by strategic plans for achieving of gender equality, and provide continuous training of staff;
12. work on improvement of infrastructure for him and taking care of children and encourage men to participate more in the activities related with households and upbringing of children (campaigns for raising awareness on use of parental absence by men, i.e. fathers) in order to contribute to balancing of private obligations between men and women, and provide conditions for women to be engaged in politics easier;
13. support the programs for education and support directed towards strengthening of female entrepreneurship;
14. introduce contents in school curriculum textbooks and other teaching materials and improve educational activities directed towards raising awareness of young people on gender equality through programs of civic upbringing/education and healthy lifestyles;
15. work on further raising awareness of media workers in the field of information and research on topics related with gender equality in order to overcome stereotypical depicting of women, as well as on strengthening of monitoring and control of use of gender sensitive language in the media, work and communication of state institutions with public;
16. work on introduction of special programs on gender equality the trainings on media reporting and research techniques for male and female students of journalism;
17. strengthen programs of alternative political education for the youth, including gender dimension.

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LESBIAN, GAY,  
BISEXUAL AND  
TRANSGENDER (LGBT)  
RIGHTS IN KOSOVO

# EXECUTIVE SUMMARY

The purpose of this study was to present the current situation in Kosovo related to Lesbian, Gay, Bisexual and Transgender (LGBT) rights and, at the same time, identify and offer recommendations for some of the challenges that Kosovo faces related to LGBT rights.

The findings are based on a review of relevant documents and reports and a review of the legal framework. Moreover, some of the findings were identified during the activities organized by STEP as a part of implementation of the project. The primary focus of the study was to provide a concrete list of recommendations based on these findings that could be used as the basis for future interventions by STEP or other relevant stakeholders.

# INTRODUCTION

Kosovo went through transformative sociocultural phases after the disintegration of Yugoslavia, the Kosovo war, and the 2008 declaration of independence. Throughout this process the government neglected the existence of sexual minorities. Human rights actors in Kosovo have not developed over the years to create conditions that would facilitate the necessary social changes, which would be needed to improve the status of the LGBT community.

Kosovo's sociocultural context features strong resistance to changes, particularly those favoring the community that faces verbal and physical abuse. A well discussed incident was the attacks against the Kosovo 2.0 network site during the launching of its magazine issue "Sex" which depicted sex and sexuality themes that included LGBT content. A group of individuals perceived to belong to extremist groups opposed the launching event as they thought the event was promoting sex and LGBT lifestyle, and that a sex party was about to take place. The individuals vandalized the premises of the event and assaulted one person. The incident was largely attributed to the way the event was advertised that featured nudity and suggested other heavily sexually laden themes. In 2014, a movie about the incident was screened during the Pristina's Femmes Fatales Festival, and the reviews stated that the movie was disproportionately focused on the fact that the attacks had been carried out by religious Muslims, leaving aside LGBT rights and the voices of persons directly affected by the attacks.

A march took place on May 17, 2014 in Pristina for The International Day Against Homophobia and Transphobia and it was the first of its kind. The march was not advertised to the general public and the marchers were mostly members of the international community who carried no perceivable messages that would indicate the theme of the march. Yet, the march was carried out with extensive security precautions. As details of the march reached the general public, online forums and social media sites were swarmed with hate speech towards the LGBT community. Hate speech happens frequently on the Internet portals and the press. The majority of the portals does not react to these violations and allows hateful content to continue with no further punitive measures. Editorial representatives state that they do not have appropriate knowledge to prevent hate speech, as well as judges and prosecutors to deal with cases effectively. This scenario keeps LGBT persons from inclusion in public life. Notably, the situation does not vary significantly across the countries in the Western Balkans, as sociocultural norms function in a similar manner inhibiting equal rights and protection of LGBT persons. Serbia and Montenegro recently adopted anti-discrimination strategies, and Serbia and Albania signed laws that addresses hate crimes. However, the implementation of the laws remains a challenge in all the countries. Similar incidents to that of Kosovo 2.0 have occurred in Macedonia, Montenegro, Bosnia and Herzegovina, and Serbia. The latter repeatedly banned the Belgrade Pride citing security concerns, which shows the dearth of political support to the LGBT community.

