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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON

PROHIBITION OF DISCRIMINATION OF MONTENEGRO

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I. Introduction

1. The present comments on the Draft Law on Prohibition of Discrimination of Montenegro have been made in the light of the Council of Europe standards, especially Article 14 of the European Convention on Human Rights (ECHR), its Protocol 12, the European Social Charter, ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination adopted on 13 December 2002, EU Directives against discrimination (in particular, the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation).

2. The Constitution of Montenegro contains a number of anti-discrimination provisions. Apart from prohibiting "direct or indirect discrimination on any grounds" (Art. 8(1)), the Constitution guarantees to everyone "equality before the law" (Art. 17), "equal protection of the rights and liberties" (Art. 19) as well as equality of women and men (Art. 18). The Constitution also proclaims that during the state of war or emergency "there shall be no abolishment of the prohibition of …discrimination" (Art. 25(3)).

3. On accession to the Council of Europe the Government of Montenegro undertook "to urgently adopt a law on non-discrimination which guarantees that no one shall be discriminated against on any ground such as sex, race, colour, language, religion, sexual orientation, handicap, political or other opinion, national or social origin, belonging to a national minority, property, birth or other status"[*]. The adoption of anti-discrimination legislation is also Montenegro's priority task under the European partnership[†].

4. Certain anti-discrimination provisions are laid down in a number of laws, such as the Criminal Code, Labour Law, Law on Minority Rights and Freedoms, Law on Gender Equality and others. It is important to ensure that the new general law on prohibition of discrimination does not conflict with those provisions and are in harmony with other relevant substantive as well as procedural rules.

II. General observations

5. In general, the draft law is well-structured and divided into five sections containing 37 articles. Yet, a number of structural amendments seem to be necessary.

6. Article 6 ("Principle of equality") and Article 7 ("Prohibition of discrimination"), which are of a more general nature, could appear in Section I ("General provisions"). These articles, particularly Article 7 providing for a blanket prohibition on discrimination, should precede Article 3 which prohibits discrimination subject to positive action ("special measures").

7. It is recommended that the definitions of direct and indirect discrimination contained in Article 8 be included in Article 3 ("Definition of discrimination").

8. Article 13 ("Protection from victimisation") could be moved to Section IV ("Institutional framework and supervision"), as the purpose of this provision is to ensure that no retaliatory action is taken against persons reporting a case of discrimination.

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[*] Opinion No. 261 (2007) on "Accession of the Republic of Montenegro to the Council of Europe", paragraph 19.3.12.

[†] Council Decision on the principles, priorities, and conditions contained in the European Partnership with Montenegro, 17 January 2007, p. 7.

9. In addition, two important elements, firstly, the institutional framework and secondly, the remedies envisaged for breaching the law, could be set out in separate sections. Substantially, both of these issues need to be regulated in the draft law in a more comprehensive and detailed way. This would certainly strengthen the law and contribute to its effective and meaningful implementation.

10. In my view, the most serious shortcoming of the present draft law is that the implementation mechanism foreseen therein is clearly inadequate. To start with, the draft does not provide for the establishment of a specialised anti-discrimination body as it has been widely advocated by ECRI[‡]. According to ECRI's General Policy Recommendation No. 7, the competence of such a body should include: "assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment". Instead, the draft law grants enforcement powers to the Protector of Human Rights and Freedoms (Ombudsman). However, Article 26 of the draft law that envisages these powers is rather short and vague. It only provides that complaints of alleged discrimination may be lodged with the Ombudsman as stipulated in the Law on the Protector of Human Rights and Freedoms. Neither this law, nor the draft amendments to the law submitted to the Venice Commission for the expertise gives full powers to the Ombudsman for the implementation of the anti-discrimination provisions. It is also to be stressed that the Ombudsman has no powers against private persons, which is necessary in combating discrimination[§]. Furthermore, the current law does not empower the Ombudsman to seek an amicable settlement through conciliation; in my view, this procedure can be effectively used for the prevention of discrimination, particularly, in such areas as employment. Last but not least: it is important to ensure that the Ombudsman institution has the necessary human and financial resources to fulfil its new tasks, and specialised training in discrimination is provided for its staff.

