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INTERSECTIONAL DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES AND THE INSTITUTION OF OMBUDSMAN: A TRAFFIC WARDEN AT CRENSHAW'S INTERSECTION

Abstract

Intersectional discrimination, as still young, and the prevailing theoretical concept does not cease to challenge the classical notion of discrimination, and the anti-discrimination legislation and case law based on it. Therefore, the issue related to the conceptual delimitation of different forms of discrimination that occurs on two or more grounds will be considered first. For this purpose, using Maconen's classification, by intersectional discrimination we mean its notion in a narrower sense. Also, the problem of choosing comparators will be considered, through the evaluation of different models present in comparative judicial and constitutional court practice, since this problem has its direct impact on how differently organized ombudsmen can respond to the challenge of intersectional discrimination. The role of the ombudsman in the fight against intersectional discrimination against women with disabilities is proving to be very important, especially given the advantage that comes with the flexibility and wide range of activities of this institution. Therefore, the paper considers various organizational alternatives when it comes to the response of the ombudsman institution to this problem. The basic hypothesis is that a single, integrated institution that covers all prescribed grounds of discrimination is more suitable for multi-layered challenges that intersectional discrimination bring. This conclusion was reached after considering the problem of determining the comparator, but also after comparative legal analysis of the solutions contained in Sweden and Croatia. Finally, the paper will present the Serbian legislative framework and cases from the practice of the Commissioner for the Protection of Equality, as an (umbrella) single purpose ombudsman in the field of discrimination.

Key words: *Intersectional discrimination; Women, Persons with disabilities; Ombudsman; Single purpose ombudsman.*

> „I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discrimating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person."
>
> Dianne Pothier, „Connecting Grounds of Discrimination to Real Peoples′ Real Experiences"

I INTRODUCTION

The notion of intersectional discrimination was introduced into scientific, particularly legal discourse through the efforts of feminist-oriented authors, primarily Kimberle Crenshaw. Encouraged by the unenviable position of black women in the United States, she vividly compared this phenomenon to a car accident at an intersection. Namely, just as a traffic accident can be much more severe if cars come from several, or even all directions at one intersection, so the consequences of discrimination against black women can be drastically more serious if they occur due to intersectional, i.e., discrimination on several grounds.[1] The concept of intersectional discrimination continues to cause considerable misunderstandings and difficulties in practice. Some of the reasons may lie in the fact that this is a newer and still predominantly theoretical concept, but also in the insistence on a qualitatively different experience that it implies. This makes it especially difficult to distinguish between intersectional, not only from conventional – uniaxial understandings of discrimination, but also from other forms of discrimination on several grounds. However, intersectional discrimination, which occurs on two or more grounds, but in such a way that these grounds act not successively, but at the same time inseparably, respects the fact of multi-layered identities, which, since they cannot be separated, thus form a single and indivisible whole of one person's experience.[2] Also, it would be wrong to assume that the experience of intersectional discrimination is as young as the notion of it in legal science. On the contrary – the long historical experience of blacks, but also women with disabilities,[3] members of national minorities, etc. in bearing

1 Dagmar Scheik, 'Executive Summary' in Susanne Burri and Dagmar Scheik (eds.), *Multiple discrimination in EU law opportunities for legal responses to intersectional gender discrimination?* (2009), 4.

2 Mirjana Dokmanović, 'Višestruka i intersekcionalna diskriminacija: koncept, definicije i uvođenje u zakonodavstvo, *Pravni život,* Vol. LXVI, No. 10/2017, 225; Shreya Atrey, *Intersectional discrimination* (2019), 46.

3 One of the most illustrative historical examples of intersectional discrimination is the case of forced sterilization or abortion to which women with disabilities and/or members of certain ethnic groups have been subjected. (Scheik, *op. cit.,* 4.). The practice of forced sterilization of Roma women has been taken on particularly systemic proportions in Czechoslovakia, to the extent that the Czech ombudsman, who played an important and

the disproportionately large burden of discrimination proved as crucial in the theoretical shaping of intersectional discrimination.[4]

Regarding women with disabilities as frequent victims of intersectional discrimination, it is pointed out that they have been invisible in the public sphere for too long due to the refusal to recognize their experience of discrimination a status different from that experienced by men with disabilities or women without disabilities.[5] Although intersectionality as a concept was partially recognized by acts such as the Durban Declaration, a significant normative shift on this issue in the international legal field was made with the adoption of the Convention on the Rights of Persons with Disabilities, whose art. 6 directly refers to women with disabilities and recognizes the exposure of women and girls to multiple discrimination. However, certain problems related to the response to the challenge of intersectional discrimination have been remained. Therefore, in addition to the reactive approach based on resolving complaints, the importance of the preventive approach through proactive duties and measures that can be used to address the problem of intersectional inequalities has been increasingly emphasized.[6]When it comes to the reactive measures, for the problem of intersectional discrimination, theory strongly suggests the establishment of a single anti-discrimination body, instead of several that are responsible for protection against uniaxial, i.e. discrimination based on one ground only.[7]

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active role before relevant international forums, found in 1991 that the practice was motivated by eugenics. This infamous historical case is at the same time an example of the positive role of the ombudsman institution in disclosing cases of intersectional discrimination and mitigating its consequences (See Gwendolyn Albert and Marek Szilvasi, 'Intersectional Discrimination of Romani Women Forcibly Sterilized in the Former Czechoslovakia and Czech Republic', *Health and Human Rights Journal,* Vol. 19, No. 2/2017, 28). Also, due to long-standing historical circumstances, black women with disabilities in South Africa are marked, due to triple-based marginalization, as the most marginalized group in society, with empirically confirmed negative effects in education, employment and access to social protection. Jacqueline Moodley and Lauren Graham, 'The importance of intersectionality in disability and gender studies', *Empowering women for gender equity-Disability & Gender,* Vol. 29, No. 2/2015, 25–26.

4 Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1/2003, 81.

5 Kosana Beker, *Višesruka diskriminacija žena u Srbiji i odabranim državama* (2019), 508. The practical repercussions of this view were reflected in the absence of significant integration of women with disabilities, both in organizations dealing with the promotion of the rights of persons with disabilities and in the movement dealing with women's rights. The representative of persons with disabilities in Finland, in laconic and at the same time devastating manner, as the cause of such practices cited the fact that organizations dealing with women's rights in Finland simply did not consider women with disabilities to be women. Compare with Tony Emmet and Erna Alant, 'Women and disability: exploring the interface of multiple disadvantage, *Development Southern Africa*, Vol. 23, No. 4/2006, 445. and Timoo Makkonen, *Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore* (2002), 20.

6 Johana Kantola and Kevät Nousianen, 'Institutionalizing Intersectionality in Europe' *International Feminist Journal of Politics – Institutionalizing Intersectionality*, Vol. 11, No. 4/2009, 469.

7 Compare with Beker, *op. cit.,* 508. and Hannett, *op. cit.,* 85.

The institution that can equally cover both the preventive and the reactive segment of the combat against intersectional discrimination, specifically women with disabilities, is the ombudsman institution.[8] The main argument in support of this claim lays not only in the fact that ombudsmen are increasingly mentioned as independent bodies within the Convention on the Rights of Persons with Disabilities[9], but in the high degree of flexibility and adaptability[10] that adorns the ombudsman institution, as a result of its long development. In theory, there is a position according to which the development of the ombudsman institution went through three phases. The first was the phase of proliferation, followed by the phase of diversification within which the so-called specialized or *single purpose* ombudsmen appeared. Their activities were first focused on one specific field of life, such as health, and then their focus moved towards the needs of certain social groups, such as people with disabilities. Finally, the phase of evolution took place, within which a hybrid, or so-called the Human Rights Ombudsman shown up.[11] The request thus facing the ombudsman within the third, evolutionary phase, to made itself visible to particularly vulnerable groups[12], is of special importance in the context of intersectional discrimination. In the same context, the existence of an extensive network of specialized ombudsmen within the diversification phase raises the crucial question of this paper: which organizational form of

8 Although in the literature dedicated to gender studies the term *ombudsperson* can often be found instead of *ombudsman*, in this paper we have opted for the term *ombudsman*. We did so bearing in mind the fact that the word *ombudsman* in the Swedish language is gender neutral, which was also confirmed by the International Ombudsman Association as well as Swedish parliamentary ombudsman himself. Tim Moore, 'Ombudsman Gender Neutral?', Northern Ireland Assembly, 81/15 from 9 June 2015, *http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/8115.pdf?fbclid=IwAR3tAw2g9nhuzS4ri_ev5drEsoBP-9W9mMlpkB-HzPGxuuofLN_aRb2LZS4*.

