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Review

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THE EFFICIENCY OF LABOUR DISPUTES RESOLUTION IN BOSNIA AND HERZEGOVINA

Summary: *Lengthy and slow judicial proceedings involve delays in the resolution of disputes after the legally set deadlines. The problem of lengthy judicial proceedings, when it comes to resolving the labour disputes, is common in BiH courts, and it is a significant problem. Labour disputes are cases which the judges are required to resolve in an expedited procedure and they have priority. However, these disputes, which should be urgent, are often processed for several years. This is how the urgent cases become lengthy trials which often question the judicial proceedings given that time plays an important role in the exercise of rights. The practice in the developed countries has shown that the introduction of specialized courts or special departments for labour disputes positively affects the uniform application of the law, a significant acceleration of proceedings, as well as the effective enforcement of court decisions. Unfortunately, a negligible number of courts in BiH have formed special departments for labour disputes or have judges who exclusively deal with labour relations cases. This means that the vast majority of courts in BiH have not established special departments for cases concerning labour relations, although this measure is recommended to the courts by the leading judicial institutions.*

Key words: *labour disputes, resolution efficiency, labour relations*

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INTRODUCTION

The industrial relations system in BiH is a subsystem of general economic, social and legal system of BiH and its entities, that is the Republic of Srpska (RS), the Federation of Bosnia and Herzegovina (FBiH) and Brčko District (BD). It is based on legal provisions and collective agreements of various entities and the District, and it regulates the establishment of labour relations and other relevant issues, the resolution of labour disputes (mediation, conciliation, arbitration), the implementation of the tripartite and bipartite social dialogue (i.e. collective bargaining) and issues concerning strike.

At the state level there are only regulations that regulate the labour relations of civil servants and employees who work in the institutions of BiH. In the entities and in the District, the Labour Law enabled the establishment of the Social and Economic Council on a tripartite basis, while in the Republic of Srpska the Law on Social and Economic Council has been adopted. The same laws allow for collective bargaining in order to conclude the general, sectorial and collective agreements at the company level, as well as at the level of one or more cantons within the FBiH. If the peaceful resolution of disputes fails, labour disputes are resolved before a court. In Bosnia and Herzegovina (the state level, entity level and district level) there are no labour courts or special departments for the resolution of labour disputes in the framework of the regular court system. Such disputes are resolved by the courts of general jurisdiction, which deal with civil disputes. The weaknesses of the judicial system include judicial proceedings which last for a very long time, lack of awareness of the parties to the dispute, high cost and the fact that the employee has the burden of proof. There are currently no specific laws relating to alternative dispute resolution in Bosnia and Herzegovina and its entities. These issues are regulated by the relevant Labour Law, the laws on strikes, Law on Social and Economic Council of the Republic of Srpska, the general and sectorial collective agreements and collective agreements at the company or canton level, as well as the labour regulations at the enterprise level.

The slowness and inefficiency of the judiciary can be seen in the segment of labour disputes. It shows that we should look for other ways of resolv-

ing labour disputes. Given their significance and character, the requirements for establishing special - specialized labour courts are justified in order to facilitate more effective resolution of disputes which do not have only a legal nature, but deep social and existential nature. Finally, these requirements are based on theoretical standpoints, as well as the positive results of the practice of countries which have such courts.

1. RESOLUTION OF LABOUR DISPUTES BEFORE A COURT

The courts are authorised on behalf of the state to seek and punish entities that have violated laws and legal norms, and to resolve disputes that have occurred as a result of certain standardized relations between individuals and legal entities. When it comes to labour relations, the role of the court is to provide a quick, efficient, and independent protection of guaranteed rights so as to avoid, prevent or compensate for bad consequences for employees, employers/companies and the economy (Centre for Judicial and Prosecutorial Training of the Republic of Srpska 2011, 5). In this regard, the courts ensure the application of the current regulations to individual cases and resolve labour disputes that arise between employees and employers, or between trade unions and employers or employers' associations concerning the violation of rights, interests, or non-performance of obligations under the employment contract. The courts provide, in terms of individual labour disputes, three forms of protection (Tadić 2012, 203):

- a) declaratory protection, which determines the existence or non-existence of employment or certain rights from that relationship,
- b) condemnatory protection, within which the court orders the defendant to do something/undergo/pay or miss, and
- c) constitutional protection, which includes the imposition of some legal changes (Demir 2011, 27).

