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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

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

on the basis of comments by

**Mr Ledi BIANKU (Member, Albania)
Ms Lydie ERR (Member, Luxembourg)**

**endorsed by the Venice Commission
at its 73rd Plenary Session
(Venice, 14-15 December 2007)**

I. Introduction

1. By a letter dated 10 October 2007, Mr Rasim Ljajic, Minister of Labour and Social Policy of Serbia, requested the expertise of the Venice Commission on the draft law on prohibiting discrimination.
2. Mr Bianku, Member of the Venice Commission in respect of Albania and Ms Err, Member of the Venice Commission in respect of Luxembourg, were appointed as rapporteurs. They examined an English version of the draft law (CDL(2007)119) and presented their comments which were endorsed by the Venice Commission at its 73rd Plenary session, on 14-15 December 2007 (CDL(2007)120 and CDL(2007)121 respectively).
3. The following opinion was drawn up on the basis of these comments.

II. Preliminary Remarks

4. According to the terms of Mr Ljajic's letter, the draft law on prohibiting discrimination is part of the social, political and economic reforms which have been launched in order to harmonize national legislation and practice with the international conventions and institutions of which the Serbia is part and also in view of the accession of the Republic of Serbia to the European Union, which requires the implementation in the internal legal order of numerous EU norms.
5. On 24 September 2002, the Parliamentary Assembly of the Council of Europe, in its Opinion no. 239 concerning the application of the Federal Republic of Yugoslavia for membership of the Council of Europe, already held that "special attention should be paid to combating discrimination against, and promoting equal treatment of, Roma" (§ 16).
6. In 2004, the Human Rights Committee recommended that "the State party should enact comprehensive non-discrimination legislation, in order to combat ethnic and other discrimination in all fields of social life and to provide effective remedies to victims of discrimination."¹
7. Moreover, in the Council Decision 2006/56/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro, the European Council declared the adoption of the legislation against discrimination as a short- and medium-term priority.²
8. Mr Ljajic in his letter underlined that the draft law on prohibiting discrimination was the result of a long consulting process among experts, representatives of the civil society and the government.

¹ See CCPR/CO/81/SEMO, § 23.

² See Council Decision 2006/56/EC of the 30th of January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of the 10th of June 1999 and repealing Decision 2004/520/EC) under <http://europa.eu/scadplus/leg/en/lvb/r18015.htm>.

III. General Considerations

9. The present assessment of the draft law on prohibiting discrimination has been conducted in the light of Council of Europe standards, especially Article 14 of the European Convention on Human Rights³ (ECHR), its Protocol 12,⁴ the European Social Charter, EU directives against discrimination⁵ and with specific attention to ECRI's materials (Recommendation no. 7 of 2002) regarding the National Legislation on the Fight Against Racism and Racial Discrimination.

10. The draft law prepared by the Serbian authorities constitutes undeniably an important and valuable step in improving the normative protection against discrimination in Serbia.

11. At the constitutional level, at least three articles expressly ban discrimination: Article 21⁶ of the Constitution adopted in 2006 offers a general prohibition of discrimination, while Articles 50 and 76 of the Constitution prohibit discrimination in specific situations such as in relation to media activities⁷ and in the framework of minority protection.

12. The compatibility and complementary nature of this draft law with the Serbian Criminal and Civil codes should additionally be secured.

³ 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."

⁴ 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."

⁵ Especially the Council directive 2000/43/EC from the 29th of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council directive 2000/78/EC from the 27th of November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶ Article 21 of the Constitution reads: "Prohibition of discrimination"

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

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

⁷ Article 50 §§ 3 and 4 of the Constitution reads: "Freedom of the Media."

"Censorship shall not be applied in the Republic of Serbia. Competent court may prevent the dissemination of information through means of public informing only when this is necessary in a democratic society to prevent inciting to violent overthrow of the system established by the Constitution or to prevent violation of territorial integrity of the Republic of Serbia, to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence.

The law shall regulate the exercise of right to correct false, incomplete or inaccurately imparted information resulting in violation of rights or interests of any person, and the right to react to communicated information."

13. The draft law is clearly structured and divided into eight parts. The articles relate to each other in a logical way; their titles are clear and helpful for the understanding of the law. Explanatory comments would, however, have been useful for a better understanding of the draft law and of the Serbian legislation and situation in general.

14. In general, the draft law contains very detailed and substantial provisions, whether substantial, institutional or procedural provisions are concerned.