9 Linda Reif, Enhacing the Role of Ombudsman Institutions in the Protection and Promotion of the Rights of Persons with Disabilities, Conference paper from 10th International Ombudsman Institute Conference, Wellington, 12-16 November 2012., 3, *https://www.theioi.org/downloads/apb7s/Wellington%20Conference_14.%20Working%20Session%20B_Linda%20Reif%20Paper%20%26%20Slides.pdf*

10 For example, the institution of the ombudsman proved to be particularly important during the COVID-19 epidemic, which was accompanied by numerous restrictions and derogations of human rights. For more on the actions of the ombudsman during the state of emergency in Serbia caused by the COVID– 19 epidemic, see Vasilije Marković, Marko Romić, "Vorgehen der Bürgerbeauftragten zur Zeit der COVID-19-Pandemie – die Erfahrung der Republik Serbien" in Wolfgang Rorbach (ed.) *Wertewandel und Werterenaissance in Zeiten der Pandemie und Klimakrise* (2022), 339–343.

11 Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory (ed.) *Righting Wrongs: The Ombudsman in Six Continents* (2000), 8–15. More on a certain reverse or negative aspects of these development phases, especially the first one reflected through the proliferation of the ombudsman institution, see Victor Ayeni, Typology of Ombudsman Institutions, Occasional paper 30, International Ombudsman Institute, September 1985, *https://www.theioi.org/downloads/9r7ft/IOI%20Canada_Occasional%20Paper%2030_Victor%20Ayeni_A%20Typology%20of%20OM%20Institutions_1985.pdf*.

12 Daniel Jacoby, 'The Future of Ombudsman' in Linda Rief (ed.) *International Ombudsman Angology* (1999), 33.

the ombudsman institution is more suitable for the complex challenge of intersectional discrimination against women with disabilities – general or single purpose ombudsmen? In case a single purpose ombudsman is a better solution, an additional question arises, what is the adequate measure of specialization?

However, before a more comprehensive consideration of this problem, it is necessary to consider in more depth the related and important issues concerning the distinction between intersectional and other forms of discrimination, as well as the difficulties in determining the comparator.

II INTERSECTIONAL DISCRIMINATION – CERTAIN CONCEPTUAL DILEMMAS

1. Terminological and conceptual clarifications

Incorporating an intersectional approach when addressing discrimination can lead us from a binary to a more global human rights perspective,[13] since it emphasizes multiple identities and heterogeneities that exist within a single, ostensibly monolithic, identity group. However, in order to arrive at such a broader picture, it seems that significant terminological and conceptual ambiguities need to be resolved first, followed by the problem of insufficient recognition of intersectional discrimination at the level of national legislation and practices.[14] In that sense, it is inevitable to mention the almost revolutionary significance of the decision of the Constitutional Court of the Republic of South Africa from November 2020 in the Mahlangu Case.[15] With this decision, Constitutional Court for the first time explicitly confirmed the prohibition of intersectional discrimination, using appropriate theories as a way of interpreting the rights guaranteed by the Constitution. Referring to the historical circumstances that led to the gender implications of the racist apartheid system, the Constitutional Court made that "... *the importance of intersectional analysis becomes unavoidable*",[16] thus becoming a reputable example in a broader comparative context.

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13 Emmet and Alant, *op. cit.*, 459.

14 Makkonen, *op. cit*,. 10, 55.

15 In this particular case, the Constitutional Court ruled on the constitutionality of the provisions of the Compensation for Occupational Injuries and Diseases Act 1993, which expressly excluded domestic workers from the definition of an employee when accessing social security assistance in case of injury, disablement or death at workplace. Ms. Mahlangu, partially blind and unable to swim domestic worker, drowned in the pool of her employer. Her daughter, financially dependent on her mother, has filed a lawsuit with the Constitutional Court, arguing that the law has led to indirect intersectional discrimination, as housekeepers in South Africa are predominantly black women. See Shreya Atrey, 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation', *International Journal of Discrimination and Law*, Vol. 21, No. 2/2021, 169–170.

16 *Ibid*., 173–174.

The conceptual definition[17] of intersectional discrimination can be approached in an easiest way with *per genus et differentiam* approach, where Makonen's classification is of valuable importance. The first and easiest step in the conceptual analysis of intersectional discrimination is its delimitation towards "classical", uniaxial discrimination. Classical discrimination is based on the historical heritage according to which social groups are determined by only one identity category (gender, religion, ethnicity, disability), and thus one person is discriminated on the basis of (only) one identity characteristic.[18] In contrast, intersectional discrimination involves multiple grounds. Thus, both "classical" and intersectional discrimination represent putting people in an unequal position, but the number of personal characteristics on the basis of which unequal treatment is performed differs. A much more subtle challenge, however, is to distinguish between intersectional and those forms of discrimination in which there are also more than one personal characteristic that serves as the basis of discrimination. Related to this is the question of the genus term for these forms of discrimination – is it more appropriate to classify all of them under the mutual name of *multiple* or *intersectional discrimination in a broader sense*? Although there is a different point of view among vast majority of Serbian scholars,[19] for the purposes of this paper, we opt for, in accordance with Makonen's classification, the term intersectional discrimination in a broader sense. This is not only because intersectional discrimination, as a genus term, is more frequent in academic writing,[20] but also because the term multiple discrimination carries with it a certain mathematical, i.e. overtone of addition the grounds of discrimination,[21] which is undoubtedly suitable for describing one type of intersectional discrimination in

17 Conceptual analysis is undoubtedly the most useful and prevailing method in legal research today. An example of the use of this scientific method, in the case of an another complex and multi-layered concept, could be found in one earlier paper of ours: Vasilije Marković, "Pojam sekularnosti – istorijski, pravni i aksiološko-etimološki aspekti", *Bogoslovlje,* Vol. 79, No. 2/2020, 103–126.

18 Kantola and Nousianen, *op. cit.* 461.

19 For example, Kosana Beker, starting from the former version of the Law on Prohibition of Discrimination, uses the term multiple discrimination for the genus term of discrimination that occurs on the basis of several personal characteristics. Given the plurality of forms of multiple discrimination, this author then distinguishes between (ordinary) multiple discrimination, additive/compound discrimination and intersectional discrimination. Within this classification, (ordinary) multiple discrimination refers to the exposure of one person to discrimination on several grounds, but not at the same time and not in the same situation. This form corresponds to the notion of multiple discrimination in Maconen's classification. Additive or compound discrimination exists when several grounds act simultaneously, but in such a way that the grounds are building on, and as an example of this form of discrimination, the case of a migrant woman in a difficult search for a gender-segregated occupation is cited. Finally, in the case of intersectional discrimination within this classification, personal characteristics as the basis of discrimination are intertwined so that discrimination in a particular case cannot be analyzed by separate characteristics. This form corresponds to Makonen's notion of intersectional discrimination. See Beker, *op. cit*., 82–87.

20 Makkonen, *op. cit.*, 55.

21 Dokmanović, *op. cit.*, 217.

a broader sense, but can prove to be extremely seductive and inaccurate when it comes to describing the phenomenon we are dealing with in this paper.

So, in accordance with Makonen's classification, intersectional discrimination in a broader sense, i.e., discrimination that occurs on several grounds encompasses *multiple*, *compoun*d and *intersectional discrimination in the narrower sense*, and what can be considered as a watershed between them is the way in which the characteristics that appear as grounds for discrimination interact.

Thus, in the case of *multiple* discrimination, several grounds of discrimination appear, but in a way that they act independently of each other, in temporally and contextually different situations of unequal treatment. In this way, discrimination takes place on one basis in a specific situation, but there is an accumulation of experience of discrimination. A common example is discrimination against women with disabilities on the basis of gender through denial of access to certain jobs, as well as discrimination against them on the basis of disability through the lack of technical conditions for access to public authorities buildings.[22] In some CoE documents, this form of discrimination is also named sequential multiple discrimination.[23] Another form of intersectional discrimination in a broader sense is compound discrimination, recognized in CoE documents as additive multiple discrimination. In this form of intersectional discrimination, the grounds of discrimination coincide, i.e., they happen at the same time, but in a way that one personal characteristic that is the basis of discrimination leans on or adds to another. However, in this form of intersectional discrimination there is no fusion, so each of the personal characteristics that are the grounds of discrimination can be recognized as such independently.[24] Finally, we come to intersectional discrimination in the narrow sense. What is *differentia specifica* of this form of intersectional discrimination is the simultaneous action of the grounds of discrimination in a way that causes a fundamentally different experience of unequal treatment that cannot be stratified into one cause.[25] The grounds of discrimination here interact in such a way putting a person in a specific position, and this position, when it comes to women with disabilities, is qualitatively different from the position of men with and without disabilities.[26] A frequent example of this form of discrimination is the mentioned case of forced sterilization of women with disabilities, especially if they at the same time belong to the certain ethnic group.[27] Thus, the difference in relation to multiple discrimination is obvious and is reflected in the fact that the grounds of discrimination do not occur in different situations, but at the

22 Makkonen, *op. cit*., 10.

23 Council of Europe, *Intersectionality and Multiple Discrimination*, *https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination*.

