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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

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

**on the basis of comments by**

**Mr Pieter van DIJK (Member, Netherlands)**  
**Mr Latif HÜSEYNOV (Member, Azerbaijan)**

*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res (2001)6 on access to Council of Europe documents.*

## I. Introduction

1. *By a letter dated 23 March 2009, the then Minister for the Protection of Human and Minority Rights of Montenegro, Mr Fuad Nimani, requested an opinion on the draft Law on Prohibition of Discrimination (CDL(2009)119).*
2. *The Venice Commission received an English translation of the draft on 25 May 2009.*
3. *Mr van Dijk and Mr Hüseyinov were appointed as rapporteurs and presented their comments (CDL (2009)121 and CDL (2009)120 respectively).*
4. *In order to have a better understanding of the local situation, a mission to Podgorica was organised. Mr Hüseyinov and Ms Martin from the Secretariat went to Podgorica on 2-3 September 2009.*
5. *The mission, well organised by the Council of Europe office in Podgorica, was very useful. The delegation had constructive meetings with the Minister for the Protection of Human and Minority Rights, Mr Dinosa, the Deputy Speaker of Parliament and other Parliamentarians, the Ombudsman and his Deputies, representatives of OSCE and EC offices in Podgorica, NGO representatives, as well as with the members of the Working Group that prepared the present draft.*
6. *The mission provided a valuable insight into the national context, the legislative process so far, key issues and challenges whether national or international facing the adoption and actual implementation of the new anti-discrimination legislation in Montenegro.*
7. *The following opinion was drawn up on the basis of the rapporteurs' comments and of the information gathered during the fact-finding mission ; it was adopted by the Venice Commission at its... Plenary Session (Venice, ...).*

## II. Background information

8. Montenegro became a member State of the Council of Europe (CoE) on 11 May 2007.
9. One of Montenegro's accession commitments to the CoE was to adopt urgently an anti-discrimination law.<sup>1</sup>
10. The Committee of Ministers invited Montenegro to adopt the Law on non-Discrimination, in line with CoE standards, by the next reporting period in its monitoring of Montenegro's progress in relation to its accession commitments and obligations <sup>2</sup>.
11. Identically, the request for adoption of a "comprehensive anti-discrimination legislation" can be found in the short-term priorities of the Council Decision of 22 January 2007 on the principles, priorities, and conditions contained in the European Partnership with Montenegro (2007/49/EC)<sup>3</sup>. The authorities have consequently presented the draft law as part of the national programme for European Union integration.

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<sup>1</sup> See PACE Opinion 261 (2007) paragraph 19.3.12." 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;"

<sup>2</sup> See SG/Inf (2009)13, Third Secretariat Monitoring Report (from May 2008 through August 2009), paragraph 71.

<sup>3</sup> The Council Decision (2007/49/EC) can be found at :  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:020:0016:01:EN:HTML>

12. The Minister for the Protection of Human and Minority Rights who intends to present the draft for adoption by Parliament as soon as possible prepared the draft law on prohibition of discrimination.

13. During the mission, the delegation understood from the discussions with the Working Group and with NGO'S that only one NGO had been involved in the drafting process. However, the authorities informed the delegation that prior to the submission on the draft to Parliament a broad public debate would be organised.

14. Furthermore, the authorities assured the delegation that before submitting the final draft to Parliament it would again be submitted to the Venice Commission for an opinion.

### III. General observations

15. The present opinion on the draft law on prohibition of discrimination is formulated in the light of the Council of Europe standards, especially Article 14 of the European Convention on Human Rights<sup>4</sup> (ECHR), its Protocol 12,<sup>5</sup> the European Social Charter, EU directives against discrimination (in particular, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation) and with specific attention to documents of the European Commission against Racism and Intolerance (ECRI) and its Recommendation No. 7 of 2002 regarding the National Legislation on the Fight Against Racism and Racial Discrimination.

16. The Constitution of Montenegro contains a specific provision on the prohibition of discrimination. It provides a general ban of direct and indirect discrimination<sup>6</sup>.

17. In its opinion on the draft Constitution of Montenegro, the Venice Commission had already appreciated this wording since it reflects, "the concern previously expressed by the Venice Commission that special measures, such as those set out in Article 4 of the Framework Convention for the Protection of National Minorities, should not be seen as discrimination. The text is therefore now in conformity with the Framework Convention. It is also in conformity with ECRI Recommendation No. 7 (2002)."<sup>7</sup>

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

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<sup>4</sup> Article 14 ECHR reads:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

<sup>5</sup> Article 1 Protocol 12 ECHR reads:

"Article 1. General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority."