11. The sanctions provided for in the draft law cannot be qualified as "effective, proportionate and dissuasive", as required by the EU Directives and ECRI's Recommendation No. 7. Thus, the remedies set forth in Article 31 of the draft law include an order prohibiting the discriminatory behaviour, and compensation. Apart from that, Article 15 provides that "an individual who is found to have acted in a discriminatory way in delivering service shall be fined". First, the draft law should be supplemented by other measures which could be applied by courts for the purpose of correcting the discriminatory behaviour, including that of legal persons. For example, the restitution of rights which have been lost would be one of such measures. Second, the draft law does not indicate, what kind of compensation can be imposed in discrimination cases; specifically, the amount of compensation to which a victim of the discriminatory behaviour is entitled is not specified. As far as Article 15 is concerned, it is not clear who and how will enforce these fines.

12. The draft law is quite abstract and general, containing almost no cross-references to other relevant pieces of legislation, and therefore leaves too much room for interpretation and discretion. The NGO representatives we met during the fact-finding mission raised serious doubts whether the local courts would be able to correctly and effectively apply such abstract provisions. Apart from that, certain key concepts and definitions used in the draft law are unclear and obscure. All this will certainly prevent individuals from properly benefiting from the provisions of the law.

[‡] Interestingly, the original version of the draft law which was subsequently put aside, envisaged the establishment of a specialised body, however this idea was said to have been rejected due to the financial implications.

[§] Cf. Article 1(2) of the Law on the Protector of Human Rights and Freedoms.

13. Furthermore, a number of actions described in the draft law as discriminatory do not necessarily constitute discrimination. Thus, slavery and human trafficking referred to in Article 11 as "grave forms of discrimination" may or may not have a discriminatory element. Similarly, the conduct envisaged in Articles 17, 23 and 24 has not always a link with discrimination. For instance, the current wording of the second paragraph of Article 24 could imply that any breach of the freedom of religion would amount to discrimination.

III. Specific comments on the draft law

Article 3 ("Definition of discrimination")

14. The definition of discrimination provided for in the first paragraph contains a rather long list of grounds of discrimination. For practical purposes, an attempt to cover as many grounds as possible when defining discrimination does not appear to be a constructive idea. The Venice Commission has made it clear that "such an approach may entail the risk that the concept of discrimination may become diluted in a way which could weaken the protection against more serious discriminatory actions"[**]. Moreover, providing an extensive list of non-discrimination grounds is unnecessary from a legal point of view, since the list is not exhaustive.

15. The expression "religion or confession" should be formulated as "religion or belief" in accordance with Article 46 of the Constitution of Montenegro and Article 9 of the European Convention on Human Rights.

16. The meaning of the term "personal trait" should be defined. This is all the more important, since during the meeting with the authorities it appeared that this term could be interpreted too broadly, covering even such physical characteristics of a person as colour of the eyes.

17. According to the definition, discrimination occurs whenever on the basis of any of the enumerated grounds "the recognition, enjoyment or exercise of someone's human rights are impaired or nullified..." The reference to human rights is clearly restrictive, and not in conformity with Protocol 12 to the European Convention on Human Rights which has a broader scope. A person can be discriminated against even where no human rights are involved.

18. In order to avoid any misinterpretation that is quite possible due to the rather broad wording of the definition, the drafters should specify that the differential treatment described in the definition constitutes discrimination if it has no objective and reasonable justification.

19. The second paragraph introduces the concept of positive action ("special measures") which is to be welcomed. However, the wording of the definition is too broad and obscure. Thus, it is not clear what the aim of "adequate progress" means. The expression "for the sake of adequate progress of national, racial or ethnic groups or persons who need protection" should be replaced by the appropriate wording used in the EU Directives and ECRI's Recommendation No. 7: the aim of any positive action should be "to prevent or compensate disadvantages suffered" by a certain group of persons. In general, it is recommended that the definition of positive action ("special measures") be modelled on these documents.