At the same time, in the case of collective labour dispute, the parties to the collective agreement can seek legal protection before a court. Resolving individual and collective disputes is regulated by two laws: Labour Law and the Law of Civil Procedure, while judicial proceedings are conducted before the regular courts in civil proceedings.

In BiH, there are no specialized labour courts. In the first instance the competent court is the municipal court (Federation of BiH) or the Court of

General Jurisdiction (Republic of Srpska) which have a general jurisdiction over the defendant. Given the nature of individual labour disputes, the employee is always a plaintiff and the employer is a defendant. When the employee is a plaintiff in a labour dispute, then, in addition to the court which has general territorial jurisdiction for the defendant, the following courts also have jurisdiction:

- a) the court which has jurisdiction in the territory where the work was or is performed,
- b) the court which has jurisdiction in the territory where the work must be performed,
- c) the court which has jurisdiction in the territory where the employment started (Demir 2011, 28).

Appeals against the decisions of municipal or court of general jurisdiction are processed by the cantonal (Federation of BiH) or the district court (Republic of Srpska).

The Supreme Court of the Federation of BiH or the Supreme Court of Republic of Srpska decides against the decision of the cantonal/district courts which in this case are authorised to make decisions on a regular legal remedy. Judicial proceedings is not linked to a prior request for the protection of the rights submitted to the employer. The judicial protection emerges as a continuation of the legal protection of employment, if it has not been realized with the employer (Gradašćević-Sijerčić et al. 2007, 37). The merit of employees' claim in the judicial proceedings is evaluated in relation to the decisions and actions of the employer, so that the process of achieving the protection of labour rights, regardless of what takes place in two forms, is one unity. It is especially important that the litigation of a labour dispute before the court against the decision of the employer does not have a suspensive action in relation to this decision. Its effects are reversed only after the enactment of a final court judgement which declares such decision void, or its abrogation by the employer.

The judicial protection of their rights and the procedure is started by an employee's lawsuit to establish that the act of the employer by which the employer decided on rights and obligations arising from employment is not permitted, and by a condemnatory request to return to the job or exercise other rights. The point of the claim is to return the employee to the

legal status prior to unlawful decision of the employer (Demir 2011, 29). If the employee does not want to return to work for the employer, he/she is entitled to the declaratory protection that will enable him/her to establish and exercise the labour relations rights. The deadline for submitting claims is one year from the date of learning of such violation, and not later than 3 years from the date of the violation. Upon the expiry of the deadline the right to judicial protection is lost. It is also important to point out that the courts are required to resolve labour disputes in accordance with the regulations, in an expedited procedure.

2. ANALYSIS OF THE EFFICIENCY OF LABOUR DISPUTES RESOLUTION IN BIH

Analysis of the efficiency of labour disputes resolution in Bosnia and Herzegovina included 54 courts, as follows: The Supreme Court of RS, the Supreme Court of the Federation of BiH, Appellate Court of the Brčko District, Courts of General Jurisdiction in Bijeljina, Brčko, Vlasenica, Teslić, Derventa, Sokolac, Kotor Varoš, Doboj, Prijedor, Trebinje, Banja Luka; Municipal Courts in: Konjic, Goražde, Mostar, Visoko, Tešanj, Zenica, Velika Kladuša, Kalesija, Cazin, Travnik, Bugojno, Sanski Most, Foča, Sarajevo, Kiseljak, Tuzla, Široki Brijeg, Žepče, Bosanska Krupa, Gradačac, Zavidovići, Ljubuški, Orašje, Kakanj, Livno; District Courts in: Bijeljina, East Sarajevo, Banja Luka, Doboj, Trebinje; Cantonal Courts in: Sarajevo, Novi Travnik, Bihać, Goražde, Livno.

