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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE DRAFT LAW
ON PROHIBITION OF DISCRIMINATION
OF MONTENEGRO**

**Adopted by the Venice Commission
at its 82nd Plenary Session
(Venice, 12-13 March 2010)**

**on the basis of the comments by
Mr Lətif HUSEYNOV (Member, Azerbaijan)**

I. Introduction

1. On 4 December 2009 the Minister for the Protection of Human and Minority Rights of Montenegro, Mr. Ferhat Dinosh, requested the Commission to give an opinion on a revised version of the draft law on Prohibition of Discrimination of Montenegro .
2. This new draft law follows an opinion, adopted by the Venice Commission at its 80th plenary session (9-10 October 2009), on a previous draft Law on Prohibition of Discrimination of Montenegro. The opinion contained a number of recommendations aimed at bringing the draft law into conformity with relevant international and European standards (CDL-AD 2009(045).
3. The new draft is also based on the results of the follow-up mission, in which Mr Huseynov participated as a representative of the Commission, which had been organised with a view to assisting in the implementation of the Commission's recommendations, in Podgorica on 12-14 October 2009. During the three days, Mr Huseynov had meetings with the members of the Working Group that had prepared the draft law.
4. Mr Huseynov was again appointed as rapporteur for the assessment of the revised version of the draft law on Prohibition of Discrimination. His comments are based upon the English translation of the text of the revised draft law, as it was submitted to the Venice Commission (CDL(2010)24). It may well be that some of the observations originate from a misunderstanding of the draft due to an unclear or inaccurate translation.
5. The following opinion was drawn up on the basis of Mr Huseynov's comments; it was adopted by the Venice Commission at its 82nd Plenary session (Venice, 12-13 March 2010).

II. General observations

6. The revised draft addresses many of the concerns previously expressed by the Venice Commission. In general, the text has been improved and become more precise and clear.
7. Another important improvement concerns the key definitions used in the draft, in particular relating to indirect discrimination and segregation. They have been aligned with relevant international and European standards; this is to be welcomed.
8. Moreover, the provisions of the draft law prohibiting the actions that do not necessarily constitute discrimination have been deleted.
9. Another commendable amendment is that, according to the current draft, legal persons are also entitled to protection from discrimination under this law. Furthermore, certain controversial provisions (Article 29 ("Territorial jurisdiction") and Article 35 ("Revision")) have been taken out.
10. With regard to the structure of the draft, the Commission's recommendations have been duly followed, and the text has been amended accordingly. Hence, the definitions of direct and indirect discrimination given in Article 8 of the previous draft have been inserted into Article 3 ("Definition of discrimination"). Furthermore, the new draft does not any more contain general provisions on principle of equality and prohibition of discrimination; they have been dropped out, as constituting doubles with other provisions of the draft. Issues relating to the implementation of the law are now dealt with in three separate chapters: Chapter III – Court Protection, Chapter IV – Institutional Framework, and Chapter V – Inspection.
11. However, a number of recommendations of the Venice Commission are not addressed at all or insufficiently addressed in the revised draft.

12. It may be regretted that the two main shortcomings highlighted in the Commission's opinion have not been removed.

13. First, no substantive amendments have been made in the draft concerning the implementation mechanism. The presented draft does not confer any powers on the Protector of Human Rights and Freedoms (Ombudsman) to fulfil his/her tasks to combat racism and discrimination as recommended in ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination. Therefore, all critical observations and recommendations previously expressed by the Venice Commission with regard to this crucial point remain valid.

14. During the follow-up mission the members of the Working Group stated that the above-mentioned issue would be dealt with in detail in the Law on Ombudsman, and the relevant amendments that would deal with the procedure of examination of discrimination cases and the enforcement powers of the Ombudsman would be forwarded to the Venice Commission for an opinion. It is to be reiterated that without such amendments the implementation of the future anti-discrimination law would hardly be effective.

15. The second major point that was brought to the attention of the Montenegrin authorities in the Commission's opinion was the inadequacy of the sanctions provided for in the draft law. Again, actually there have been no changes made in the new draft. Similar to the previous draft, the present version 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. In this context, the mere reference in Article 22 to "compensation of damage, in accordance with the law" cannot be regarded as adequate.

16. Furthermore, again the draft law does not provide for any other measures that could be applied by courts for correcting the discriminatory behaviour, including that of legal persons (for example, the restitution of rights that have been violated).

17. In the light of the above, the previous observations that the sanctions and remedies foreseen in the draft law cannot be qualified as "effective, proportionate and dissuasive", as required by the EU Directives and ECRI's Recommendation No. 7, paragraph 12 are still valid and must be reiterated.