[**] Opinion on the Draft Law on Protection against Discrimination of "the former Yugoslav Republic of Macedonia". Opinion No. 486/2008, CDL-AD(2008)042, Paragraph 41.

Article 5 ("Protected persons")

20. The wording of this article suggests that legal persons are not protected by the present law. It would be advisable to specifically indicate (either in this Article or elsewhere in the draft law) that legal persons or entities are also entitled to protection from discrimination under this law.

Article 7 ("Prohibition of discrimination")

21. It is not clear what is meant by "invocation to discriminate". One might presume that the article would also prohibit an instruction to discrimination, as required by relevant international standards[††].

Article 8 ("Direct and indirect discrimination")

22. It is a positive element that the draft law prohibits both direct and indirect discrimination. However Article 8 is worded in such a way that one can hardly see the distinction between the two concepts. More specifically, the definition of indirect discrimination is not consistent with relevant international standards. It is recommended that, in providing this definition, the drafters draw inspiration from the above-mentioned EU Directives and ECRI's Recommendation No. 7 (paragraph 1 b) and c)).

23. The reference in both paragraphs as well as in subsequent provisions should be not to "personal trait", which in itself can easily give rise to an unduly broad interpretation, but to the grounds enumerated in Article 3.

Article 10 ("Mobbing")

24. It is unclear why the drafters have included "mobbing" as a specific form of discrimination. The definition provided is very close to the one of harassment set out in Article 9, paragraph 1. Interestingly, unlike the definition of harassment, Article 10 does not refer to "personal trait" as a ground for mobbing. In my view, this article, as it stands, seems unnecessary, unless the discriminatory nature of "mobbing" as well as its difference from harassment is clarified.

Article 11 ("Grave forms of discrimination")

25. The article provides for a number of "grave forms of discrimination", without indicating any consequences for committing such acts. In other words, it is not clear whether or not these "grave forms of discrimination" will entail criminal sanctions and/or higher amounts of damages. So, the classification provided has no legal effect, and therefore the relevance of the entire provision is highly questionable. But if the article is retained, a possible solution would be either to specify the remedies and sanctions for such "grave acts" or to make a cross-reference to relevant provisions of criminal and/or civil law.

Article 12 ("Segregation")

26. The definition of segregation is not correctly formulated and deviates from international standards. Two points can be raised here. First, segregation, i.e. separation or isolation by a natural or legal person of other persons on the basis of certain grounds (race, national or ethnic origin, sex, disability etc.) without an objective and reasonable justification should be considered as discrimination even when it is not coercive. A school segregation case is a clear example. Thus, the element of coercion needs not to be incorporated into the definition of segregation. Second, the expression "and putting them into disadvantaged position" can also be dropped out. In order to establish whether segregation has occurred there is no need to

[††] Cf. Article 2(4) of Council Directive 2000/43/EC, Paragraph 6 of ECRI's Recommendation No. 7.

prove that a particular person or group of persons has been placed in a disadvantaged position; the mere fact of separation on the basis of the above-said grounds would be sufficient to constitute discrimination provided that there is no objective and reasonable justification for that behaviour.

27. The second paragraph appears to be superfluous, since what it proclaims clearly derives from the first paragraph of the article.

Article 16 ("Discrimination in use of facilities/buildings and areas in public use")

28. The article requires that the construction of facilities or buildings for public use be done so as to enable unrestricted access to individuals with reduced mobility or disabled persons. This provision is welcome, although one should admit that it will be very difficult to adequately implement it, from the financial perspective.

29. The second paragraph of the article provides that for the owner of a facility to comply with his/her duty to make appropriate adaptations to the facility other legal and physical persons should provide two thirds of funds required for such adaptations. However, it is unclear who these "other legal and physical persons" are. More importantly, the article is not in keeping with the case-law of the European Court of Human Rights[‡‡] and EU Directives[§§], which refer to the concept of reasonable accommodation; according to this concept, an employer must provide accommodation to an individual with a disability "unless such measures would impose a disproportionate burden on the employer".