However, Kosovo is at an opportune moment for key interventions on lesbian, gay, bisexual, and transgender (LGBT) rights. While current efforts for LGBT rights in Kosovo are still limited, combination of a number of factors provides a milieu for positive social change. In particular, the current context includes: increasingly active Kosovar LGBT organizations; pressure on the Government of Kosovo related with the EU accession and visa liberalization; support from key governmental officials; engaged international community with outspoken diplomats; and the opening of a broader societal dialogue in the wake of the attacks against Kosovo 2.0.

## LEGAL FRAMEWORK

The *Constitution of the Republic of Kosovo* and the Anti-Discrimination Law both provide important human rights protections and explicitly include sexual orientation. Unfortunately, the protections have not been effectively implemented to protect the LGBT community, in part because of a weak judicial system, and in part because the need to amend the Anti-Discrimination Law to provide more effective mechanisms.

First, the Constitution recognizes sexual orientation as a protected characteristic and thus prohibits discrimination on the basis of sexual orientation.<sup>51</sup> It also lists a number of fundamental rights and freedoms that are to be enjoyed without discrimination. Secondly, the Constitution provides for direct applicability of a range of international human rights agreements and instruments such as the European Convention on Human Rights<sup>52</sup>, and in the instances of incompatibility between the national and international norms, the international norms will prevail. In addition, interpretation of human rights provision shall be consistent with the decisions of the European Court of Human Rights.<sup>53</sup> For the LGBT community, this is especially significant as the European Court of Human Rights has already developed its jurisprudence and has recognized the rights of the LGBT community in different spheres of society. This includes freedom of assembly, freedom of expression, balancing freedom of thought, conscience and religion and non-discrimination in the context of employment, succession to a tenancy, social protection, parental authority and adoption, civil union and gender identity.

In addition, the Anti-Discrimination Law prohibits direct and indirect discrimination<sup>54</sup> in a range of fields including employment (access to employment, as well as promotion, training and dismissal), education, social protection and social advantages, access to housing, access to goods and services, participation in public affairs, access to public places and any other right set forth by the law.<sup>55</sup> Harassment, instruction to discrimination, victimization and segregation are also deemed as forms of discrimination and thus are prohibited.<sup>56</sup> However, despite the fact that the Anti-Discrimination Law has been in force since 2004, there are not many discrimination cases, which have reached the courts. As has been previously reported, this is partly due to inadequacies of the law itself in relation to the procedures<sup>57</sup> and lack of an independent equality body<sup>58</sup> that would assist victims of discrimination to seek redress.<sup>59</sup>

During 2012, the Government of Kosovo (GoK) included the Anti-Discrimination Law in the legislative agenda to be amended, and the new draft had some improvements, including the addition of gender identity.<sup>60</sup> However, the draft law needs to go further with addressing procedures before the courts

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51 Article 24.2, Constitution of the Republic of Kosovo

52 Article 22, *Ibid*

53 Article 53, *Ibid*

54 Article 2.a, Anti-Discrimination Law, Law No. 2004/3

55 Article 4, *Ibid*

56 Article 3, *Ibid*

57 Chapter II, *Ibid*

58 Chapter III, *Ibid*

59 See report by the Youth Initiative for Human Rights – Kosovo, 'Anti-Discrimination Law in Kosovo – Seven Years On' December 2011, available at [http://ks.yihr.org/public/fck\\_files/ksfile/Anti-Discrimination%20Law%20in%20Kosovo%20-%20seven%20years%20on.pdf](http://ks.yihr.org/public/fck_files/ksfile/Anti-Discrimination%20Law%20in%20Kosovo%20-%20seven%20years%20on.pdf) accessed on May 20, 2014

60 Article 3, Draft Law on the Protection from Discrimination

and the role of an independent equality body, as these two areas have hindered implementation until this point. As part of a larger project, the Council of Europe with the Support of the European Union has provided legislative expertise on three draft laws, including the Anti-Discrimination Law,<sup>61</sup> and the GoK has agreed to take the recommendations into account. The Ombudsperson has been proposed as equality body. In order to ensure a strong Anti-Discrimination Law, that can address these issues, it is critical that the draft law goes through an open and consultative process, where all of these issues can be addressed.