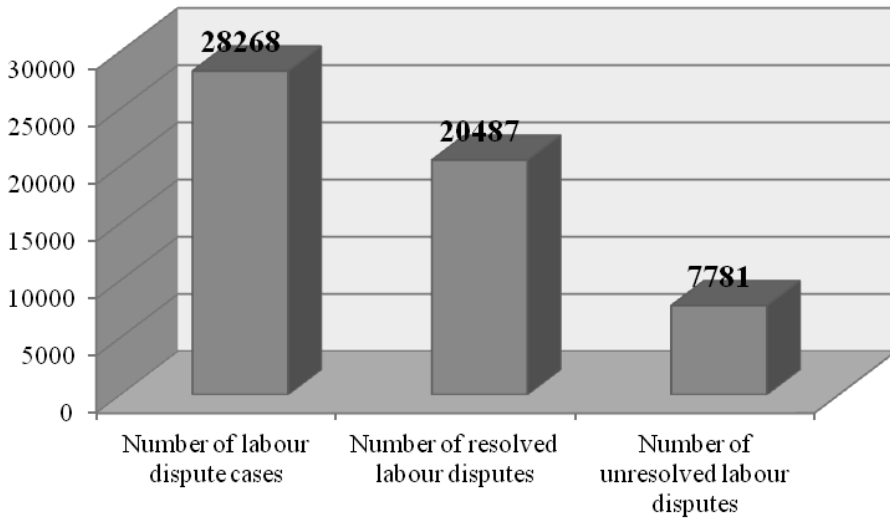
The main factor affecting the efficiency of the judiciary in BiH when it comes to the protection of labour rights is the large number of cases in this area but also generally large number of cases in the courts, and a significant number of them are old or backlog cases (the High Judicial and Prosecutorial Council of Bosnia and Herzegovina 2014, 3). Overview of the situation in the courts in BiH points to the fact that municipal and courts of general jurisdiction operating in major cities or in municipalities with large population have higher number of cases concerning the labour relations.

At the same time, these courts have insufficient number of judges. For example, the Municipal Court in Mostar at the beginning of 2014 had 44,187 cases, of which 4,088 disputes in the area of labour relations, while only

3 judges work exclusively on these cases. Municipal Court in Visoko processes about 36,936 cases, with 228 cases in the area of labour relations, and there are 6 judges working on these disputes but also on other cases. Municipal Court in Sarajevo has 843,347 cases, of which 3,981 are labour disputes and there are 7 judges within the Civil Department working on these and other cases. Accordingly, it is not surprising that the main issue that the courts have when it comes to resolving labour relations disputes is the insufficient number of judges due to the volume of work.

Resolving the issue of backlog of cases in the courts, including labour disputes, is provided by the authorities in BiH in their strategic documents. The Justice Sector Reform Strategy (JSRS) in BiH contains certain measures that should contribute to more efficient operation of courts and resolving backlog of cases. The measures directly related to the backlog of cases include: the introduction of a case management system, the introduction of time frames for the cases, and increase of number of judges. The introduction of the case management system should enable the exchange of information and collection of statistics, recording significant trends, ensure greater uniformity in the way of court management and opportunities for the exchange of the best practices.

In 2009, the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina has made a decision to increase the number of judges in the courts in order to, among other things, improve the efficiency of the courts in resolving the backlog of cases, so it was suggested that the number of judges in the first instance courts should be increased by 21%, while in the appellate courts the number of judges should be increased by 34%. It was also suggested to increase the number of professional staff in the courts by 102%.



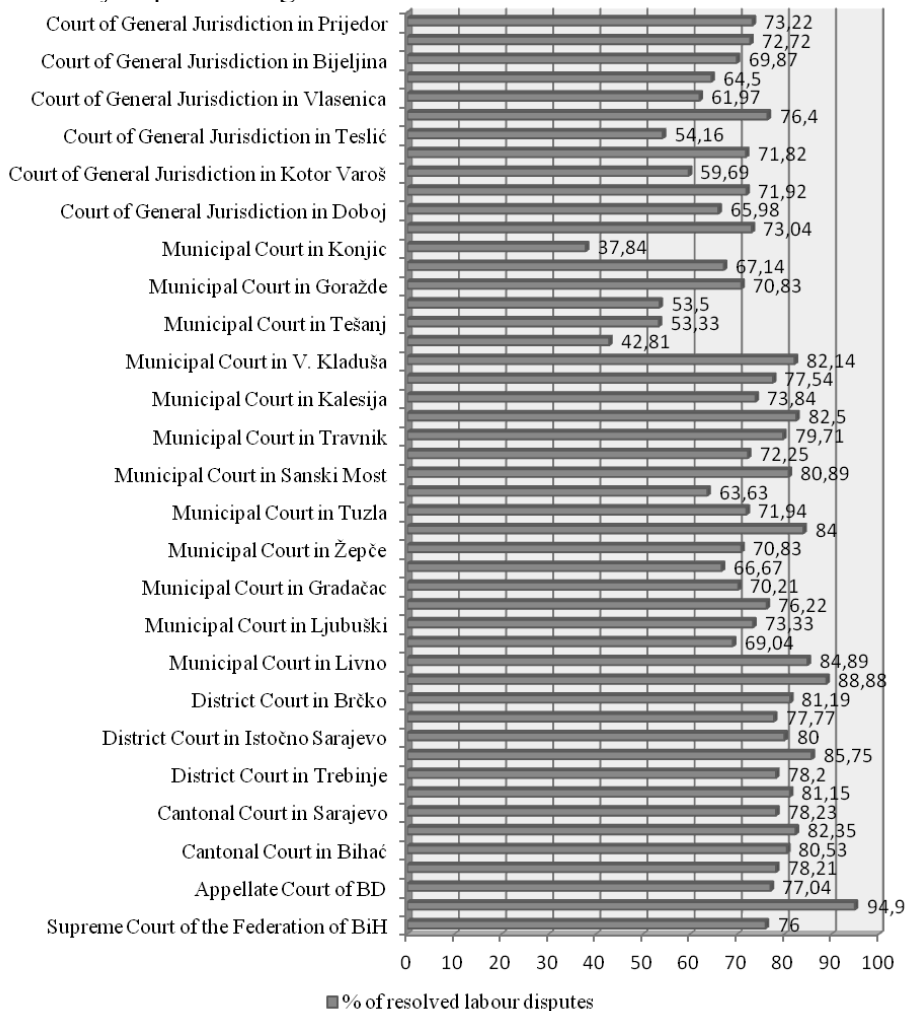
Graph 1. The total number of resolved and unresolved labour disputes in 2014 (author)

