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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON PROHIBITING DISCRIMINATION OF THE REPUBLIC OF SERBIA

by

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I. Introduction

1. By a letter of 10.10.2007 the Serbian Minister of Labour and Social Policy has asked the Council of Europe and the Venice Commission to provide experts' opinions in relation to the draft Law on the "Prohibition of Discrimination" prepared by the Serbian Ministry of Labour and Social Policy. The present opinion evaluates this draft Law prepared by the Serbian Ministry of Labour and Social Policy.

2. For the purpose of the evaluation of this draft law and especially as to its compatibility with Council of Europe standards, especially Articles 14 of the European Convention on Human Rights and its Protocol 12, the European Social Charter, especially Article E of Part V of the Charter, the EU Directives against discrimination and, with specific attention ECRI materials, especially its 2002 Recommendation no. 7 on the National Legislation on the Fights Against Racism and Racial Discrimination.

3. The draft law proposed by the Serbian authorities constitutes a very important step in improving the normative protection against discrimination in the Republic of Serbia. The discrimination is prohibited expressly by the Constitution of Serbia, adopted by the Parliament on 30 September 2006. There are at least three Constitutional Articles prohibiting discrimination. Among them, Article 21 of the Constitution offers a general prohibition of discrimination.[1] The two other Constitutional Articles prohibit discrimination in specific situations such as in relation to media activities[2] and in the framework of minorities' protection.[3] The proposed law is a comprehensible attempt to guarantee the application of the above mentioned and other Constitutional provisions.

II. General Considerations

4. Is to be asserted that the draft law represents a very serious attempt in this direction and it might be considered as a very comprehensive draft law for the purpose it has. It seeks to

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1 Article 21 of the Serbian Constitution entitled "Prohibition of discrimination" reads:

"All are equal before the Constitution and law.
Everyone shall have the right to equal legal protection, without discrimination.
All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination."

2 Article 50 of the Constitution entitled "Freedom of the Media" in its 3rd and 4th paragraphs reads:

"Censorship shall not be applied in the Republic of Serbia. Competent court may prevent the dissemination of information through means of public informing only when this is necessary in a democratic society to prevent inciting to violent overthrow of the system established by the Constitution or to prevent violation of territorial integrity of the Republic of Serbia, to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence.
The law shall regulate the exercise of right to correct false, incomplete or inaccurately imparted information resulting in violation of rights or interests of any person, and the right to react to communicated information."

3 Article 76 of the Constitution entitled "Prohibition of discrimination against national minorities" reads:

"Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection.
Any discrimination on the grounds of affiliation to a national minority shall be prohibited.
Specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavourable living conditions which particularly affect them."

provide for a general prohibition of discrimination as its Articles 1 and 3 plainly proclaim. To this aim the law, provides for the prohibition of a wide range of discrimination situations, offers detailed definitions and establishes important remedies for making the fight against discrimination work in practice. Generally, in relation to the proposed draft law, there might be outlined the following aspects.

5. The draft law contains very detailed substantial provisions, institutional provisions, procedural ones and effective remedies. To my opinion they are quite well developed and well related to each other in general.

6. The draft law offers a well structured provisions into eight parts which follow each other in a logic and functional line and the I think facilitate the working with the law in the future for the institutions and other subjects having to deal with it.

7. Part VII of the draft law entitled "Penal Provisions", to my opinion either should be integrated within Part V of the Law entitled "Judicial Protection", making this way also a direct and logical link to the procedural provisions of this Part,[4] either following that Part, as Part VI of the Law. This option harmonises better the logic and the role of the provisions of the two parts, having all the same character – providing remedies, administrative, civil or criminal, for the fight against discriminations cases. In relation to the penal provisions, a compatibility exam or reference exercise might have to be considered, if not already done by the Serbian Authorities, for ensuring a cohesion and efficient application of the sanctions of this specific law in the framework of general criminal law, especially from the judiciary.

8. Within the same logic, Part VI of the draft law, entitled "Supervision", would be better to follow the Part "Penal Provisions", as the Supervision of the application of the law should comprise the effectiveness of the Penal Provisions and proceeding in the fight against discrimination. Although the Penal Provisions require the reaction of criminal prosecution bodies, I do not see why their role should be left outside such supervision. The proposed transfer I think reflects better this idea.