With regard to hate speech, according to the Criminal Code of Kosovo, inciting hatred, discord or intolerance is a criminal offence punishable by a fine or by imprisonment of up to five years. Such hatred, discord or intolerance could be against a national, racial, religious, ethnic or other such group living in the Republic of Kosovo.<sup>62</sup> Since sexual orientation is not specifically recognized, it has been argued that this would fall into 'other such group.' Not explicitly being named as a protected group can potentially create challenges in successfully prosecuting crimes on this basis.

With regard to family recognition, the Constitution of the Republic of Kosovo proscribes that everyone has the right to marry and create a family, but the Family Law of Kosovo<sup>63</sup> proscribes who can exercise this right. According to the Family Law, 'marriage is a legally registered community of two persons of different sexes'.<sup>64</sup> As the legal framework stands, members of the LGBT community would not be able to get married or seek recognition of their cohabitation, since the Family Law does not permit them to exercise their right to private and family life.

The legal status for transgender people in Kosovo is ambiguous. Birth registration in Kosovo is regulated through the Law on Civil Status. The birth certificate legally confirms the birth<sup>65</sup> and one of the details that it will record is sex.<sup>66</sup> Importantly, the law recognizes that the content of the act of birth may be amended in cases expressly stipulated in the Law on Civil Status or other laws in force, although this is not elaborated further.<sup>67</sup> The Law on Personal Names permits that a citizen of legal age may change his/her personal name upon his/her request.<sup>68</sup> Therefore, the legislation currently in force does not permit a person to change the data on their birth certificates and obtain gen-

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61 See report of the Council of Europe, 'Reform Proposals to Energize Non-Judicial Human Rights Institutions in Kosovo', December 2013, available at [http://www.monckton.com/docs/general/REFORM\\_PROPOSALSfinale\\_%20\(1\).pdf](http://www.monckton.com/docs/general/REFORM_PROPOSALSfinale_%20(1).pdf) May 20, 2014

62 Article 147, Criminal Code of Kosovo, Code No. 04/L-082

63 Law No. 2004/32

64 Article 14.1, Family Law of Kosovo

65 Article 32, Law on Civil Status, Law No. 04/L-003

66 Article 36.3.6, *Ibid*

67 Article 38, *Ibid*

68 Article 12, Law on Personal Name, Law No. 02/L-188

der recognition. However, recently a case has been reported of a young woman who had a sex change operation in Germany and she was able to change her name and gender in her Kosovan documents through the assistance of a lawyer. While the legal basis is not clear, it is reported that she had documents from medical professionals and a decision from a German court detailing her sex change, which may have been used to persuade the Kosovan authorities for the necessary changes in her documents.

While the above highlights some of the key areas for the protection of rights based on sexual orientation and gender identity, there is currently no comprehensive review of the Kosovan legal framework for the areas where protection is fully provided and where there are significant gaps and exclusions. Furthermore, there are few lawyers in Kosovo with significant legal expertise in this area, making it difficult for LGBT organizations to participate fully in national conversations regarding draft laws, pursue strategic litigation, or provide assistance for cases that can be initiated under the current legal code.

# GOVERNMENT AND JUSTICE SECTOR

Kosovo has limited mechanisms to hold the Government accountable for implementation of reforms, training, and education. The Office of Good Governance is universally viewed as weak. While people are hopeful about the Advisory Group, they are also extremely skeptical. The fact that it took this long to get started, that many people/organizations did not receive invitations to the first meeting, and the weak mandate furthers the skepticism. Although the ongoing EU's twinning project that plans to provide training to public authorities claims to be considering the specifics of the Kosovo society and to be working closely with the LGBT community to test if the training can work. Judges and prosecutors are universally viewed as challenging. They have undergone little or no training. There is little or no training as part of legal education. Furthermore, the Government of Kosovo is currently providing little or no information about rights based on sexual orientation or gender identity, or the mechanisms for individuals to access their rights.