24 *Ibid.*

25 Emmet and Alant, *op. cit*., 458; Kantola and Nousianen, *op. cit.,* 462.

26 Ana Horvat, 'Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 58, No. 6/2008, 1468.

27 Makkonen, *op. cit.,* 11.

same time. On the other hand, the difference in relation to compound discrimination is more nuanced and is reflected in the fact that the grounds of intersectional discrimination cannot be distinguished, since they participate in creating a unique experience of discrimination not cumulatively, but synergistically and pervasively. An aggravating circumstance in distinguishing between compound and intersectional discrimination in the narrower sense is that the existence of cumulative or substantive interaction of grounds of discrimination is very often an empirical, i.e. an issue that depends on the circumstances of the particular case.[28]

When it comes to the Serbian positive legal framework, the first legal act passed in the field of discrimination was the 2006 Law on Prevention of Discrimination of Persons with Disabilities, and even then its relevance in this area was recognized by scholars, due to multiple discrimination of women with disabilities.[29] Shortly afterwards, the Law on Prohibition of Discrimination was adopted as a kind of *lex generalis* in the field of anti-discrimination legislation. This act, as one of the more severe forms of discrimination, prescribed discrimination of persons on the grounds of two or more personal characteristics (multiple or intersecting discrimination). Although this is not specified in the legal text itself, the Commissioner for the Protection of Equality stated in his Handbook for Recognizing Cases of Discrimination before Public Authorities that multiple discrimination is considered as simultaneous discrimination based on two or more personal characteristics, and intersecting discrimination is considered as simultaneous exposure of person to the different forms of discrimination.[30] Thus, not only did the legal text not sufficiently distinguish between multiple and intersectional (intersecting) discrimination, but the Handbook also failed to bring the intersecting more closely to the notion of intersectional discrimination. It is not surprising then the reaction of the UN Committee on the Elimination of Discrimination against Women, which four years after the adoption of the Law on Prohibition of Discrimination, stated in its Concluding Observations the absence of the concept of intersectional discrimination in Serbian legislation and called for its introduction.[31] That is why, inter alia, the Committee encouraged the Republic of Serbia to adopt a new draft Law on Prohibition of Discrimination.[32]

Amendments to the Law on Prohibition of Discrimination (hereinafter: LPD) from 2021 unambiguously introduced and clarified the notion of inter-

28 Emmet and Alant, *op. cit.,* 458. Kimberlé Crenshaw notices this difference in the experience of black women, who, while experiencing discrimination similar to that of white women or black men, are more likely to be discriminated on the grounds of race and gender, and sometimes experience intersectional discrimination that cannot be reduced to the simple sum of racial and gender discrimination. Cited according Hannett, *op. cit.,* 67.

29 Ivana Krstić, 'Pozitivna diskriminacija žena – mera ostavrenja ravnopravne participacije u društvu' in M. Jovanović (ed.), *Kolektivna prava i pozitivna diskriminacija u ustavnopravnom sistemu Republike Srbije* (2009), 152.

30 Brankica Janković, Jelena Kotević and Marijana Pavjančić, *Priručnik za prepoznavanje slučajeva diskriminacije pred organima javne vlasti* (2016), 115.

31 CEDAW/C/SRB/CO/2-3, from July 2013., paras. 10b, 11b.

32 CEDAW/C/SRB/CO/4, from March 2019, para. 12a.

sectional discrimination into Serbian legislation. Thus, the LPD now in Art. 13 subpara. 5, mentions as one of the severe forms of discrimination the one that occurs on the ground of two or more personal characteristics, regardless of whether the influence of certain personal characteristics can be differentiated (multiple) or not (intersectional discrimination). Therefore, in the legal definition of intersectional discrimination, the criterion of interaction of personal characteristics that are the grounds of discrimination is accepted. This also drew a clearer distinction in relation to multiple discrimination[33], which is certainly a commendable step forward.

2. Comparator paradox

Apart from the unambiguous conceptual definition, the most serious obstacle, in theory and legislation, in the combat against intersectional discrimination is the approach in determining the comparator.[34] In anti-discrimination legislation, a comparator is a person or group who is in the same or similar situation with a discriminated person / group, provided that the comparator differs from that person or group in the presence or absence of a personal characteristic that was grounds for discrimination.[35] The existence of a (hypothetical) comparator in defining and examining the existence of discrimination helps to establish a link between discriminatory action and its cause contained in the grounds of discrimination, since "*comparative activity is inherent*" in determining (in)equal treatment.[36] Basically, the problem of determining the comparator in uniaxial, either direct or indirect discrimination does not exist, and to examine whether a person is discriminated on the grounds of disability, it is relevant experience of a person without disability as a comparator in the same or similar situation. Problems, however, arise in determining comparators in cases of multiple, and especially intersectional, discrimination For example, when it comes to determining discrimination against a woman with a disability, is it, as a comparator, more appropriate a woman without a disability, a man with a disability, or even a person who does not share any of the personal characteristics, such as a man without a disability? The position of a man without a disability is undoubtedly more privileged, but the reason for this may lie in the synergistic action of two

33 It is descriptively defined in the LPD as discrimination in which the influence of certain personal characteristics can be differentiated, and which, it seems, should include both time delimitation and delimitation of the effects that individual personal characteristics produce in the experience of discrimination. Or, to put it differently, the legal formulation of multiple discrimination includes both sequential and additional multiple discrimination. One of the further *de lege ferenda* steps towards a more comprehensive and precise legal recognition of different forms of intersectional discrimination could be the separation and closer explanation of these forms, in accordance with the dominant theoretical classification used in this paper.

34 Scheik, *op. cit.,* 19.

35 Beker, *op. cit.,* 518.

36 Hannet, *op. cit.,* 84, as well as Shreya Atrey, "Comparison in Intersectional Discrimination", *Legal studies,* Vol. 38, No. 3/2018, 379.

personal characteristics (gender and disability), which makes the position of women with disabilities particularly difficult.[37] And maybe, due to the described features of intersectional discrimination, it is incompatible with the notion of comparator? Legislative and judicial practice has not yet been able to offer an unambiguous answer to these questions.

So far, through the effort to solve the problem of comparators in intersectional discrimination in judicial and constitutional case law, several models have been offered – strict, flexible, and contextual comparison, which has proved particularly exemplary in the case law of the Constitutional Court of South Africa in *Hassan Case*. The strict comparison insists on the existence of a comparator even in the case of intersectional discrimination, and considers it a person who shares with the applicant all relevant characteristics, except those listed as the ground of discrimination. In the case of intersectional discrimination against women with disabilities, this may mean either that her comparator is a man without a disability, or that her comparators are a man with a disability and a woman without a disability. Both variations of the strict comparison model have been severely criticized for petitions alleging intersectional discrimination as they ignore the fact that the applicant may share one or more grounds with certain already disadvantaged groups. Thus, by requiring strict comparison, the court may stray too far from the particular nature of intersectional discrimination.[38]

In attempts to make up for the shortcomings of the strict, a model of flexible comparison, present in one case of the Ontario Court of Appeals, appeared. In the Falciner Case, the court started from the postulate of strict comparison in terms of providing separate comparators for each of the grounds of discrimination, but the flexibility, whose role was to take into account the complexity of specific cases, was reflected in the court's ability to either by widening or narrowing, redefines the comparators offered by the applicant. The main shortcoming of this model, in addition to the opportunity for judicial reasoning to intervene in the determination of comparators, was that it maintained the separation of comparators for each of the grounds