<sup>6</sup> Article 8 of the Constitution reads : Prohibition of discrimination

"Direct or indirect discrimination on any grounds shall be prohibited. Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination. Special measures may only be applied until the achievement of the aims for which they were undertaken."

<sup>7</sup> See CDL-AD (2007)047, paragraph 7.

19. The present draft for a specific law concerning the prohibition of discrimination constitutes a further important step in the fight against discrimination and has to be welcomed.

20. 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 is in harmony with other relevant substantive as well as procedural rules.

21. It is important to mention that the English translation of the text submitted to the Venice Commission for consideration is occasionally unclear and seems not correct in all its details. Some of the following observations and issues of concern raised might be caused by a misunderstanding of the correct meaning of the text.

### **The structure of the draft**

22. With regard to the structure, the present draft is a rather long piece of legislation, however well structured, divided into four Chapters, with 37 articles altogether.

23. The draft contains some inconsistencies in the order of the provisions, which could jeopardize the logic and understanding of the draft. For instance, Articles 3, 6, 7 and 8 seem to constitute doubles with other provisions, or at least could be combined with each other.

24. 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").

25. The definitions of direct and indirect discrimination given in Article 8 should be included into Article 3 ("Definition of discrimination").

26. 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.

### **The normative content**

27. With regard to the normative content, the current draft contains several provisions, which cannot be considered as of statutory nature. In this regard, articles 1 and 2 would for instance have more the character of a commentary than a normative character. As the Venice Commission has already pointed out at other occasions, "in accordance with an acknowledged principle, laws should contain provisions of an exclusively statutory nature, i.e. which create rights or obligations, set up bodies and define their duties and responsibilities or lay down their procedure"<sup>8</sup>.

28. The Venice Commission would consequently recommend to the drafters to 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. The explanatory memorandum would be also the right place and tool to set out the legal and practical context of the draft law, references and cross references and links to other parts of the national legislation and to relevant sources of International and European law and standards.

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<sup>8</sup> See CDL-AD(2009)018, paragraph 8.

## The legislative technique

29. The drafters have tried to cover and to regulate exhaustively any possible situation. As the Venice Commission had already stated, “whether an act on discrimination issues should be abstract or concrete depends on national legal culture and context, on the state of the national legal community, on the administration and the courts”<sup>9</sup>.

30. One of the consequences of an extensive or concrete drafting, which tries to solve legislatively as many questions as possible, is that it leaves little room for interpretation and discretion to the authorities and courts to develop their policy and their case law, respectively, based on the law. Whether this consequence can be seen as a drawback or a suitable benefit depends on the level of legal development and confidence that can be put in the competent authorities and judiciary. Whereas in old and long established democracies extensive drafting might be considered as drawback, it has often been seen as a necessary step in newly established democracies.

31. At the same time, the provisions happen to be quite abstract and general, containing almost no cross-references to other relevant pieces of legislation, and would leave too much room for interpretation and discretion. The NGO representatives with whom the delegation of the Venice Commission met during the fact-finding mission raised serious doubts whether the local courts would be able to apply correctly and effectively such abstract provisions.

32. Indeed, certain key concepts and definitions used in the draft law are unclear and obscure. All this may prevent individuals from properly benefiting from the provisions of the law.

33. Lastly, while a number of actions described in the draft law as discriminatory do not necessarily constitute discrimination,<sup>10</sup> other definitions do not contain any reference to a necessary discriminatory element that would be prohibited.

34. The Venice Commission leaves to the national authorities the choice of the legislative technique, but invites the drafters to elaborate and draft this piece of legislation in a way that it ensures a correct implementation and understanding of the notions by both professionals and individuals.

## Implementation mechanisms

35. The most serious shortcoming of the present draft law is that the implementation mechanism foreseen therein is clearly inadequate.

36. A key element to combat racial and other forms of discrimination are not only the substantive provisions of the law but in particular in the mechanism that is foreseen to protect from discrimination and also to ensure that the legislation will be implemented correctly and effectively.

37. In this regard, ECRI General Policy Recommendation No. 7, recommends under paragraph 24 that:

*“The law should provide for the establishment of an independent specialised body to combat racism and racial discrimination at national level (henceforth: national specialised body). The law should include within the competence of such a body: assistance to victims; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-*

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<sup>9</sup> CDL-AD(2008)042, paragraph 30.