# THE LGBT ORGANIZATIONS IN KOSOVO

There is a significant number of non-governmental organizations dealing with the promotion and protection of human rights in Kosovo. The majority is project oriented and dependent on donors' financial assistance. Three of them work specifically on the LGBT related issues: CSGD (Center for Social Group Development) which was founded in 2002 and has been offering a drop-in center since 2003. This organization provides the community with relevant information about HIV prevention and HIV test, and referrals. QESH (Center for Social Emancipation), founded in 2005, maintains the largest network for lesbian and bisexual women. It offers support groups, art opportunities, legal assistance, and it organizes lectures at the universities. CEL (Center for Equality and Liberty) was founded in 2013 and works on awareness, advocacy, and empowering the LGBT community. It offers drop-in hours and plans to expand its programming of activities. A major supporter of the LGBT cause in Kosovo is the YIHR (Youth Initiative for human Rights), which regularly cooperates with the LGBT organizations and openly promotes the rights of the LGBT community.

## CONCLUSION

The LGBT rights have become a burning issue in the process of structuring the identity of Kosovo. It remains a sensitive topic and homophobia is pervasive. Verbal and physical abuses against the LGBT persons are not uncommon. This situation demonstrates how challenging the organizational changes that enable the implementation of human rights can be. The attempts to influence changes of social attitudes towards the LGBT persons are typically prevented by Kosovo's deeply ingrained family oriented way of living, frequently grounded in strong religious beliefs that oppose the acceptance of the LGBT persons into the society, which makes the work of the LGBT organizations particularly difficult. Kosovo's high unemployment rate and the difficulties to get a visa to travel abroad leave the LGBT persons with the option to hide their sexual orientation or identity and even marry others of the opposite sex in view of the challenges too difficult to overcome. The modern legislation of



Kosovo has been an important step forward, even though the laws are not implemented. The LGBT organizations in Kosovo can influence the implementation of the laws through work on advocacy, awareness, and empowering. The LGBT organizations offer safe places where individuals can be themselves and socialize with others and therefore improve their well-being. This does not mean their services cannot be refreshed and updated to better meet the needs of the community. Today, the LGBT community, as well as Kosovo society, appears unprepared to have an open and robust community. There is a tendency to institutionalize the problem which delays progress and hinders individuals' creativity and initiative, but significant changes at an institutional level cannot come unless the forces for change are greater than those that keep the existing status quo intact.

# RECOMMEN- DATIONS

The recommendations listed below are based on the information provided in this report and are mostly directed to the state stakeholders, non-governmental organizations and will serve as guidance for the work of the members of STEP.

- *Enhancing the Legal Framework* - ensure that the legal framework of Kosovo provides full protections on the basis of sexual orientation and gender identity.
- *Empowering the LGBT Community and Ensuring Effective Services*- strengthening networks to include other human rights organizations that can broaden the base of support. Ensure that there is appropriate training, expectation, and support for professionals so that services are appropriately provided to the members of the LGBT community.
- *Enhance Public Discourse Around the LGBT Rights*- Broaden the discourse by providing support to the LGBT groups, other civil society actors, prominent Kosovars, and government officials to speak out strongly and frequently about the LGBT rights in the frame of human rights and anti-discrimination. Ensure that the media treats the matter appropriately by training media sector and strengthening the capacity of the LGBT groups and human rights groups to hold the media accountable.
- *Increasing the Support of the Government of Kosovo, the Judiciary, and other Duty Bearers ensuring inclusive education* - Ensure cooperation and communication between various projects in the educational sector; at the

primary and secondary level, work on different projects including training of teachers and curriculum reform, both of which can benefit from an enhanced focus on human rights inclusive of the LGBT rights; at the university level, create enhanced teaching tools and teaching opportunities around sexual orientation and gender identity.