37 Beker, *op. cit.,* 88.

38 Atrey (2018), *op. cit.,* 383–386. Particularly problematic in this regard are the practices of Anglo-Saxon courts, which, in order to simplify the complexity of cases of potential intersectional discrimination, insisted that the claimant decide on one personal characteristic by reducing intersectional to uniaxial discrimination, or to designate one comparator for each of the grounds of discrimination. This approach was present in the case of *Bahl v. The Law Society*, where a woman of Asian descent is required to designate a man as a comparator in one part of the request and a person of non-Asian descent in another. Another problematic practice was the doctrine of "sex plus", by which US courts prejudged predominantly personal characteristics (gender), and required that the claimant invoke only one other personal characteristic, in order to prevent a situation in which anti-discrimination demands became like the mythological multi-headed Hydra. The problem with this judicial approach, which equates intersectional with additve multiple discrimination, is that while it allows for a claim based on a larger but still limited number of grounds, it easily overlooks the possibility that, in the complex totality of life, a person can put its identities, such as religious, racial, etc. in front of his comprehensive identity (see Hannett, *op. cit*., 76, as well as Beker, *op. cit*., 520).

of discrimination. Such separation may prove adequate in single or multiple, but not when it comes to the intersectional discrimination.[39]

Finally, it is necessary to mention the contextual comparison inaugurated by the Constitutional Court of the Republic of South Africa in the case of legal exclusion from the inheritance of Muslim widows from polygamous marriages (*Hasan case*). The peculiarity of this model is that, starting from the historical experience and the context of South African society, a Muslim widow from a polygamous marriage was placed at the centre of the intersection of groups composed of 7 comparators that share one, two or no common characteristics. This comprehensive inclusion in the consideration of a spectrum of comparators wider than those offered by the applicant, as well as the non-fragmentation of identity, proved to be helpful in determining the specific nature of the intersectional deficiency. Contextual comparison, thus, unlike strict, is not based on one or separate bases of comparison, nor, unlike flexible comparison, excludes or limits certain relevant comparators *a priori* and without explanation. It was noticed that this model is based on equality of results,[40] which is a process that in the next step could lead to the termination of the need for a comparator in the definition of (intersectional) discrimination.[41] While the role of judges in this process is to, with indisputable knowledge, reputation and skills, bolder enter into the creation of practices based on contextual comparison, [42] the question of the role of the ombudsman in the same process arises. In that sense, it seems that the organizational scheme, which includes a multitude of single purpose ombudsmen, does not correspond to the desired tendencies, but on the contrary, is more in line with logic of strict comparisons, which proved as quite unsuitable to the intersectional discrimination.

III THE INSTITUTION OF THE OMBUDSMAN AS AN EQUALITY BODY IN COMPARATIVE LAW

It is already stated that the process of diversification in the development of the ombudsman institution is characterized by the appearance of the so-called single-purpose ombudsmen, or ombudsmen who specialize either in one area of social life or for particular social group. In principle, single-purpose ombudsmen are compatible with the general-purpose ombudsman, and their functions are identical or complementary.[43] However, the reverse of this process was evident in the inflation of the name ombudsman, which began to be used to denote various institutions and practices, to the extent that in France this increase in the number of "mediators" was characterized as "*ba-*

39 Atrey (2018), *op. cit*., 387–390.

40 *Ibid*., 391–394.

41 Horvat, *op. cit.,* 1464, Kantola and Nousianen, *op. cit.,* 466.

42 Beker, *op. cit*., 523.

43 Compare Marko Davinić, *Evropski ombudsman i loša uprava* (2013), 70., and Dragan Radinović, *Ombudsman i izvršna vlast* (2001), 157.

nalization of the institution of mediator and their powers."[44] Such criticism is especially directed at the executive, or at ombudsmen formed by state or non-state administration bodies with the aim of reacting to the complaints of the users of the services of the body that appointed them. The former are often given the epithet *quasi,* [45] while the latter are even denied the right to the title of ombudsman.[46] In foreign theory also, for the same reasons, it was emphasized that in order to harmonize single and general-purpose ombudsmen, it is necessary to adopt and implement universally accepted principles. One of the most important of these is the adoption of the classic characteristics of ombudsman independence in terms of appointment, funding, work and accountability.[47] On the other hand, the position according to which no institutional form of ombudsman is *a priori* an undoubted guarantor of independence and freedom of decision seems quite well-founded.[48] This is all the more so since the manner of election or appointment of the ombudsman is still socio-culturally conditioned, and does not have to, *eo ispo*, imply the inevitable existence of the independence of this institution.[49]

Based on the arguments presented, we consider the position which would deny the executive model of the ombudsman the name and dignity of that institution to be too exclusive. Therefore, considering the subject of the paper, the comparative analysis took into account both the parliamentary (Republic of Croatia) and some ombudsmen who belong to the executive model (Kingdom of Sweden). An additional reason why these two countries were selected for comparative analysis lies in the fact that they has appointed its own ombudsmen as the body in charge of promoting equality in accordance with Art. 13 of the EU Racial Equality Directive,[50] but through a different and even opposite organizational approach.

In the context of intersectional discrimination against women with disabilities, the activities of equality bodies have proven to be extremely important and useful, according to research.[51] Moreover, within the so-called institutionalization of intersectionality in the European framework are increasingly present attitudes that prefer a single or unified body for equality, with competence on all grounds and in all social areas, as an effective mechanism in the combat against intersectional discrimination.[52]

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44 Cited according Dragaš Denković, "Medijator – francuski ombudsman", *Anali Pravnog fakulteta u Beogradu* Vol. 31, No. 1–4/1983, 266.

45 See Davinić, *op. cit.,* 64.

46 Dragan Milkov, "Specijalizovani ombudsmani", *Zbornik radova Pravnog fakulteta u Novom Sadu* Vol. 41, br. 3/2007, 112,113.

47 Brian Elwood, "How to harmonize general ombudsman activities with those related to specialized ombudsman", *The International Ombudsman Yearbook* (1999), 203–205.

48 Ayeni, *op. cit.,* 17.

49 For more on the *pro et contra* views of executive ombudsman models, see Davinić, *op. cit.,* 64–69.

50 Horvat, *op. cit.,* 1475.

51 Beker, *op. cit.,* 540

52 Kantola and Nousianen, *op. cit.,* 460, 470, as well as Isabelle Chopin and Catharina Germaine, *A comparative analysis of non discrimination law in Europe 2019* (2020), 105.

1. Kingdom of Sweden

The Kingdom of Sweden was a pioneer country when it comes to the institutions of the modern ombudsman. At the same time, Sweden was the country where single-purpose ombudsmen appeared for the first time, through the constitution of a single-purpose ombudsman for military personnel in 1915, after the special need to protect their rights arose.[53] However, in 1968, the parliamentary and single-purpose military ombudsmen were integrated, laying the foundations for the current organizational structure of the parliamentary ombudsman institution in Sweden. Today, this structure consists of four ombudsmen elected in Parliament, who form a single institution, and one of whom is the main parliamentary ombudsman with the task of coordinating the work of the entire institution, and each of the four parliamentary ombudsmen has separate areas of responsibility based on social life. and controlled institutions, instead of categories of vulnerable persons.[54]

In addition to the development of the parliamentary ombudsman institution presented at the end of the 20th century, there were numerous single-purpose ombudsmen in Sweden with a very narrowly defined field of activity (ethnic discrimination, disability, sexual discrimination, press, consumer protection).[55] Among them, the Ombudsman for Equal Opportunities was of special importance, due to his competence in matters of discrimination related to gender-based work, which was a consequence of the legal solution according to which gender equality was protected only in the field of labor market. The significant number of proceedings conducted by this Ombudsman during the 1990s indicated the justification for its introduction into the Swedish legal system,[56] but was also an indication of the need for organizational changes that followed.

Although the practice of these single-purpose ombudsmen in cases of potential intersectional discrimination was very scarce, one case in which the Ombudsman for Ethnic Discrimination acted, concerning discrimination based on sex and ethnicity, was brought before the Labor Court. Although the court found no discrimination in this case, the previous question was whether the Ombudsman for Ethnic Discrimination was competent to address the court at all, ie. whether he had active legitimacy. The court answered this question in the affirmative, considering that there were no legal obstacles for the Ombudsman for Ethnic Discrimination to address the court, but, no less important, he pointed out that in this particular case cooperation

53 Milkov, *op. cit.,* 114.

54 Claes Eklundh, "Švedski parlamentarni ombudsmani", *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3–4/1990, 8–11; Milkov, *op. cit*., 102., as well as Dejan Milenković, „Uporedni pregled institucije Ombudsmana" in Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo (eds.) *Ombudsman– međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* (2002a), 45–49.

