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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OBSERVATION ON THE
DRAFT LAW ON PROHIBITION OF DISCRIMINATION
of MONTENEGRO

by Mr Peter van DIJK (Member, the Netherlands)

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1. General observations

- a) The comments follow the order of the articles of the draft.
- b) The English translation of the draft, as submitted to the Venice Commission, is not correct in all its details. This may also have as a result that some of the observations made are caused by a misunderstanding of the text of the draft.
- c) The draft contains provisions that would seem to constitute doublers with other provisions or, at least, could easily be combined, e.g. Articles 3, 6, 7 and 8.
- d) Some of the articles of the draft would seem to have more the character of a commentary than a normative character, such as, e.g., Articles 1 and 2. More in general, it is recommended that the draft law will be accompanied by an explanatory memorandum to set out the legal and practical context of the draft, and to clarify some of its provisions and procedures.
- e) The draft is rather comprehensive. It is recommended not to regulate any possible situation or any specificity in the law, but to leave it to the authorities and the courts to develop jurisprudence and case law based upon the law.

2. Observations article by article

Articles 1 and 2

See the General observations above.

Article 3

The definition contained in the first paragraph deviates, as to its enumeration of the grounds of discrimination, somewhat from that of Article 1 of Protocol 12 to the European Convention on Human Rights (ECHR). There is no express reference to the grounds of birth, colour, association with a national minority and property. The reference to "religion of confession" would seem more or less a tautology, and should perhaps be changed into religion and belief in conformity with Article 9 ECHR.

More importantly, in the definition the concept of discrimination is restricted to the enjoyment or exercise of one's human rights. This would be in conformity with the scope of Article 14 ECHR, but not with the much broader scope of Protocol 12. It is recommended that the scope of the definition is broadened accordingly.

It is not clear how Article 3 relates to Articles 6 and 7.

In the second paragraph, which deals with the so called "positive discrimination", the very important criterion of proportionality is missing.

Article 5

The third paragraph, in its English translation, is formulated somewhat inaccurately because in most cases a court cannot *a priori* protect a person from discrimination, but must restrict itself to determine the discrimination *post factum*, may in certain cases order its discontinuation and may decide on damages.

Article 6

The fact that the draft contains a general provision on equality in addition to the one containing a definition of discrimination and the fact that the second paragraph of Article 6 formulates the two as the two sides of the same coin, raises the question of the relationship between the two provisions. In the first paragraph, the provision on equality is formulated in broader terms than

the definition of discrimination in Article 3, while in fact the obligation to respect the principle of equality is more restrictive than the prohibition of discrimination, since unequal treatment may be justified in certain cases while discrimination covers only those forms of unequal treatment that are based upon such personal qualities as constitute an integral part of the person concerned.

Article 8

The definition of direct discrimination in the first paragraph would seem not to be in full conformity with the definition of Article 3. It is, therefore, recommended to combine the two articles.

In the second paragraph, here again, the criterion of proportionality is missing.

Articles 9 and 10

It is not evident that these definitions should be included in a law concerning the prohibition of discrimination as specific forms of discrimination. Harassment and mobbing may have a discriminatory element, but should also be prohibited and sanctioned if committed without any discriminatory intention or effect. The same holds good for such crimes as slavery, human trafficking and genocide, mentioned in Article 11 as "grave forms of discrimination".

Article 11

It is not evident what the meaning and function of this provision in the framework of the law are. Do these "grave forms of discrimination" constitute special crimes in a criminal law context or justify higher amounts of damages in a civil law context? In that case the link with the relevant criminal or civil law provisions should be made. In general, however, it should be left to practice to assess the seriousness of a certain discriminatory act, in the framework of establishing the relevant facts and consequences. Therefore, "serious consequences" as a criterion should be left to practice.

Apart from that, it is not obvious that a practice of discrimination by means of the media constitutes an aggravated form of discrimination. The media, too, have to take into account the "duties and responsibilities" which the exercise of the freedom of expression carries with it (Article 10 ECHR), but given the vital role which the media play in a democratic society, one has to be especially careful when curtailing the freedom of expression in their respect.

Article 12

The second paragraph would seem to be superfluous.

Article 13

It is not evident that this provision has a specific meaning in connection with discrimination, and consequently deserves a place in the present draft.

Article 14

The second and third paragraph may have very serious implications, because they may open the door for far-going interference with the functioning of courts and individual judges. A party who has lost a case before a court may be easily inclined to feel discriminated against by the court concerned. Therefore, it is of vital importance that any complaint as to discriminatory behaviour will have to be judged by an independent court.

Moreover, a possible disciplinary measure against one or more judges on the basis of (systematic) discriminatory behaviour is quite different from "remedial against the decision". It is not clear what is meant by that, but in any case a judicial decision may be annulled or quashed only through a judicial legal remedy provided for in the law or through revision by the court that took the decision, but not by any other authority.

More or less the same holds good for discriminatory behaviour on the part of the Prosecutor, dealt with in the fourth paragraph: any disciplinary sanction may be imposed only through a

judicial procedure provided by law, while the prosecuting act concerned may only be withdrawn or changed by the same Prosecutor or his superior.

Article 15

The words "shall be fined" and "shall be called to disciplinary account" make the impression that no discretion is left to the court who has to decide on the fine or disciplinary matter.

Article 16

The second paragraph is not very clear, especially on the point of who are the legal and physical persons who are to provide two third of the funds.

Article 17

This provision is formulated as a general provision concerning personal freedom, and would seem to have no particular connotation with the prohibition of discrimination.

Article 18

In the third paragraph it should be specified on what grounds the treatment should be based in order to be qualified as discrimination.

Article 19

This provision goes very much in detail with its enumerations. General prohibition of discrimination of any person in a labour related situation might seem sufficient, leaving it to the authorities and the courts to specify the exact scope.

Article 21

The first paragraph would seem to be superfluous next to Articles 6 and 7.

Article 22

Does this provision also imply the right of persons of the same sex to marry? If that is the case, it is advisable to expressly include that right in view of its still controversial character in several member States of the Council of Europe.

Article 23

Again, does this provision imply the right of persons of the same sex to marry, found a family and adopt children? If so, it is recommended to expressly state so.

Articles 26 and 27

The relationship between the two provisions is not clear. While Article 26 confers upon the Protector of Human Rights and Freedoms a supervisory role, Article 27 does the same in relation to the Minister mentioned there.

Article 28

The relation between this provision and Article 26 is also not clear. Does the victim has a choice between the two procedures, may he or she institute both procedures, either at the same time or the one after the other, or is the procedure before the Protector of Human Rights and Freedoms of a mediatory character and may only the judicial procedure result in a binding decision? The latter is at least the impression following from Article 44 of the Law on the Protector of Human Rights and Freedoms.

Article 29

It is not sufficiently clear from this provision which court has jurisdiction in what kind of case. Are only the civil courts competent or also the administrative courts if an act or failure to act of an administrative body is involved?

Article 35

It is not clear what kind of revision of what act or decision is meant. In any case, a revision of a court decision can only be decided upon by a court and only on very specific conditions.

Article 36

Should not the same transitional rule apply to the courts?

3. Concluding observation

The fact that Montenegro intends to introduce a specific law concerning the prohibition of discrimination has to be welcomed.

The draft is very comprehensive and contains many highly important and progressive provisions and procedures to protect persons under the jurisdiction of Montenegro against discrimination.

However, even when taking into account that there may be certain translation problems, the draft would need to be revised at several points to avoid doublers, to delete provisions that have no particular relation to the discrimination issue, to clarify certain of the prohibitions, and to regulate more clearly the system of supervision and remedies.