9. Generally the law offers very well detailed and comprehensive definitions, with a clear conceptual reference to European acts definitions, being even more detailed and elaborated sometimes. In relation to the definition of discrimination the draft law offers a more precise and detailed list of grounds which do not justify discrimination acts or omissions. (see Article 6)

10. The draft law is oriented very well as to the need for what the draft calls "affirmative" – I would suggest the use of "positive" – actions. In relation to this aspect especially, considering also the concern of the drafters appearing especially in Article 3 § 3, and Article 13 of the draft law, it would be suitable to have a general and clear reference to the principle of proportionality. It might be understood by Article 13 § 2 but the direct terminological reference would give much more impact, considering it constitutes an interpretation principle of the provisions dealing with human rights. This would give an important key for interpretation and application of this proposed law to the Commission and other competent bodies.

11. There is a general remark concerning the language of the texts. Either the provisions sometimes are drafted in very long sentences, even superfluous, either there is a problem of language during the translation. For example the term "unwarranted" could be replaced with "unjustified".

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[4] Such as for instance, Article 46 as to the territorial jurisdiction, Article 49, temporary measures, etc.

III. Considerations in relation to specific provisions

12. Taking into account the general observations as to the pertinence of the draft law provisions generally in this section of the comments focus is given only to remarks related to provisions which might be of concern for the application of the law.

Part I

Articles 2 to 6

13. A very good enunciation of general provisions on this Part, on Articles 2, 3 and 4 of the Draft Law is the most expressive characteristic of this Part. Although it might seem repetitive, especially in Articles 2 and 4, the enunciation of principle of equality seems instead elaborative and useful. It might be suggested to have as Article 3 the actual Article 4 as the purpose of Article 4 seems a further development of Article 2, whereas the purpose of Article 3 is to ban the discrimination, which is indeed the contrary to equality of rights and duties. Then the actual Article 5 follows as the exception a preceding Article on the general ban on discrimination. It might be also proposed to have the actual Article 6 before the current Articles 3 and 5.

Article 7

14. The concept of "voluntary examiner" as defined in item 3 of the first paragraph of this Article becomes superfluous to my opinion in presence of the provision of Article 28, paragraph 1, allowing for any person to submit a complaint against discrimination cases.

Article 8

15. The definition of indirect discrimination in the second paragraph of Article 8 seems not perfectly formulated, especially if read comparatively with the first paragraph of the same Article. The example offered by ECRI in Part I "Definitions" of the above mentioned 2002 Recommendation no. 7, might be the suggested formulation.

Articles 9 to 12

16. Whereas Article 6 seems to provide a very well detailed definition of the discrimination, Article 10 attempts to widen the definition. This could make sense to my understanding only if instead of the term "discrimination" would be used the terms "harassment" or "discriminatory harassment". If this version of Article 10 is to be maintained, it might look like the definition of discrimination it offers narrows the definition given in Article 6 of the draft law. On the other hand, victimisation and harassment being conceived in the draft law as specific aspects of discrimination a closer place to Article 6 would be well deserved for Articles 9, 10 and 12 of the draft law.

17. In relation to the very interesting concept of "serious forms of discrimination" contained in Article 11 of the draft law, it might be suggested to include, as serious forms of discrimination, the victimisation, harassment and advocating and instigating discrimination as well. To my understanding, all these aspects are characterised by a clear subjective element, and therefore are very serious forms of discrimination.

Article 13

18. The term "affirmative" used in Article 13 might be replaced by the term "positive", at least in English understanding.

Article 14

19. It is quite superfluous and might also been seen as limiting the positive impact of the present draft law.

Part II

20. The establishment of the Commission for the Protection of Equality constitutes one of the strongest points of the proposed draft law. The provisions dealing with it are quite comprehensive and detailed and create the premises for a good functioning of the institution. However the following remarks might be taken into consideration by the drafters.

Article 15

21. This Article foresees for an "independent and autonomous organ". In the draft law is proposed the composition of the Commission of 3 members does not offer the best possible guaranties of independence. It might be considered to increase the number of members at least to 5 in order to provide for a more collegial body.