<sup>10</sup> 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.

*raising of issues of racism and racial discrimination among society and promotion of policies and practices to ensure equal treatment.”*

38. Whereas the creation of a specialised body is considered as the best solution, transferring the same competencies to an already existing institution, which would benefit from the competencies described above, would be equally adequate.

39. The draft does not provide for the establishment of a specialised anti-discrimination body as it has been widely advocated by ECRI.

40. 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 (CDL(2009)114). Neither this law, nor the draft amendments to the law (CDL(2009)110) submitted to the Venice Commission for opinion gives full powers to the Ombudsman for the implementation of the anti-discrimination provisions.

41. The current draft also fails to give the Ombudsman the powers and means the fight against discrimination implies.

42. The Ombudsman has no powers in respect of private persons, which he or she would need to combat discrimination<sup>11</sup>. The wording of the present draft<sup>12</sup> and the Law on the Protector of Human Rights<sup>13</sup> imply that the area of competencies of the Protector is limited to the public sphere. However, according the ECRI's Recommendation, the institution in charge of the protection of and fight against discrimination should cover the private sphere as well.

43. Moreover, neither the current draft nor the law or the amendments to the law on the Protector describe or confer to this institution sufficient powers to fulfil its tasks to combat racism and discrimination, like assistance to victims, investigations powers, right to initiate and participate in courts proceedings, for instance as are recommended in ECRI Recommendation No. 7.

44. Furthermore, the current law does not empower the Ombudsman to seek an amicable settlement through conciliation, whereas this procedure can be effectively used for the prevention of discrimination, particularly in such areas as employment.

45. Finally, yet importantly, neither the current draft nor any other proposed legal instrument foresees the necessary supplementary human resources, specialised training in discrimination and financial means for the protection against discrimination that would be necessary for the Office of the Protector of Human Rights.

46. Consequently, neither the general current legal framework nor the current draft offer sufficient legal guaranties and means for a genuine protection against discrimination by the Protector of Human Rights.

47. The Venice Commission would consequently strongly recommend reconsidering the mechanism of protection in view of complying with the requirements of paragraph 24 of Recommendation No. N7 of ECRI.

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<sup>11</sup> Cf. Article 1(2) of the Law on the Protector of Human Rights and Freedoms.

<sup>12</sup> Draft Article 26.

<sup>13</sup> Article 23 of the Law on the Protector reads: “The Protector shall consider cases involving violations of human rights and freedoms committed by the authorities ....”

## **Sanctions**

48. The second important shortcoming concerns the sanctions as provided for by the draft.

49. Remedies are foreseen in only one article in vague terms<sup>14</sup>. Apart from that, only one article refers to fines, without more specifications on the possible amounts, decision's holder, and enforcement<sup>15</sup>.

50. The draft law should be supplemented by other measures, which could be applied by courts for correcting the discriminatory behaviour, including that of legal persons. For example, the restitution of rights, which have been violated, would be one of such measures.

51. Moreover, the draft law does not indicate, what kind of compensation can be imposed in discrimination cases; specifically, the criteria to determine the amount of compensation to which a victim of the discriminatory behaviour is entitled are not specified.

52. Consequently, 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, paragraph 12<sup>16</sup>.

53. Substantially, both of these issues, the institutional framework and the remedies, need to be regulated in the draft law in a more comprehensive and detailed way. This would definitely strengthen the law and contribute to its effective and meaningful implementation.

## **IV. Comments related to specific provisions**

### **Article 1 - Subject of the law, and Article 2 - Purpose of the law**

54. These articles do not have any normative purposes. Moreover, they are redundant.

55. The delegation was told that those types of articles could be found in each piece of legislation of the country and are regarded as a legal tradition. The Venice Commission, however, would recommend to the drafters to make sure that the provisions of the law are of a normative nature. The quality of the law and the principle of legal certainty imply also that repetitions and redundancies are avoided.

### **Article 3 - Definition of discrimination**

56. The definition of discrimination provided for in the first paragraph contains a rather long list of grounds of discrimination.

57. Despite the length, some grounds provided for under Article 1 Protocol 12 to the ECHR are still missing. Indeed, there is no express reference to the grounds of colour, association with a national minority and property.

58. The Venice Commission would consequently recommend aligning the grounds of discrimination to those of the Article 1 Protocol 12 to the ECHR.

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<sup>14</sup> Thus, the remedies set forth in Article 31 of the draft law include an order prohibiting the discriminatory behaviour, and compensation.