Article 17 ("Discrimination on the grounds of condition of health")

30. This article, as it stands, does not appear to fit in an anti-discrimination law. As noted above, the conduct referred to therein is not necessarily discriminatory. Rather, it would constitute a violation of the right to liberty and security or the right not to be subjected to ill-treatment. It is evident that the title of the article does not correspond to its content. The title implies that discrimination on the ground of health condition of an individual (for example, because of having a specific disease) is prohibited. But the text of the article speaks of discrimination in the field of healthcare. In any case, the text should be reformulated in order to clearly prohibit discrimination occurring either on the ground of health or in the field of healthcare.

Article 21 ("Discrimination on the basis of sex")

31. In the light of the general prohibition of discrimination explicitly proclaimed in Article 7 of the draft law ("Any form of discrimination on any grounds is prohibited"), the first paragraph of Article 21 is not needed.

Article 24 ("Discrimination by religion")

32. The title of the article should be changed; "discrimination on the ground of religion or belief" would be more relevant. Appropriate amendments should also be made in the text of the article.

33. The first paragraph only prohibits discrimination by State authorities, whereas it is unquestionable that discriminatory action against other persons on the ground of religion or belief can also be committed by private persons.

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‡‡ *Glor* v. *Switzerland*, Application No. 13444/04.
§§ Council Directive 2000/78/EC, Article 5.

Article 27 ("Supervision of the enforcement of the Law")

34. According to this article, the Ministry of Human and Minority Rights Protection is empowered to supervise the implementation of the law. However, as noted above (*see* Article 26), the same function is conferred upon the Ombudsman. In this respect, it needs to be clarified what powers and responsibilities the Ministry should carry out to enforce the law. It is important to ensure that this supervisory role of the Ministry does not undermine the independence and autonomy of the Ombudsman.

Article 28 ("Judicial protection from discrimination")

35. The third paragraph of the article provides for the 15 day deadline for lodging complaints with courts. This period is certainly too short.

Article 30 ("Initiating procedures")

36. The third paragraph of the article allows third parties (in particular, organisations dealing with the protection of human rights and freedoms) to initiate proceedings on behalf or in support of victims of discrimination. This provision is, in principle, to be welcomed. However, the right of third parties to bring a legal action is limited to certain cases, namely when discrimination occurs "by means of media, at a public gathering or by a public authority, or if it has caused serious consequences". In this part the provision deviates from the EU Directives[***] and ECRI's Recommendation No. 7 (Paragraph 25), pursuant to which third party action is possible in all cases of discrimination.

Article 35 ("Revision")

37. The provision is not clear. It needs to be clarified what the drafters mean under "revision".

V. Conclusions

38. The intention of the Montenegrin authorities to adopt a single comprehensive anti-discrimination act is to be welcomed and encouraged. The act is likely to constitute a significant step in combating discrimination in the country.

39. The draft law has a number of positive aspects. The draft law prohibits both direct and indirect discrimination as well as a wide range of discriminatory actions. It introduces the concept of positive action. Human rights organisations and other relevant entities are allowed, although with certain limitations, to initiate proceedings on behalf or in support of victims of discrimination. The draft law provides for a shared burden of proof in discrimination cases.

40. However, in many aspects the draft law does not comply with international and European standards. In this respect, the following key recommendations can be made:

- to provide for the establishment of a specialised anti-discrimination body or in case of granting enforcement powers to the Ombudsman to ensure that: a) the Ombudsman has full powers for the implementation of the law; and b) the Ombudsman institution has the necessary human and financial resources to fulfil its new tasks, and specialised training in discrimination is provided for its staff;
- to make the draft law more precise and clear;

[***] Council Directive 2000/43/EC, Article 7(2).

- to provide for “effective, proportionate and dissuasive” sanctions for breaching the provisions of the law, and to regulate this issue in a more comprehensive and detailed way;
- to delete or revise the provisions prohibiting the actions which are not always discriminatory;
- to specifically indicate that legal persons or entities are also entitled to protection from discrimination under this law;
- to improve the definitions used in the draft, in particular relating to discrimination, indirect discrimination, positive action and segregation;
- to introduce in the draft law cross-references to other relevant laws.