However, this measure has not yet shown any results and good practices also show the limited impact of this measure. In the study on the management of backlog of cases in the courts, which was recently conducted, it is pointed to the fact that it would take years to employ all the judges, so the increase of number of judges does not have a positive effect on the number of resolved cases. The authors of the study suggested introducing a system of evaluation of the work of the judges and courts. This method, already widely applied in developed countries has shown great results when it comes to the efficiency of the courts (Bečirović, Demirović, Šabeta 2014, 65).

Also, the introduction of time frames for the cases proved as partially effective method in several countries, as well as the introduction of individual calendars for the judges through which it is possible to monitor each case and the time that the judge devotes to resolving a dispute (Demir 2011, 31). Lengthy and slow judicial proceedings involve delays in the resolution of disputes after the legally set deadlines. The problem of lengthy judicial proceedings, when it comes to resolving the labour disputes, is common in BiH courts, and it is a significant problem.

Labour disputes are cases which the judges are required to resolve in an expedited procedure and they have priority. However, these disputes, which

should be resolved in an expedited procedure, are often resolved after several years in BiH: even between 3 and 5 years, i.e. there is not a single case that was resolved in an expedited procedure. This is how the urgent cases become lengthy trials which often question the judicial proceedings given that time plays an important role in the exercise of rights. At the same time, each delayed proceedings is an unresolved case.



Graph 2. The percentage of resolved cases in 2014 (author)

Good practices in the world confirm that computerization can help to speed up the process of resolving labour disputes. Also, the practice in the world has shown that, besides computerization, training in management can also significantly decrease the number of cases in courts and speed up the resolution of labour disputes. Also, work procedures (filing a lawsuit, case processing, etc.) should be analysed and reviewed in order to reduce delays and costs (Düvel et al. 2005, 27). In addition, the practice in developed countries has shown that the introduction of specialized labour courts or special departments for labour disputes positively affect the uniform application of the law, and a significant acceleration of procedures (Botero et al. 2003, 41), as well as the prompt implementation of court decisions. Unfortunately, a negligible number of courts in BiH have formed special departments for labour disputes (only 3 out of 54 courts that were analysed) or have judges who exclusively deal with labour relations cases. This means that the vast majority of courts in BiH have not established special departments for cases concerning labour relations, although this measure is recommended to the courts by the leading judicial institutions. When it comes to labour disputes, the common occurrence and problem is the failure to execute court decisions. According to the Law on Enforcement Procedure (Official Gazette of BiH no. 32/03 and 33/06) the payment of these funds is possible only if there are funds provided for this purpose in the budgets of the institutions, and considering that these funds are constantly decreased in the budgets, their payment is questionable. Also, the problem of non-execution of court decisions occurs when it comes to the mode of payment related to the processes which were won by people against the Republic of Srpska and the Federation of BiH, which is regulated by the Law on Establishment and Mode of Settlement of the Internal Obligations of the Federation of BiH (Official Gazette of Federation of BiH no. 9/04) and the Law on Establishment and Settlement of Internal Debt of the Republic of Srpska (Official Gazette of the Republic of Srpska no. 28/13, 41/13, 59/13). These payments are made in bonds and the parties are not satisfied with the circumstances or deadlines. A common problem, particularly relevant for labour relations, is the inability of citizens to realize their receivables due to insolvency of the company where they worked. A large influx of labour disputes cases is caused primarily by poor

implementation of general acts of employers or their incompatibility with the laws - particularly the employment contract - by employers, regardless of whether the employer comes from the private or public sector. Thus, a great number of violations of labour rights are the underlying causes of the large number of cases in the courts.