Article 16

22. The fact that one of the members of the Commission, especially if they remain 3 in total, is proposed by the government, does not constitute an argument in support of the its declared independence. The open competition might be also considered for the membership, for candidates to apply directly, be evaluated by the competent parliamentary committee and then be elected by the National Assembly.

Article 17

23. Paragraph 6 of this Article, suggesting for gender equality among the members of the Commission seems unproductive if the number of the body is impair – 3. The term "proportional gender representation" in this case could seem more appropriate.

Article 19

24. Very positively, paragraph 2 of this Article seems to offer additional guaranties by providing "One and the same person may not be elected a member of the Commission twice in a row".

Article 22

25. It is not clear why the procedure for the election of the replacement of a member is different from the procedure for the initial election of the members foreseen on Article 17 § 1 of the draft law. Whereas in Article 17 § 1 is the Committee of the Assembly initiating the procedure, in Article 22 is the Chairman of the Parliament who initiates the procedure. It is not clear from the draft law whether in the case of the replacement the proposal of the new candidates should come from the body which, in concordance with Article 16, has proposed the former member being replaced.

Article 24

26. The procedure for the election of the Chairman of the Commission amongst the three members themselves, it is not very effective and very guarantying to my opinion, if the Commission will continue to be composed of such limited number of members. In this situation it might very easily be that the Chairman is elected by 2 votes in favour and one against, one of the votes in favour being his/her own vote. It might be recommendable, also with the purpose of

increasing the support and authority of the Chairman, for having him/her elected by the National Assembly among the three elected members of the Commission.

Article 26

27. In relation to this Article as well might be reiterated the question of the number of the members of the Commission. Such limited number of members makes questionable the legitimacy of the decisions of the Commission taken by majority.

Article 27

28. One of the most problematic aspects in ensuring the effective independence of institutions is the question related to the necessary resources for guarantying a smooth and effective operation. In the case where, as in the one provided by this Article, all the resources are to be directly provided by the Government without any control, approval and guarantee especially as to sustainability, from the Assembly, the independence of the institution is questionable. So would be as well the effectiveness of its activity, especially vis-à-vis the government.

Part III

Article 28

29. The active locus standi provided by the paragraph 1 of this Article seems as open as to give the complaints against discrimination cases the character of an *actio popularis*. Nevertheless is not very clear why the categories of defendants are limited specifically and the complaint against a person who does not belong to these categories would make the complaint rejected, as Article 32 § 1, item 2 foresees.[5] This risk indeed limiting the scope and the effectiveness of the law itself. There is no information why this selective choice has been adopted by the authorities in drafting this Article.

Article 29

30. This Article regulates the procedure of the complaint, and it is very tolerant as to formal elements of lodging a complaint. This is a positive element which, on the other hand will require technical staff for the Commission in order to be able to handle the complaints.

Article 30

31. In relation to this Article might be raised the concern whether it might be more appropriate to respect the general principle of exhaustion of administrative remedies before using the judicial ones. It is advisable to proceed first with the complaint before the Commission and then to the courts not only for reinforcing the role of the Commission but also for respecting the principle of irreversibility of a judicial decision by administrative means and also the *res judicata* principle, once a court has taken a final judgement.

Article 32

32. This Article regulates the cases when a complaint is rejected. It generally respects the normal criterions for rejection of application also by European judicial institutions.[6] However it deserves to recall that the limitation of the categories of defendants, which is mentioned also in

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5 Physical persons are generally excluded, whereas they might also be authors of discrimination, lets say in a selling contract.

6 Article 35 of the European Convention on Human Rights.

paragraph 28 of this Opinion, light bring to a non appropriate rejection of a complaint. Furthermore, the term prescribed in Article 32, paragraph 1 item 3 "stipulated deadline" it is not clear whether refers to the 6 months deadline appearing in Article 31 or refers to another deadline. The same question, probably with much more reason, could be asked about the term "stipulated deadline" on the following item of the same paragraph of Article 32. If the reference is not to the 6 months rule, then another, not practically prohibitive deadline should be decided by the Commission in a adequate, public and general manner.