<sup>15</sup>Article 15 provides that "an individual who is found to have acted in a discriminatory way in delivering service shall be fined".

<sup>16</sup> Recommendation No. 7, paragraph 12 reads: "The law should provide for effective, proportionate and dissuasive sanctions for discrimination cases. Such sanctions should include the payment of compensation for both material and moral damages to the victims."

59. Additionally, when defining discrimination, trying to cover as many grounds as possible cannot constitute either a practicable or a constructive approach. The Venice Commission has already made 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”<sup>17</sup>. Moreover, providing an extensive list of non-discrimination grounds is unnecessary from a legal point of view, since the list is not exhaustive.

60. According to the definition, discrimination occurs whenever because of any of the enumerated grounds “the recognition, enjoyment, or exercise of someone’s human rights are impaired or nullified...” Although this wording would be in conformity with the scope of Article 14 of the ECHR, the restriction of the enjoyment or exercise of one’s human rights is not in conformity with Protocol 12 to the ECHR which has a broader scope. Indeed, a person can be discriminated against also in cases where no human rights are involved.

61. The Venice Commission would therefore recommend aligning the scope of the definition in Article 3 with Protocol 12 to the ECHR.

62. Furthermore, in order to avoid any misinterpretation 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.

63. 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 ECHR.

64. 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 eye’s colour.

65. Finally, the ways in which Article 3.1 and Article 6 (Principle of equality) and Article 7 (Prohibition of discrimination) would relate with each other remains unclear.

66. The second paragraph introduces the concept of positive action (“special measures”) which is to be welcomed.

67. However, the current drafting has, here again, omitted the very important criterion of proportionality, which should be inserted.

68. Moreover, 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.

69. In general, the Venice Commission would recommend that the definition of positive action (“special measures”) be modelled on EU Directives and ECRI’S Recommendation No. 7.

### **Article 5 - Protected persons**

70. The fact that the draft law aims to protect anyone on the territory of Montenegro and is not limited to Montenegrin citizens is to be welcomed.

71. However, the wording of this article suggests that legal persons would not be protected.

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<sup>17</sup> CDL-AD (2008)042, paragraph 41, Opinion on the Draft Law on Protection against Discrimination of “the former Yugoslav Republic of Macedonia”.

72. The Venice Commission would hence advise indicating specifically, 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 6 - Principle of equality**

73. The relationship between the principle of equality enshrined in this article and that contained in the definition of discrimination under Article 3 raises concern. In the first paragraph, the provision of equality is formulated in broader terms than the definition of discrimination under 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.

### **Article 7 - Prohibition of discrimination**

74. The meaning of the term “invocation to discriminate” remains unclear. Even though one might presume that the article would also prohibit instructing another person to discriminate, as required by relevant international standards<sup>18</sup>, this should be made more clear and explicit.

### **Article 8 - Direct and indirect discrimination**

75. The fact that the draft law seeks to prohibit both direct and indirect discrimination is to be welcomed.

76. However, the current wording of Article 8 does not clearly define and distinguish the two concepts. More specifically, the definition of indirect discrimination is not consistent with relevant international standards. It is therefore 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)<sup>19</sup> which would also imply the addition of the principle of proportionality, which is missing in the current draft.

77. Here again, the reference to “personal trait” in both paragraphs as well as in subsequent provisions should be avoided and should be replaced by a reference to the grounds enumerated in Article 3. The notion of “personal trait” can easily give rise to an unduly broad interpretation.

### **Article 9 - Harassment and sexual harassment, and Article 10 - Mobbing**

78. The difference between mobbing and harassment as provided for in Article 9.1 is unclear and should be clarified, although unlike the definition of harassment, Article 10 does not refer to “personal trait” as a ground for mobbing.

79. If these articles were to remain, the Venice Commission would recommend redrafting both articles, by clarifying the distinction between both definitions, by adding the discriminatory element prohibited with regard to mobbing and by avoiding referring to the notion of “personal trait”.

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<sup>18</sup> Cf. Article 2(4) of Council Directive 2000/43/EC, paragraph 6 of ECRI’s Recommendation No. 7.

<sup>19</sup> b) “direct racial discrimination” shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

c) “indirect racial discrimination” shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

**Article 11 - Grave forms of discrimination**

80. The article provides for a number of “grave forms of discrimination”, without indicating any consequences for committing such acts. Therefore, the meaning and function of this provision remain unclear in the framework of a law on the prohibition of discrimination.