18. Moreover, some of the amendments made in the new draft could be easily considered as a step back.

19. Thus, it is unfortunate that Article 30 of the previous draft has been completely deleted. That provision envisaged the right of third parties to bring a legal action, although limited to certain cases (if discrimination occurs "by means of media, at a public gathering or by a public authority, or if it has caused serious consequences"). In its opinion on the previous draft the Venice Commission recommended improving the text by providing that third party action is possible in all cases of discrimination. It should be recalled that this important procedural safeguard is explicitly laid down in the EU Directives against discrimination¹ and ECRI's Recommendation No. 7 (Paragraph 25). In the Commission view, it would be a considerable failure if the anti-discrimination law of Montenegro does not allow third parties (notably, organisations dealing with the protection of human rights and freedoms) to initiate proceedings on behalf or in support of victims of discrimination.

¹ See, in particular, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 7(2); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

20. Finally, the removal of some provisions of the previous draft can be regarded as questionable. In this regard, the drafters may have retained certain provisions that have been completely taken out (namely Article 15 (“Discrimination in the field of public service delivery”), Paragraph 2 of Article 21 (“Discrimination on the basis of sex”) and Article 24 (“Discrimination by religion”). Moreover, for the sake of consistency, the drafters might also consider including specific provisions dealing with discrimination on the grounds other than those set out in Section II of the draft law (“Special forms of discrimination”), such as discrimination on the basis of language, political or other opinion, age, association with a national minority and discrimination by association. This could help avoiding a possible impression that discrimination occurring on the afore-mentioned grounds is considered as less important than those cases specifically referred to in the current draft.

III. Article-by-article analysis

Article 1 (“Subject of the Law”) and Article 2 (“Protection from discrimination”)

21. These two articles have been amended, but not substantially. They still have more the character of a commentary than a normative character, and therefore the Venice Commission’s following recommendation remains valid: the drafters should make sure that the draft law contains exclusively provisions of a statutory nature, which should be drafted in a clear manner leaving any explanations of the provisions and procedures as currently enshrined in the law to an explanatory memorandum.

Article 3 (“Definition of discrimination”)

22. Several changes have been made in the definition of discrimination, most of them complying with the Commission’s recommendations.

23. First, as already noted, the definitions of direct and indirect discrimination have been included in this article. It is to be welcomed that the definition of indirect discrimination is now fully consistent with relevant international standards: it has been modelled on the EU Directives and ECRI’s General Policy Recommendation No. 7, implying that the principle of proportionality has also been added.

24. Second, the reference to the enjoyment or exercise of one’s human rights has been removed as being clearly restrictive and not in conformity with Protocol 12 to the European Convention on Human Rights.

25. Third, the definition of discrimination now directly refers to the element of unjustified treatment.

26. However, despite the respective critical observation, the list of non-discrimination grounds has become even more extensive in the new draft; some more grounds have been added to that list (age, membership in a group or assumed membership in a group, colour of skin, “affiliation to minority nation or minority national community”). In this regard, it is worth reiterating the Commission’s position on this particular issue that when defining discrimination, trying to cover as many grounds as possible cannot constitute either a practicable or a constructive approach. Moreover, providing an extensive list of non-discrimination grounds is unnecessary from a legal point of view, since the list is not exhaustive.

27. The expression “unequal treatment” newly introduced into the definition of discrimination appears to be superfluous, since the meaning of this expression is wide and includes any distinction, exclusion, restriction, preference, or omission (and all this is already reflected in the definition).

28. The term “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.

29. Apart from incitement to discriminate, which is referred to in Paragraph 4 of Article 3 as a form of discrimination, the law should also prohibit instructing to discriminate² and aiding to discriminate³.

Article 5 (“Special measures for protection from discrimination”)

30. The provision dealing with positive action (“special measures”) is, in general, set out in a separate article. What is more important is that the wording has been substantially changed and is now in conformity with international standards. However, two points can still be raised. First, the current drafting has, again, omitted the criterion of proportionality; in order not amount to discrimination, positive action should consist of proportionate measures. Second, the words “for protection from discrimination” in the title of the article should be deleted since they might be seen as restricting the scope of positive action which should not be limited only to protective measures.

Article 7 (“Application of the law”)

31. This article, despite its general title, is intended to define the personal scope of the present law and to replace Article 5 (“Protected persons”) of the previous draft. It is to be welcomed that the current wording is in compliance with the Venice Commission’s recommendation, providing that legal persons are also entitled to protection from discrimination under this law; although the wording (“Protection from discrimination in accordance with this Law also can be achieved by legal persons being discriminated on any of the grounds referred to in Article 3 of this Law”) appears to be unfortunate.

Article 10 (“Mobbing”)

32. The definition of mobbing has been considerably extended, but despite the specific recommendation made by the Venice Commission, a discriminatory element has not been added to that long definition. Therefore, it still remains unclear why the drafters consider mobbing as a form of discrimination.

Article 11 (“Grave forms of discrimination”)

33. Following the Venice Commission’ recommendation, the drafters have taken out the list of “grave acts”, including slavery and human trafficking which do not necessarily constitute discrimination as well as discrimination by means of the media.