55 Milkov, *op. cit.,* 116.

56 Dejan Milenković, „Ostale specijalne vrste ombudsmana" in Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo (eds.) *Ombudsman– međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* (2002b), 232–234.

between Ombudsman for Ethnic Discrimination and Ombudsman for Equal Opportunities was necessary.[57]

In the context of the position of women with disabilities, it is necessary to emphasize the role that the Office of the Ombudsman for Persons with Disabilities, established in the mid-90s of the 20th century, played in solving their problems, since that special emphasis on the problems of women with special needs was put in the work of this single-purpose ombudsman.[58] The reason why the work of this single-purpose ombudsman focuses on the situation of particularly vulnerable groups such as women with disabilities, at a time when the concept of intersectional discrimination is just beginning to break through among scholars, may lie in the fact that the Nordic countries, especially Sweden among them, were pioneers in the concept of gender equality and its institutionalization.[59] Moreover, Sweden was among the top five countries in the world in terms of a quantified representation of equality between women and men.[60]

At the beginning of 21st century, reform processes of harmonization of anti-discrimination legislation and integration of bodies for its implementation has began in the Scandinavian countries, and this process was the most complete in Sweden.[61] From the documents of the Swedish committee preparing the reform, it can be seen that the intention was not so much harmonization as codification of fragmented anti-discrimination legislation into one, more efficient and comprehensive act, so that protection would be as similar as possible for different grounds of discrimination.[62] Also, the Swedish committee mentioned intersectionality as one of the ten arguments in favour of the integration of single-purpose ombudsmen into one institution, which was also proposed as part of the reform, believing that such an institution could improve the situation of people who suffered multiple discrimination. It was stated actually, as one of the examples, that a woman with a disability in that case would no longer have to choose an ombudsman to whom she would like to submit a complaint.[63] The epilogue of the reform was a

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57 Cited according to Ann Numhauser-Henning, Sweden, in Dagmar Scheik, Susanne Burri (eds.) *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination* (2009), 121.

58 Milenković (2002b), *op. cit.*, 231.

59 Anette Borchorst, Freidenvall Lenita, Johanna Kantola, Liza Reisel and Mari Teigen, "Institutionalizing Intersectionality in the Nordic Countries: Anti-Discrimination and Equality in Denmark, Finland, Norway, and Sweden" in A. Krizsan, H. Skjeie & J. Squires (eds.) *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (2012), 60.

60 Liza Reisel, "Legal Harmonization and Intersectionality in Swedish and Norwegian Anti-discrimination Reform", *Social Politics: International Studies in Gender, State & Society*, Vol. 21, No. 2/2014, 221.

61 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit.,* 70.

62 Reisel, *op. cit.*, 232–233.

63 *Ibid.,* 234–238. On the other hand, the Gender Equality Ombudsman pointed out that he did not see how an intersectional perspective could prove useful when it came to the proposed integration. (*Ibid*). The Gender Equality Ombudsman thus articulated the fear

new, unified law on discrimination and the integration of four single-purpose ombudsmen into one institution of the Equality Ombudsman. However, in this 2009 Act, unlike the Norwegian solution, there is no provision that would explicitly determine the competence of the Equality Ombudsman in cases of intersectional discrimination, which, according to some authors, is one of the necessary preconditions for effective combat against intersectional discrimination.[64] While such an explicit legal provision would undoubtedly be helpful, its absence does not necessarily mean a significant reduction in the effectiveness of the fight against intersectional discrimination. First of all, because the competence to act in cases when the allegation of discrimination was based on several grounds was not denied to the ombudsmen before integration, so a fortiori it could not be renounced even after the establishment of the Equality Ombudsman. Also, although it has not found its place in the Act itself, intersectional discrimination and the combat against it have been highlighted in expert reports in the reform process as an important argument in favor of unifying legislation.[65] Finally, some authors are of the opinion that the harmonization of Swedish legislation in the field of discrimination came as a consequence of the integration of single-purpose ombudsmen into one institution, and not *vice-versa*.[66] If such a position is accepted, the importance of intersectionality is even greater, since overcoming doubts about the competence of single-purpose ombudsmen in cases of intersectional discrimination was, perhaps, the reason for the integration of specialized into a single ombudsman for equality.

The impression after a year of work of the integrated Ombudsman for Equality, appointed by the executive, proved to be overwhelmingly positive, and the effectiveness in dealing with multiple discrimination was emphasized (through a noticeable increase in the number of complaints by Roma women).[67] However, the practice related to this problem did not become too widespread,in the following period, and such a trend, at least when it comes to intersectional discrimination based on gender and disability, has not changed significantly in the past few years. Namely, in the Report on Statistics of Complaints to the Equality Ombudsman, which was prepared by the Office of the Equality Ombudsman for the period 2015-2019. it can be noticed that cases of discrimination on the grounds of gender and disability do not exceed one-digit percentage within the total number of applications

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of integration of the ombudsman and resistance to it, which was widely present among gender equality activists. At this point, however, it should be pointed out that it is recognized in theory that the reason for resisting integration, although declaratively based on the interest of particularly vulnerable groups, may often lie in the desire to maintain their own status and position. Richard Carver, "One NHRI or Many? How Many Institutitions Does it Take to Protect Human Rights?– Lessons from the European Experience", *Journal of Human Rights Practice* Vol. 3, No. 1/2011, 3.

64 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit*., 78.

65 Reisel, *op. cit.*, 234.

66 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit.,* 82.

67 Richard Carver, Srdjan Dvornik and Denis Redžepagić, *The Rationalization of the Croatian Human Rights Protection System* (2010), 22.

in this period, which, according to the Report, was 9364. The report states that out of a total of 3,631 complaints submitted due to discrimination on the grounds of disability, only 4% contained gender as a basis for discrimination, while out of 1,711 complaints regarding discrimination based on sex and gender, only 8% cited disability as grounds for discrimination too.[68] If we take into account the understandable barrier stated in the Report on the impossibility to statistically express how many within this percentage there were complaints related to multiple, compound and how many to intersectional discrimination stricto sensu, it can be assumed that the percentage of complaints due to intersectional discrimination was even lower.

Despite the underdeveloped practice, the advantage of the integrated over separate organizational approaches in the ombudsman's work on intersectional discrimination may be confirmed by the principle followed by the Swedish Ombudsman for Equality in cases where the complaint does not clearly state the grounds for discrimination. In such situations, the Equality Ombudsman considers that the complaint of alleged discrimination applies to all those grounds that may be relevant in a particular case.[69] Such a proactive and contextual approach simply would not be possible if the complaint was submitted to separate single-purpose ombudsmen for sexual or disability discrimination. Moreover, by applying this principle, the Equality Ombudsman will help to improve the statistics of the share of complaints related to intersectional discrimination in the total number of complaints, but also to find a more adequate answer to the problem of comparators in intersectional discrimination.

2. Republic of Croatia

Just as Sweden in global terms, Croatia is a pioneer among the countries of the former Yugoslavia. Namely, in Croatia, the institution of the ombudsman (called *Pučki pravobranitelj*), was introduced by the 1991 Constitution and the 1992 Law.[70] In addition to this parliamentary general purpose ombudsman, there is an extensive network of single purpose ombudsmen in the Croatian legal system (for gender equality, children and persons with disabilities).[71] The adoption of the new Anti-Discrimination Law has expanded the powers of general and single purpose ombudsmen, as all four institutions have been inaugurated as equality bodies under the EU Racial Discrimination Directive.[72] However, the competence of the general purpose ombudsman is defined as the broadest, since Articles 12 and 13 of this Law stipulate that single purpose ombudsmen perform certain tasks if determined

68 Diskrimineringsombudsmannen, *Diskriminering 2015–2019 Statistik över anmälningar som har inkommit till DO* (2020), 26–28.

69 *Ibid.*

70 Milenković (2002a) *op. cit*., 117.

71 All of them are being elected in the parliament, while the government of Croatia has a certain role in the election of the ombudsman for persons with disabilities and gender equality.

72 Horvat, *op. cit*., 1454.

by a special law, except for those tasks related to the collection and statistical analysis of discrimination cases, submitting regular and and extraordinary reports on cases of discrimination to Parliament, conducting research and giving opinions and recommendations, and proposing appropriate legal and strategic solutions to the Government.[73]

What is still correctly pointed out in theory as the main problem of the organizational scheme of the ombudsman institution in Croatia is the absence of legal regulation of the case of positive conflict of jurisdiction, which is especially important when it comes to multiple and intersectional discrimination. Moreover, they were pointed out as one of the main motives for pleading for unification into one ombudsman institution. In case single purpose ombudsmen remain, dealing with intersectional discrimination would recquire adopting complicated guidelines on cooperation, depending on the specific grounds of discrimination, while placing cases of intersectional discrimination in the competence of the general purpose ombudsman (*Pučki pravobranitelj*) would necessarily require his close cooperation with narrow professional services, which would also raise the question of the existence of single purpose ombudsmen.[74] The existence of numerous single purpose ombudsmen, with the inevitable impression of complications among citizens due to guidelines for the distribution of competencies, in the context of intersectional discrimination would reopen the problem of choosing a comparator when submitting a complaint.