81. Moreover, it is not clear whether these “grave forms of discrimination” will entail criminal sanctions and/or higher amounts of damages. Thus, the classification provided has no legal effect, and therefore the relevance of the entire provision is questionable.

82. If this article were to remain, the drafters should make this article effective by either specifying the remedies and sanctions for such “grave acts” or by making cross-references to relevant provisions of criminal and/or civil law.

83. With regard to the current criterion of serious consequences which is contained in the draft, it is worth recalling that such a criterion should be left to practice which will assess the seriousness of a certain discriminatory act while establishing the relevant facts and consequences entailed.

84. Finally, whether discrimination by means of the media can constitute an aggravated form of discrimination, as it is foreseen in this provision, remains questionable. This might be interpreted as a restriction to the freedom of expression of the media. Given the vital role that the media play in a democratic society, any limitation must be done cautiously. Such a restriction might be also excessive given the media’s “duties and responsibilities” comprised in the exercise of the freedom of expression (Article 10 ECHR).

**Article 12 - Segregation**

85. The definition of segregation is not correctly formulated and deviates from international standards under several aspects.

86. Firstly, segregation, i.e. separation or isolation by a natural or legal person of other persons because 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. Thus, the element of coercion should not be incorporated into the definition of segregation as it is currently.

87. Secondly, the expression “and putting them into disadvantaged position” is unnecessary and should be deleted. Indeed, in order to establish whether segregation has occurred there is no need to prove that a particular person or group of persons has been placed in a disadvantaged position; the mere fact of separation because of the above-said grounds would be sufficient to constitute discrimination provided there is no objective and reasonable justification for that behaviour.

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

89. The Venice Commission would hence recommend re-drafting this provision in order to be in line with international standards.

**Article 14 - Discrimination in procedures before authorities of the state**

90. This article foresees remedies, sanctions, and disciplinary measures if discrimination has occurred during procedures before State authorities, and more specifically before the courts or the prosecutions offices.

91. This article may raise serious concern since it opens the door for far-reaching interference with a court’s functioning and the independence of judges. Any complaint as to

discriminatory behaviour should be judged by an independent court. Likely disciplinary measures against a judge or a prosecutor may be imposed only through a procedure, preferably judicial, provided for by law.

92. Discrimination in procedures before authorities of the state shall certainly be prohibited by this draft. However, the draft instead of creating specific sanctions should rather refer to the general procedure of disciplinary measures against a judge or a prosecutor provided for by law.

#### **Article 15 - Discrimination in the field of public service delivery**

93. This article defines specific cases of discrimination in the field of public service delivery. However, even though it is welcome to foresee sanctions, here again the wording “shall be fined” and “shall be called to disciplinary account” might imply that no discretion is left to the court which will decide on the fine or disciplinary issue.

#### **Article 16 - Discrimination in the use of facilities/buildings and areas in public use**

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

95. 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 the 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<sup>20</sup> and EU Directives<sup>21</sup>, 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**

96. 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. It would rather constitute a violation of the right to liberty and security or the right not to be subjected to ill-treatment. 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. Nevertheless, the text of the article speaks of discrimination in the field of healthcare.

97. 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 18 - Discrimination in the field of education and vocational training**

98. The third paragraph should specify the grounds that fulfil the legal qualification of discrimination of an action or behaviour.

#### **Article 19 - Discrimination in the field of work**

99. This provision goes very much into details in enumerating any possible situation.

100. However, it is not clear from the current wording whether this provision would apply indistinctively to the public and to the private sphere. The concept of “disciplinary account” would

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<sup>20</sup> *Glor v. Switzerland*, Application No. 13444/04.

<sup>21</sup> Council Directive 2000/78/EC, Article 5.

suggest that only public institutions be covered by this provision. This would be contrary to international standards and especially to ECRI's Recommendation, which states that the law should apply to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors<sup>22</sup>.

101. Finally, the Venice Commission would rather recommend drafting a general prohibition of discrimination of any person in a labour related situation leaving to the authorities and the courts the scope of application of this prohibition.

#### **Article 21 - Discrimination on the basis of sex**

102. In light of the general prohibition of discrimination explicitly proclaimed in Article 6 (principle of equality) and Article 7 ("Any form of discrimination on any grounds is prohibited"), the first paragraph of Article 21 is not needed.