In this regard, it is important to act preventively in order to relieve the courts but also to prevent the violations. As the courts cannot do much in this regard, preventing the widespread practice of violating labour rights will require a systematic approach to the problem by the executive authority and the authorities that monitor the implementation of laws. Therefore, it is important to consider that, when it comes to labour disputes, resolving problems in the courts should be accompanied by reforms in other areas. First of all, the relevant institutions should work to strengthen the institutions and procedures in accounting and auditing in the private and public sectors. Information on employers who violate the rights of their employees should become public, and such companies must not be the beneficiaries of benefits or subsidies awarded by the institutions of the government (Kazić 2011, 63).

In addition to strengthening institutions and procedures in accounting and auditing, it is necessary to increase the competence of the labour inspection and penalties imposed by these institutions. These public institutions responsible for monitoring of the implementation of the law are powerless at the moment. The work of administrations for inspection affairs is inefficient because their jurisdiction is limited and penal policy they apply is weak (Duraković 2011, 55). So, the inspection fines the employer of the employees who work "off the books" with about 1,000 BAM, regardless of whether there are one or 300 such employees. Small fines and high taxes for contributions affect the fact that a large number of employers, including even public institutions and companies, consider paying fines much lower expenditure than regular fulfilment of legal obligations to register and pay social and pension benefits to the employees (Initiative and Civil Action 2009, 7).

At the same time, the protection of labour rights through collective action is considerably weaker. Union organizing is often denied right by the employers, while the institutions of councils of employees are almost rarely,

if at all, used within the company. At the same time, the unions often complain about regulations related to the strikes. In order to strengthen the application of these mechanisms of collective action, it is necessary to work on strengthening of the social dialogue, especially through the social and economic councils. The role of the Social and Economic Councils (SECs) in the Federation of BiH and the Republic of Srpska, and at the state level, is to harmonize economic and social policies, and to conclude and implement collective agreements (Demir 2011, 33). Consequently, these councils have the authority to ask for information and monitor the implementation of policies, laws and general agreements. Strengthening social and economic councils at the state level would enable a greater impact of the union on decision-making processes in the area of labour and thereby reduce violations of labour rights and the influx of cases to the courts.

At the same time, a large influx of cases in the courts in the area of labour relations is also caused by the poor utilization of measures prior to judicial proceedings or alternative dispute resolution mechanisms. It has been proven that mediation services and other alternative methods of dispute resolution in the courts solve a large number of problems that the courts face, including a large influx of cases, and significantly reduce costs.

Alternative dispute resolution refers to methods of resolving disputes in the workplace. The methods of alternative dispute resolution includes the conciliation, mediation and arbitration, which are started by a mediator or arbitrator. Mediation involves processes through which a third party has a role to assist in communication between the feuding parties. Mediation involves a procedure in which a third party helps to reach an agreement between two or more people in a dispute, and arbitration involves a similar process but in arbitration a third party makes a binding decision. These types of alternative dispute resolution include non-judicial form of dispute resolution. However, there is also a judicial form of alternative dispute resolution which includes the involvement of a judicial authority, usually a judge, immediately before a hearing. The main aim of alternative dispute resolution is a resolution of the dispute as soon as possible.

Past practice has shown that the alternative dispute resolution is more successful for certain types of disputes which are more complex, more versatile, such as unspecific dismissal, discrimination in the workplace or

violence, while in specific cases, such as non-payment of salaries, the alternative dispute resolution has a limited effect. One of the primary benefits of alternative dispute resolution is to provide solutions that are acceptable to both parties to the dispute and thus ensure peace in the workplace. In this way, alternative dispute resolution contributes to greater legal security and stabilization of the social situation in the society. At the same time, the advantage of alternative dispute resolution is the speed of resolving disputes and lower costs compared to the lengthy court proceedings.

CONCLUSION

Overview of the situation in the courts in BiH points to the fact that municipal and courts of general jurisdiction operating in major cities or in municipalities with large population have higher number of cases in the area of labour relations. Lengthy court proceedings directly increase the costs of the procedure and the time and cost of access to justice. Accordingly, lengthy trials will cost more, and at the same time the access to justice for the citizens of poor economic status will be difficult.