Since anti-discrimination legislation does not solve the problem of potential positive conflict of jurisdiction, general and single purpose ombudsmen signed an Agreement on Interinstitutional Cooperation in 2013, which provides for mutual notification of cases in which there is a suspicion of overlapping or simultaneous jurisdiction of two or more institution, and the need to exchange information and cooperate in resolving such cases.[75] In addition to the fact that the question of the vague legal nature of this agreement could possibly be raised, it has been criticized in theory with the claim that it does not solve the problem of cases of intersectional discrimination. This is because the division of competencies on the grounds of discrimination prevents the accumulation of coherent experience within one institution. Besides, it was pointed out that in the period from the signing of the agreement until 2018, there was no joint case management by the signatories of the Agreement.[76] The proposal that, regardless of the signed agreement, in cases of intersectional discrimination against women, competent institution is one with adequate experience and ability to see all the complexity of such cases,[77] seems to us too legally imprecise.

73 Zakon o suzbijanju diskriminacije, *Narodne novine* No. 85/08, 112/12.

74 Horvat, *op. cit*., 1477.

75 Sporazum o međuinstitucionalnoj suradnji Pučkog i specijaliziranih pravobranitelja od 10.12.2013. godine, *http://ombudsman.hr/attachments/article/360/Sporazum%20o%20međuinstitucionalnoj%20suradnji.pdf.*

76 Beker, *op. cit.,* 510, 541.

77 *Ibid.,* 241.

Another problem related to the issue of intersectional discrimination is the absence of conceptual differentiation in Croatian anti-discrimination legislation. Unlike the recent amendments in Serbia, the Croatian Anti-Discrimination Law does not distinguish between different forms of intersectional discrimination, but in Art. 6 states that multiple discrimination, as discrimination against a person on several grounds, is one of the more severe forms of discrimination. One of the consequences of such an undifferentiated legal approach to the complex problem of intersectional discrimination is the non-withdrawal of the difference between intersectional and multiple discrimination in the work of the general purpose ombudsman. This logically entails the impossibility of obtaining statistical data on the number of complaints in which the complainant referred to something that could be characterized as intersectional discrimination.[78] What, however, can be read from the statistical data when it comes to complaints related to multiple, and thus certainly in one unknown part and intersectional discrimination, is the avoidance of special and turning primarily to the general purpose Ombudsman, which can be additional signal to the need for the integration of single-purpose ombudsmen in Croatia. Namely, according to the general purpose Ombudsman's report, in 2019, out of a total of 77 on the basis of multiple discrimination, 75 complaints were sent to the general purpose Ombudsman, and only two to the Ombudsman for Children, while the Ombudsmen for Persons with Disabilities and Gender Equality did not receive any complaints on the basis of multiple discrimination. In this context, it is valuable to mention that the Ombudsmen for Persons with Disabilities and Gender Equality in 2019 were addressed by 28, i.e., 308 women.[79] Even in 2020, out of 319 women who addressed the Gender Equality Ombudsman, none of them did so due to multiple discrimination. In 2020, there were 2 complaints before the Ombudsman for Children addressing multiple discrimination, while there were 3 such complaints before the Ombudsman for Persons with Disabilities. The overwhelming majority of such complaints, as many as 54 of them, were submitted to the general purpose Ombudsman (*Pučki pravobranitelj*) in 2020.[80]

The low percentage of citizens addressing single-purpose ombudsmen in cases of multiple discrimination, which may be conditioned by confusion in determining comparators, as well as the insufficiently resolved problem of positive conflict of competences clearly speak in favor of the need for organizational reform of the ombudsman institution in Croatia. In response to the perceived need, it was proposed to either merge into one institution, or at least increase the functional coordination of the existing ones.[81] Between these two possibilities, in the context of intersectional discrimination, we consider full integration as a more adequate solution. If any future reform really goes in that direction, we should not be surprised by the resistance of single-purpose ombudsmen. Such resistance, as the Swedish experience

78 *Ibid.,* 245.

79 Izvješće pučke pravobraniteljice za 2019, Pučki pravobranitelj, Zagreb 2020, 8.

80 Izvješće pučke pravobraniteljice za 2020, Pučki pravobranitelj, Zagreb 2021, 10.

81 Carver, *op. cit.,* 7. as well as Carver, Dvornik and Redžepagić, *op. cit.,* 50.

teaches us, would be partly due to a legitimate suspicion that a unified approach could cover all vulnerable social groups and problems, but it would not be completely devoid of certain much more prosaic motives.

IV LEGAL FRAMEWORK AND PRACTICE OF OMBUDSMAN IN THE REPUBLIC OF SERBIA

In the Republic of Serbia, unlike Croatia, there is no such a wide and extensive network of ombudsman institutions. In addition to the Protector of Citizens (*Zaštitnik građana*), as a general purpose ombudsman, there is also the institution of the Commissioner for Protection of Equality (hereinafter the Commissioner), established by the Law on Prohibition of Discrimination, whose role is to be a specialized ombudsman exclusively in charge of one human right – the right to equality.[82] Although the position of the Commissioner is (still) not regulated by Constitution, he is in all his characteristics a single purpose ombudsman, whose efficiency, just like that of the general purpose ombudsman, should be based on a mixture of personal and institutional authority.[83] Also, the efforts to regulate the mutual relations and actions of the Protector of Citizens and the Commissioner with an agreement similar to the one in Croatia did not bear fruit, but that fact does not represent an obstacle to resolving the problem of a positive conflict of jurisdiction. This is because in practice the Protector of Citizens reacts to complaints for violation of rights which the Commissioner protect with his scope of competences only after citizens use the opportunity to address the Commissioner first, unless there are special circumstances provided by Art. 28 par. 9 of the Law on the Protector of Citizens.[84] This practice undoubtedly contributes to avoiding the problem of conflicts of jurisdiction, and to strengthening the Commissioner as a central institution for protection against discrimination. However, the legal basis for such conduct is not entirely indisputable. Namely, it is based on Art. 28 of the Law on the Protector of Citizens, which determines the protection of rights before the Protector of Citizens as subsidiary in relation to legal proceedings before administrative bodies. The Commissioner, however, is not an administrative body, but a control body that enjoys independence.[85] Analogue treatment of the Commissioner with the administrative body could be overcome by introducing a provision on cooperation of the Protector of Citizens with independent control bodies in the section of the law in which

82 Nevena Petrušić and Aleksandar Molnar, "The Status and Correlations Between the Ombudsman and the Commissioner for the Protection of Equality in the Serbian Legal System" in Miroslav Lazić and Saša Knežević (eds.) *Legal, Social and Political Control in National, International and EU Law* (2016), 86.

83 Marko Davinić, *Nezavisna kontrolna tela u Republici Srbiji* (2018), 275.

84 Redovan godišnji izveštaj Zaštitnika građana za 2020. godinu, 126.

85 Of lesser importance is the fact that the Commissioner's independence is in theory interpreted as just an explanation of his organizational autonomy, and not the systemic independence that the Protector of Citizens enjoys under the Constitution. More about the quasi-constitutional position of the Commissioner and proposals for amending the constitutional text on this issue see Petrušić, Molnar, *op. cit,*. 83.

the same was done when it comes to the regional and local ombudsmen (Articles 40-41 of mentioned Law). In addition to the mentioned practice, as a very positive example of mutual cooperation between the Protector of Citizens and the Commissioner, we should point out the case of joint request for assessing constitutionality and legality of some provisions of the Law on Determining the Maximum Number of Employees in the Public Sector before Constitutional Court. Disputed provision meant sex discrimination against women employed in the public sector, compared both to men in the public sector and women outside the public sector.[86]

How can the described relationship between the Protector of Citizens and the Commissioner affect the position of women with disabilities who are victims of intersectional discrimination? In answering this question, the emphasis should be further shifted to examining the activities of the Commissioner, since this institution is, on behalf of the Republic of Serbia, a member of the EQUINET organization that brings together European equality bodies. Also, the competence of the Commissioner is very broad, so that it covers all grounds for discrimination provided for in Art. 2 of Law on Prohibition of Discrimination.