#### **Article 22 - Discrimination on the basis of sexual identity and sexual orientation**

103. As currently drafted, this provision would also imply the right of persons of the same gender to marry.

104. If this were the intention of the drafters, that right should then be more explicitly included, since, in view of its still controversial character in several member States of the Council of Europe such a right needs to be clearly stated.

105. Nonetheless, the drafters should bear in mind that the inclusion of the right of persons of identical gender to marry would be in contradiction with the Constitution of Montenegro, which specifically states under Article 71 "Marriage may be entered into only on the basis of a free consent of a woman and a man".

#### **Article 23 - Discrimination on the grounds of spousal and family relations**

106. The meaning and purposes of this provision are unclear. As currently drafted, the wording could imply the right of persons of the same gender to marry, to found a family, and to adopt children. If this is the intention of the drafters, these rights should be expressively stated.

#### **Article 24 - Discrimination by religion**

107. The title of the article should be changed into "discrimination on the ground of religion or belief". Appropriate amendments should also be made in the text of the article.

108. The first paragraph only prohibits discrimination by State authorities, whereas it is unquestionable that private persons can also commit discriminatory action against other persons on the ground of religion or belief. Here again the scope of application of the draft law seems to be limited to the public sphere.

109. The Venice Commission recalls that a law on prohibition of discrimination shall apply to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas.

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<sup>22</sup> "7. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services."

## **Article 26 - Mechanism for protection from discrimination and Article 27 Supervision of the enforcement of the law**

110. The relationship between the two articles remains unclear. While Article 26 confers upon the Protector of Human Rights and Freedoms a supervisory role, Article 27 does the same in relation to the Ministry for the Protection of Human and Minority Rights Protection.

111. The Ministry competent for the protection of human rights and minority rights is granted supervisory duties in relation to the implementation of the draft law. In this respect, the draft law should clarify further the powers and responsibilities the Minister can carry out to perform his supervisory duties. It is important to ensure that this supervisory role of the Minister does not undermine the independence and autonomy of the Ombudsman.

## **Article 28 - Judicial protection from discrimination**

112. The relationship between this provision and that of Article 26 is unclear and jeopardises in practice the protection mechanism.

113. It is difficult to understand from the draft whether a victim would have to choose between judicial protection and a complaint to the Protector, or whether it is possible to introduce both procedures, simultaneously or consecutively. Moreover, the very nature of the Protector intervention is unclear; whether his /her decision would have a binding character is unclear from the current draft. According to the current Art. 44 of the Law on the Protector, the Protector's decisions do not have any binding character.

114. Finally, the 15 days deadline for lodging a complaint is too short and unrealistic.

115. With regard to judicial protection, the Venice Commission would invite the drafters to be guided by ECRI's Recommendation No. 7, especially paragraph 10<sup>23</sup> and the explanatory report thereto.

## **Article 29 - Territorial jurisdiction**

116. The provision seems to provide for a specific *ratione loci* jurisdiction in addition to *ratione materiae* jurisdiction. The provision is unclear since it does not give an indication of the jurisdiction of a court whether civil or administrative cases or whether parties are involved [this sentence would have to be redrafted since it is not well formulated and not clear].

117. The drafters are invited to determine more clearly the jurisdiction of the courts.

## **Article 30 - Initiating procedures**

118. 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.

119. 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<sup>24</sup> and ECRI's Recommendation No. 7 (paragraph 25), pursuant to which third party action is possible in all cases of discrimination.

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<sup>23</sup> Paragraph 10 reads : 10. The law should ensure that easily accessible judicial and/or administrative proceedings, including conciliation procedures, are available to all victims of discrimination. In urgent cases, fast-track procedures, leading to interim decisions, should be available to victims of discrimination."

<sup>24</sup> Council Directive 2000/43/EC, Article 7(2).

**Article 35 - Revision**

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

121. The drafters should bear in mind that 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 - Acting Protector**

122. This article seems to confer competence to the Protector of Human Rights and Freedoms through a transitional rule to deal with cases of discrimination as from the entry into force of the law.

123. The same transitional rule should apply to the courts.

**V. Conclusions**

124. 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.

125. 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.

126. However, in several 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;
- to avoid repetitions;
- 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 by definition discriminatory;
- to define clearly the scope of application of the law to the public and private sphere;
- 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.

127. The Venice Commission welcomes particularly the agreement given by the Montenegrin authorities to have a follow-up mission taking place. This mission will allow a delegation of the Commission to meet again with the Working Group in order to assist in the implementation of the above-mentioned recommendations.

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