A large influx of cases in the area of labour disputes is caused primarily by poor implementation of general acts of employers or their incompatibility with the laws, especially the employment contract, by employers, regardless of whether the employer comes from the private or public sector. In order to efficiently resolve labour disputes, it is necessary to take the following measures:

- Increase the number of judges working on labour relations cases, as well as associates and supporting administrative staff;
- Increase the availability of free legal aid;
- Increase the availability of mediation and other mechanisms for alternative dispute resolution, particularly extra judicial forms of these methods;
- Educate citizens on legal mechanisms for the protection of labour rights and judicial proceedings;
- Involvement of the trade unions in resolving individual labour disputes;
- Specialization of the courts and the establishment of labour courts, or at least establishment of special departments within the courts;

- Specialization of judges: appointment and training of judges who should work only on these cases;
- Preventive work within the relevant institutions in the executive authorities (the harmonization of collective agreements with the legislation; strengthening the role and jurisdiction of the inspections and tax administration).

REFERENCES

1. Bečirović, Azra i Demirović, Amer i Šabeta, Rusmir. 2014. *Posljednji korak u reformi sudstva: rješavanje svih predmeta u razumnom roku*. Sarajevo: Fond otvoreno društvo BiH, Program podrške istraživanjima u oblasti javnih politika.
2. Botero, Juan Carlos i La Porta, Rafael i López-de-Silanes, Florencio i Shleifer, Andrei i Volokh, Alexander. 2003. "Judicial Reform". *World Bank Research Observer* 18 (1): 61-88. Datum pristupa 25. maj 2016. doi: 10.1093/wbro/lkg005.
3. Visoko sudsko i tužilačko vijeće (VSTV) BiH. 2014. *Rješavanje starih predmeta u sudovima*. Sarajevo: VSTV Bosne i Hercegovine.
4. Gradašćević Sijerčić, Jasminka. 2007. *Modul 2 – Radno zakonodavstvo u Bosni i Hercegovini: Radni odnosi u praksi*. Sarajevo: Visoko sudsko i tužilačko vijeće Bosne i Hercegovine, JU Centar za edukacija sudija i tužilaca Federacije Bosne i Hercegovine, Centar za edukaciju sudija i tužilaca Republike Srpske.
5. Demir, Elma. 2011. *Izveštaj o rezultatima održanih stručno-konsultativnih sastanaka u oblasti rada i zapošljavanja*. Sarajevo: Forum sindikalnih aktivista i aktivistica SDP-a.
6. Demir, Elma. 2011. "Sudska zaštita prava iz radnih odnosa u Bosni i Hercegovini." *Pristup pravdi u Bosni i Hercegovini*. Azra Šehić, Elma Demir, Ivana Stipanović, Jasmin Jašarević, Maja Sahadžić, Maja Šoštarić, Milena Savić i Rebeka Kotlo, 117-153. Sarajevo: Mreža pravde u Bosni i Hercegovini.

7. Duraković, Besim. 2011. *Prijedlog mjera i aktivnosti na rješavanju problema iz oblasti Kantonalne uprave za inspekcijske poslove TK*. Tuzla: Uprava za inspekcijske poslove TK.
8. Düvel, Wiebke. 2005. *Rešavanje sporova u radnim odnosima: Komparativni pravni pregled u Evropskoj Uniji, Švajcarskoj i zemljama jugoistočne Evrope*. Brisel: Institut evropskog sindikata.
9. Inicijativa i civilna akcija (ICVA). 2009. *Primjena Evropske socijalne povelje kroz zakone i praksu u Bosni i Hercegovini*, Sarajevo.
10. Kazić, Zorica. 2011. *Godišnji pregled radnih odnosa i socijalnog dijaloga u južno-istočnoj Evropi za 2010: Bosna i Hercegovina*. Beograd: Friedrich-Ebert-Stiftung.
11. Tadić, Mato. 2012. *Upravno i radno pravo*. Sarajevo: JP NIO „Službeni list Bosne i Hercegovine“.
12. Centar za edukaciju sudija i tužilaca Republike Srpske, 2011. *Izveštaj i materijali sa Seminara iz građanskopravne oblasti „Radno pravo“*. Mrakovica.
13. „Službene novine Federacije BiH“, broj 32/03 i 33/06.
14. „Službene novine Federacije BiH“, broj 9/04.
15. „Službeni glasnik Republike Srpske“, broj 28/13, 41/13, 59/13.