The new Government Strategy for Gender Equality for the period 2021-2030 points out that the problem of lack of complete data on the challenges faced by particularly vulnerable groups affected by multiple discrimination, including women with disabilities, has not yet been eliminated.[87] Another strategic document went a step further with the assessment that by not establishing a mechanism for monitoring and responding to cases of multiple discrimination, the system remains without an intersectoral mechanism for monitoring these cases, which could be useful for gaining insight into the phenomenon and eliminating its causes and consequences.[88]

From the regular reports of the Commissioner in previous years, we can see a trend of increasing the number of complaints addressing to multiple discrimination (116 of them in 2019, and as many as 177, or almost a quarter of the total number of complaints filed in 2020). However, both reports point out that such information should be taken with a grain of salt because it often happens that complainants list more personal characteristics, especially when they are not sure which personal characteristic was the exact ground for discrimination. Thus, it does not necessarily mean that in each of the complaints there was indeed discrimination on the basis of several personal characteristics.[89] The first special report published by the Commissioner since its establishment, which referred to discrimination against persons with disabilities,

86 Davinić (2018), *op. cit.,* 119.

87 Nacionalna strategija za rodnu ravnopravnost za period 2021–2030. sa akcionim planom za 2021–2023, 61, 100,

88 Polazne osnove za izradu nove strategije prevencije i zaštite od diskriminacije za period 2020–2025, 25.

89 Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2019 godinu, 250; Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2020 godinu, 212.

emphasized that the patriarchal and traditional character of Serbian society greatly complicates the position of women with disabilities, because they are denied the possibility of *"fulfilling traditionally imposed social roles"*. Also, the exposure to violence and the denial of access to health, especially gynaecological services, were singled out as particularly significant problems that this vulnerable group faces with.[90] The Commissioner's Special Report on Discrimination against Women points out that violence against women with disabilities is very widespread, and that women with intellectual and then various forms of physical disability are in the worst position. Also, as another aspect of the difficult position of women with disabilities, the problem of full deprivation of legal capacity, ie very rare use of the institute of partial deprivation of legal capacity, was noticed. The Commissioner saw the reason for this practice in the persistence in the medical approach to disability, which in the international context has been largely replaced by the social approach, which views disability primarily as a socially conditioned problem.[91] One example from the practice of the Commissioner, in which the discriminatory treatment of the Center for Social Work in Rakovica was established, can show very vividly how severe the consequences of deprivation of legal capacity can cause to women with disabilities. Namely, temporary guardian was appointed for a woman in the procedure of deprivation of legal capacity, as well as for her minor child who, based on a temporary conclusion on providing accommodation, should have been placed in the Center for Protection of Infants, Children and Youth in Belgrade. The Center based this decision on the position that it is a person whose "*... intellectual functioning is at the level of mild mental retardation*", and that due to "*..infantility and lack of intellectual capacity for counseling work is not able to independently care for her minor child "*. However, the Commissioner in his Opinion established the existence of discrimination, assessing that allegations of this type have no objective basis.[92] Although in his Opinion the Commissioner did not explicitly address this possibility, in theory this case is characterized as an example of multiple discrimination against women with disabilities.[93]

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90 Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2020 godinu, 58–59.

91 Poseban izveštaj o diskriminaciji žena iz 2015. godine, 172. More on the social approach to the phenomenon of disability and its advantages over the medical one, see: Emmet, Alant, *op. cit.,* 446.

92 Mišljenje Poverenika br. 07-00-290/2014-02.

93 Kosana Beker, „Zaštita višestruko diskriminisanih žena, majke sa invaliditetom u sistemu socijalne zaštite: studije slučaja iz prakse Poverenika za zaštitu ravnopravnosti", in Miomir Kostić, Darko Dimovski, Zdravko Grujić (eds.) *Deca i mladi kao deo sistema: zaštita ili sekundardna traumatizacija*, (2016), 173–174. In one another case concerning the refusal of the Clinic for Gynecology of the Central Committee of Serbia to schedule a gynecological examination for an elderly disabled woman who was deprived of legal capacity, the Commissioner also failed to unequivocally establish the existence of multiple discrimination in the specific case. Here, however, some progress was made by the fact that the Opinion specifically pointed out the worse position of women with disabilities "*...who face many obstacles when providing health care and are often exposed to the risk of multiple discrimination*" Mišljenje Poverenika br. 07-00-437/2014-02.

The same reluctance of the Commissioner to investigate whether there were elements of multiple discrimination against women with disabilities is also noticeable in some other cases.One of them is the determination of the discriminatory behavior of the Commission for the assessment of work ability and the possibility of employment or maintaining employment of persons with disabilities. The Commission thus denied the disabled woman the right to work by determining her the status of a disabled person who cannot maintain employment under any conditions, despite the fact that the complainant previously had work experience.[94] In another similar case, members of the Commission grossly insulted the complainant with inappropriate questions and humiliating approaches.[95] In both cases, the Commissioner pointed out that the actions and decisions of the Commission were based on stereotypes towards people with disabilities, but he did not dare to take a step further, so the question of the existence of stereotypes towards women with disabilities, unfortunately, remained unanswered. Moreover, this action of the Commission can be considered questionable from the point of view of constitutionality, since the Constitution of the Republic of Serbia in Art. 60 st. 5 prescribes a special constitutional guarantee of protection at work for youth, *women* as well as *persons with disabilities*![96] Nevertheless, in another case, the Commissioner issued an Opinion in which indications of a more determined consideration of multiple and intersectional discrimination against women with disabilities can be seen. It is about a complaint submitted by two civil society organizations, adressing discrimination based on gender and disability which occured in the video shown on a public service as part of a humanitarian campaign. The controversial moment in the video was the line spoken by the boy about how, since she became a disabled person, her mother cannot take care of him anymore. In their complaint to the Commissioner, the applicants pointed out that citing illness and gender as grounds for neglecting children represents discrimination against women and people with health problems. What should be especially emphasized in connection with this case is that in the explanation of the Opinion, the Commissioner pointed out that special attention should be paid to the position of women with disabilities who are mothers or want to become mothers, and whose additional problem is their "*social invisibility*" In addition, in the explanation significant attention is devoted to the analysis of stereotype according which women are unable to fulfill the role of mothers due to disability, and that the degree of disability of a woman in a patriarchal society is measured by this very fact. The commissioner considered it "*inadmissible that the public portrayal of mothers with disabilities has been placed in the context of their inability to take care of*

94 Mišljenje Poverenika br. 685/2011.

95 Mišljenje Poverenika br. 07-00-484/2017-02.

96 For more on the constitutional guarantee of special protection at work, see Jovana Misailović, "Posebna radnopravna zaštita materinstva", *Zbornik radova Pravnog fakulteta Niš*, Vol. 59, No. 86, 2020, 238–240; Jovana Misailović, "Zaštita žena od otkaza ugovora o radu" in Dejan Mirović (ed.) *Pravo u funkciji razvoja društva* (2019), 706.; as well as Jovana Rajić Ćalić, "Posebna zaštita žene za vreme trudnoće, porodiljskog odsustva i odsustva radi nege deteta u Srbiji i u uporednom pravu", *Radno i socijalno pravo*, Vol. 23, No. 1/2019, 339–342.

their children".[97] Although in this particular case, intersectional discrimination was still treated indirectly, this case can really be considered as a turning point and a signpost towards a bolder approach in the coming period. Therefore, in theory, the standpoint of the Commissioner in this case is rightly stand out for its contribution to increasing public awareness of the multiple marginalization of women with disabilities.[98]

Certainly, the Commissioner's reluctance to deal more decisively with issues of multiple, and especially intersectional discrimination, which is much more challenging to determine, was also greatly favored by the recent very unclear legislative framework of this more severe form of discrimination. In that sense, the amendments to the anti-discrimination legislation from 2021, which for the first time precisely defined the difference between multiple and intersectional discrimination, can have, along with the existing very adequate organizational scheme and competences of the ombudsman institution, especially that single purpose one, a beneficial effect on the future more proactive and successful resolution of this problem women with disabilities are facing with in the Republic of Serbia. Also, as another potentially very effective tool available to the Commissioner in strengthening awareness of the complexity of the problem of intersectional discrimination of women with disabilities, is the institute of strategic litigation. Strategic litigation is a special type of litigation, by which the Commissioner is actively legitimized to file a lawsuit, with the written consent of the person to whom the discriminatory act refers, if he deems the matter to be of strategic or broader social and public interest.[99] Some scholars also points out that an important advantage of strategic litigation is that it can be used as a lever to influence judicial practice and public policies in improving the position of discriminated groups, and that it therefore equally protects discriminated persons and promotes equality.[100] To put it differently, strategic litigation as an instrument achieves equally effective both reactive and preventive action of the ombudsman institution. If we take into account the most common characteristics that in comparative law determine the motivation to initiate strategic litigation, it will quite obvious that the problem of intersectional discrimination meets most of these alternative criteria. Some of those criteria are the potential of a legal issue to later serve for dealing with a social problem or a legal gap, the possibility of a reversal or a more far-reaching effect on courts practice, understanding of the problem in the wider media and public sphere, and above all that, the Commissioner in Serbia in his current practice also took into account whether