34. However, the major concern of the Commission has not been addressed: the present draft does not provide for any consequences for committing “grave forms of discrimination”. The mere reference to “sanction or compensation of damage” can hardly be considered as relevant, since the mentioned remedies can be applied for any act of discrimination. Therefore, the meaning and function of this provision remain unclear.

² See, in particular, Council Directive 2000/43/EC, Article 2(4); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2(4).

³ See, in particular, ECRI Recommendation No. 7, Para. 6.

35. Moreover, the current wording, at least in its English translation, seems somehow tautological: “grave form of discrimination” is defined therein as “discrimination causing, or that can cause grave consequences”. The previous wording of the said provision would seem preferable though.

Article 12 (“Segregation”)

36. The drafters have taken on board all the comments made by the Venice Commission in its opinion. Thus, the element of coercion as well as the expression “and putting them into disadvantaged position” have been dropped out, and a reference to objective and reasonable justification has been incorporated into the definition. The definition of segregation is now in line with international standards. Furthermore, the second paragraph of the said article of the previous draft has been deleted.

Article 13 (“Discrimination in procedures before public state authorities”)

37. The article, in its current wording, seems to be superfluous, since what it proclaims clearly derives from the first paragraph of Article 3 of the present draft.

Article 14 (“Discrimination in the use of facilities/buildings and areas in public use”)

38. The current wording duly addresses the concerns expressed in the Venice Commission’s opinion.

Article 15 (“Discrimination on the grounds of condition of health”)

39. The text of the article has been reformulated as suggested by the Venice Commission. It now clearly prohibits discrimination on the ground of health. However, the reference in the article to the exercise of one’s rights appears to be restrictive. It should be noted that the scope of protection from discrimination is broader and also covers cases where a person is discriminated against by a public authority in the exercise of discretionary power or by any other act or omission.

Article 16 (“Discrimination in the field of education and vocational training”)

40. This article is the revised version of Article 18 of the previous draft. Now it does not give rise to any concern.

Article 17 (“Discrimination in the field of labour”)

41. This article is the revised version of Article 19 of the previous draft. It duly addresses the concerns of the Venice Commission expressed in its opinion.

Article 18 (“Discrimination of persons with disabilities”)

42. It is recommended that the concept of reasonable accommodation set forth in the EU Directives⁴ be introduced into this article.

⁴ See, Council Directive 2000/78/EC. Article 5 of the Directive reads as follows: “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”.

Article 19 (“Discrimination on the basis of gender identity and sexual orientation”)

43. Paragraph 3 of the Article is redundant.

Article 23 (“Deadline for filing the action”)

44. The previous draft provided for the 15 days deadline for lodging a complaint with a court, which was found to be too short and unrealistic. This limitation period has now been increased to 60 days “from the day of cognition for discrimination performed”. This deadline should be increased. Furthermore, the objective deadline should also be specified (preferably, within one year from the date of the occurrence of the alleged discrimination).

Article 26 (“Report of the Protector of Human Rights and Freedoms”)

45. This is a new provision, which is to be welcomed. According to this amendment, the Ombudsman, in his/her annual report to be submitted to Parliament shall devote a separate part to his/her activities in combating discrimination. Furthermore, if the Ombudsman deems it “exceptionally important”, he/she may submit to Parliament a separate report on discrimination.

Article 27 (“The role of inspection”)

46. This article has been introduced to replace Article 27 of the previous draft, which was found to be problematic, since it granted supervisory duties, alongside the Ombudsman, to an executive authority, namely the Ministry for the Protection of Human and Minority Rights. According to the newly introduced provision, the inspection services shall, within their competencies as established by law, enforce the respective provisions of the present law. This formulation appears to be satisfactory.

IV. Conclusions

47. The efforts of the Montenegrin authorities to bring their draft law on prohibition of discrimination, in close co-operation with the Venice Commission, into conformity with international and European standards should be highly appreciated.

48. It is to be welcomed that the revised draft addresses many of the concerns previously expressed by the Venice Commission. The text of the draft law has been improved and become more precise and clear. The key definitions used in the draft, in particular relating to indirect discrimination and segregation have been aligned with relevant international and European standards. The provisions of the draft law prohibiting the actions, which do not necessarily constitute discrimination, have been deleted. According to the revised draft, legal persons are also entitled to protection from discrimination under this law. The Commission’s recommendations on the structure of the draft have been duly followed, and the text has been amended accordingly.

49. However, a number of critical observations previously made by the Commission are not addressed at all or insufficiently addressed by the new draft. Therefore, the following key recommendations remain valid:

- 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 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 improve the definition of positive action (“special measures”) in the light of the EU Directives and ECRI’s General Policy Recommendation No. 7;
- to introduce in the draft law specific cross-references to other relevant laws.

50. Furthermore, the draft law should explicitly provide that third parties (notably, organisations dealing with the protection of human rights and freedoms) are entitled to initiate proceedings on behalf or in support of victims of discrimination.

51. The Venice Commission remains at the disposal of the Montenegrin authorities for any further assistance.