Article 33

33. The deadline of 15, provided in this Article for submission of the statement from the defendant to the Commission seems quite guarantying, but one might wonder whether this deadline is too demanding and if would be respected in practice and it would not remain without any effect in practice. Although Serbian authorities are better placed to consider this issue and to give the right answer to our concerns.

Article 34

34. The efficiency of the paragraph 3 provision of this Article is questionable when it refers to "organ supervising its/his work". Which of the organs supervising the work of legal entities like companies or NGO's for instance will be the body to be informed by the Commission. This paragraph seems even superfluous to my opinion, in presence of paragraph 4 of this Article and especially to the reference of the latter to Articles 63 and 64 of the draft law.

Article 35 and 36

35. The same concern as in relation to Article 33 above could be raised - here probably even with a stronger reason - in relation to the 7 days deadline for the objections of the defendants in Article 35 and in relation to the 15 days deadline for the information of the redressing measures.

36. In Article 36 the 'sanction' appearing in paragraph 3 seems without direct effect. It might be more appropriate to have public/media information after stronger sanction are taken. In this regard does not seem to be in the law, particularly in Part VII, any provision providing for a penal sanction[7] in these cases.

Part IV

Article 39

37. The sanctions appearing in this Article, especially public condemnation, to my opinion, are quite vague and without direct effect. It might be more appropriate to have this sanction as additional sanction to another administrative or penal sanction.

Article 40

38. It might be seen a contradiction between the two paragraphs of this Article. To my understanding the actual formulation of paragraph 1 of this Article might raise concern about the right of a person to have access to a court in a dispute related to his/her/its reputation.[8]

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[7] A useful reading of Article 41 might lead to the conclusion that there is provided the possibility to open the way to these sanctions instead.

[8] See for instance the judgement of the European Court of Human Rights concerning the case of *British American Tobacco v. Netherlands*, 20 November 1995, Series A No.331.

Article 41

39. In this Article, replacing the term "may" with the term "should" might lead to a better protection against discrimination and to a more accurate and effective achievement of the purpose of this law.

Articles 42 and 43

40. I have difficulties to see a clear difference or complementarities between these two Articles. This assumption do not concern paragraph 2 of Article 42, which to my opinion might also be included in Article 25 of the draft Law.

Part V

Article 45

41. In relation to this Article might be pertinent our observation in relation to Article 30 of the draft law.[9]

Article 46

42. The provision of this Article being unclear to my reading, might be considered the redrafting.

Article 47

43. The provision of the second paragraph of this Article seems to limit the number of subjects having the right to bring charges, compared to Article 28 paragraph 1 of this draft law, but does not clarify by which law these persons are authorised.

44. The reference on the paragraph 3 of this Article should be corrected to "Article 7 paragraph 1, item 3 of this Law".

Article 50

45. In relation to this Article it might be questionable the existence of paragraph 3. An explanation of the Serbian Authorities on the purpose of this provision might be suitable.

Part VI

Article 54

46. The provision of this Article requesting the authorised Ministry to supervise the implementation of this Law, to my opinion, undermines the independency and the autonomy of the Commission, guarantied by Article 15 of this draft law. It might be suggested to have the National Assembly, through its Plenary or the competent Committee, as the organ supervising the implementation of this law.

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[9] See paragraph 31 above of the observation.

Part VII

Article 59

47. Especially in relation to this Article a sanction by fine, in a case of particularly grave violation such as the one provided by this Article, might result ineffective. This remark might have to be considered as well in relation to other Articles of this Part. In any case, the Serbian authorities remain in a better position to finally evaluate the legal solutions in this relation.

Article 61

48. It is interesting why for applying the sanctions against the perpetrators of discrimination, paragraph 1 item 4 of this Article provide as a minimum threshold the discrimination "based on two or more characteristics".

IV. Conclusive Remarks

49. This draft law, constitutes one of the most comprehensive and complete legal acts for the protection against discrimination acts. A reconsideration following the concerns in this opinion might be useful for the purpose of its effective application. Another important legal operation might be, if not already done, the comparison and the compatibility and complementarity exercise especially with the Serbian Criminal and Civil Codes.