97 Mišljenje Poverenika br. 07-00-354/2014-02.

98 Beker (2019), *op. cit.*, 455.

99 Davinić (2018), *op. cit.*, 271.

100 Brankica Janković, Ivana Krstić, „Značaj i uloga strateških parnica u zaštiti od diskriminacije u Republici Srbiji", in *Jačanje kapaciteta institucije ombudsmana za ljudska prava u borbi protiv diskriminacije – Zbornik radova sa konferencije 'Razmjena najboljih iskustava u rješavanju kršenja ljudskih prava sa posebnim fokusom na borbu protiv diskriminacije'* (2018), 80.

discrimination was carried out against particularly vulnerable groups.[101] It is out of question that this last criterion specifically and directly refers to the position of victims of multiple and intersectional discrimination, including women with disabilities.

V CONCLUSION

Even after almost three decades since it was introduced into scientific discourse, intersectional discrimination is not devoid of certain doubts, both theoretical and practical. In the conceptual recognition of this specific form of discrimination on two or more grounds, the criterion of the manner of interaction of personal characteristics that appear as grounds for discrimination proved to be very useful. In intersectional discrimination in the narrower sense, with all the difficulty of its clear recognition in practice, personal characteristics that appear as the basis of discrimination in this case act permeative and inseparable. It is very commendable that the Serbian anti-discrimination legislation has recently adopted this criterion and thus laid the foundations for better recognition and resolution of cases of intersectional discrimination. Another important problem, equally important both for defining intersectional discrimination and combating it in practice, is that the issue of determining the comparator is far from an unambiguous and definitive solution. It seems, however, that until the obsolescence of determining comparators in cases of intersectional discrimination becomes generally accepted, the most adequate solution to this problem is offered by contextual comparison, which has emerged from case law.

What should be the organizational response of the ombudsman institution to the complex challenge of intersectional discrimination, or, using Crenshaw 's metaphor, how many traffic wardens are enough to prevent accidents at a risky intersection, is essentially a functional question. A key argument in favor of more single purpose ombudsmen is based on easier identification with the specific needs of vulnerable groups, whose members place the most trust in institutions whose staff can show empathy and understanding of their particular situation. However, even if we leave aside the prosaicness of other motives that can be found in the practice of single purpose ombudsmen,

101 *Ibid.*, 86–87. Moreover, in 2017, the Commissioner filed a strategic lawsuit specifically regarding the discrimination of a female person based on her health condition and disability, whose employer canceled her employment contract, after she was diagnosed with leukemia. In the statement on the complaint, the defendant employer pointed out that there is no space for employees who have health problems to perform their work. The High Court accepted the claim, but the judgment was changed by the Court of Appeal. The procedure for revising this verdict was not completed until the submission of the Commissioner's regular annual report for 2020 (see Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2017 godinu, 170. and Izveštaj za 2020 godinu, 48). Pending the final outcome of this strategic litigation, its initiation alone may signal the use of this procedural mechanism by the Commissioner in other cases where multiple, and especially intersectional, discrimination is even more noticeable.

such an approach to the back door inevitably introduces an implicit hierarchy of rights and needs of vulnerable groups.[102] It is practically impossible for every vulnerable group to get an institution that would be entirely dedicated to it, and then the position on the degree of vulnerability in a society that requires the establishment of an ombudsman institution inevitably depends on the discretion of the authorities, which can sometimes be arbitrary. The best example of this is Croatia, where, despite a very wide network of single purpose ombudsmen, the most vulnerable social group – national minorities – has never received its own single purpose ombudsman. The porosity of the argument about a better focus on vulnerable groups by more single purpose ombudsmen is most evident in the example of intersectional discrimination. Namely, if such an argument is consistently accepted to its extreme logical limits, then, in the context of intersectional discrimination, the door would be opened to further and unbridled diversification of the ombudsman institution. What makes victims of intersectional discrimination so particularly vulnerable is the inability to identify their experience with vulnerable groups with whom, in a wider concentric circle, they share only some of their personal characteristics. Thus, women with disabilities cannot be fully identified only with women, but also only with the experience of persons with disabilities. If the specialization of the ombudsman institution is a solution for the special experiences of certain vulnerable categories, then it would have to continue to include those groups that are invisible and additionally discriminated within already marginalized social categories. We are witnesses that, fortunately, such a situation does not seem to happen due to very practical reasons.

Metaphorically speaking, while too many traffic wardens at one intersection, due to uneven signalization and / or poor distribution of work, can only increase the risk of accidents, such a danger does not exist if there is only one traffic warden at the intersection. Therefore, data collection and coherent practice in dealing with different grounds of discrimination within one ombudsman institution, which certainly does not mean the impossibility of a quality and empathetic approach to each case separately, seem, especially after the Swedish experience, as a significant advantage of an integrated institution over more specialized ones. Such an integrated institution would, without a doubt, face the multi-layered problem of intersectional discrimination more easily and efficiently, since there would be no issues of disputed jurisdiction, but also no difficulties in determining comparators.

On the other hand, one should be aware of the fact that in some countries of Southeast Europe, the establishment of a single body that would cover several grounds of discrimination was the result of utilitarian reasons, and not the need to really solve the problem of intersectional discrimination.[103] When it comes to Serbia, that was not the case, but only recent legal changes that clarify the concept of intersectional discrimination, with the previously broad

102 Carver, *op. cit*., 8–11.

103 Kantola and Nousianen, *op. cit.,* 472.

competence of the Commissioner, and the practice of subsidiary actions of the Protector of Citizens in cases of discrimination, have laid a solid foundation for clearer strategy and addressing intersectional discrimination. Whether the Commissioner, partly by using the institute of strategic litigation, will succeed in that, will be shown by the practice in the following period.

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INTERSEKCIJSKA DISKRIMINACIJA ŽENA I DEVOJAKA SA INVALIDITETOM I INSTITUCIJA OMBUDSMANA: SAOBRAĆAJAC NA RASKRSNICI KRENŠOOVE

Apstrakt

Intersekcijska diskriminacija, kao još uvek mladi, i preovlađujuće teorijski koncept ne prestaje da predstavlja izazov klasičnom poimanju diskriminacije, i na njemu utemeljenom antidiskriminacijskom zakonodavstvu i sudskoj praksi. Stoga će najpre biti razmotreno pitanje koje se odnosi na pojmovno razgraničenje različitih oblika diskriminacije do koje dolazi po dva ili više osnova. U tu svrhu, služeći se Makonenovom klasifikacijom, pod intersekcijskom diskriminacijom podrazumevamo njen pojam u užem smislu. Takođe, biće razmotren i problem odabira uporednika, kroz prikaz različitih modela prisutnih u uporednoj sudskoj i ustavnosudskoj praksi, budući da ovaj problem ima i svoj direktni uticaj na to kako različito organizovani ombudsmani

mogu odgovoriti na izazov intersekcijske diskriminacije. Uloga ombudsmana u borbi protiv intersekcijske diskriminacije žena sa invaliditetom pokazuje se kao veoma značajna, posebno imajući u vidu prednost koju sa sobom donose fleksibilnost i široki spektar delovanja ove institucije. Stoga se u radu razmatraju različite organizacione alternative kada je u pitanju odgovor institucije ombudsmana na ovaj problem. Osnovna hipoteza je da višeslojnosti izazova intersekcijske diskriminacije više odgovara jedna, integrisana institucija, koja pokriva sve propisane osnove diskriminacije. Do ovakvog zaključka došlo se nakon razmatranja problema određenja uporednika, ali i uporednopravne analize rešenja u Švedskoj i Hrvatskoj. Naposletku, u radu će biti prikazani srpski zakonodavni okvir i slučajevi iz prakse Poverenika za zaštitu ravnopravnosti, kao (krovnog) specijalizovanog ombudsmana u oblasti diskriminacije.

Ključne reči: *Intersekcionalna diskriminacija; Žene; Osobe sa invaliditetom; Ombudsman; Specijalizovani ombudsmani.*