15. The draft law offers detailed and comprehensive definitions, which are not only in line with European standards but even more detailed and elaborated than the latter.

16. In this regard, the Venice Commission notes with satisfaction that the draft law sets out the principle of equality, a right to "equal rights", while Article 14 of the ECHR does not mention the principle of equality as such.

17. With regard to the definition of discrimination the draft law offers even more precise and detailed examples of prohibited discrimination than the European provisions.⁸ However, in order to improve the clarity of the draft law with regard to the general definition of direct and indirect discrimination, the drafters could profitably adopt ECRI's definitions.⁹

18. Additionally, the draft law seems successfully oriented to foster what is referred to in the draft as "affirmative actions". In this regard, the Venice Commission would recommend introducing a general and clear reference to the principle of proportionality.

IV. Technical Aspects

19. Even though the text as a whole is well structured, a few modifications would enhance the logic of the structure.

20. To that end, current Article 4 (The principle of equal rights and obligations) should become Article 3 and hence follow the principle of equality provided for in Article 2. Current Article 6 on the notion of discrimination should precede current Article 3 on the general ban on discrimination and current article 5 on the Exemption from the general ban on discrimination.

21. As they refer to specific aspects of discrimination, Articles 9, 10 and 12 should follow Article 6 on the notion of discrimination.

22. Articles 3 and 13 could be merged, since they both refer to affirmative actions. It could also be more adequate to use the term "positive" or "measures to promote effective equality" instead of "affirmative" actions.

23. Additionally, Part VII (Penal Provisions) could be integrated within Part V (Judicial Protection), making a direct and logical link between the provisions of these two parts.

⁸ For instance, it is worth mentioning that while EU directives enumerate four grounds of discrimination, the present draft law lists eighteen grounds of prohibited discrimination, active or passive.

⁹ According to ECRI's Recommendation no. 7: "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. 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 group 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".

Following the same reasoning, Part VI (Supervision) could follow the Penal Provisions because Supervision should include the effectiveness of these Penal Provisions.

V. Considerations related to some specific provisions

24. In addition to the general assessment and technical remarks, specific provisions of the draft law deserve detailed comments.

Part I : General provisions (Articles 1-13)

25. This first part of the draft law contains the major principles and definitions for prohibiting discrimination. It offers a wide range of discrimination situations which are prohibited and offers general provisions along with detailed definitions.

The principle of equality (Article 2)

26. This article provides for the principle of equality. The wording goes further than the ECHR which does not mention the principle of equality as such.

27. In this regard, this draft Article 2 constitutes a real improvement with regard to the ECHR.

The principle of equal rights and obligations (Article 4)

28. In view of avoiding the risk of restricting the scope of this principle, it is recommended that the terms “solely or mainly” in paragraph 2 of this Article be deleted. Indeed these two terms could make the proof of a violation of the principle more complex, which would be regrettable and unwelcome.

Exemption from the general ban on discrimination (Article 5)

29. This Article states that exemption to the present draft law can only be provided for by the Constitution. The hierarchy of norms could have been more appropriately provided for under Article 2 of this draft.

The notion of discrimination (Article 6)

30. This article defines discriminatory acts or grounds extensively. The Venice Commission welcome this.

31. It includes the notion of nationality which goes beyond the requirements of EU directives.

32. However, the Venice Commission would recommend including initially a definition of direct discrimination as such. In this regard ECRI’s definition in its Recommendation no. 7 would be a good example to follow.

33. As in relation to Article 4 § 2 and for the same reason, the terms “solely or mainly” in paragraph 2 of this Article should be deleted.

Definitions of the terms (Article 7)

34. The definition of “voluntary discrimination examiner” is unclear; it should be redrafted.

35. Moreover, this notion might be seen as superfluous in view of the provisions laid down under Article 28 § 1 allowing “any person” to submit a complaint against discrimination cases.

Forms of discrimination (Article 8)

36. The definition of indirect discrimination in § 2 does not seem to be correct.

37. The Venice Commission would recommend adopting the definition offered by ECRI's Recommendation no. 7.¹⁰

Prohibition of victimisation (Article 9)

38. The Venice Commission would recommend adding a definition of victimisation. This would help the understanding of the notion and purposes of the Article and its title.

Prohibition of harassment (Article 10)

39. The current wording of Article 10 might narrow the wide definition of discrimination under Article 6.

40. It is therefore recommended that the provision be clarified in order to avoid such negative consequences, by, for instance, replacing the term "discrimination" by "harassment" or "discriminatory harassment".

Serious forms of discrimination (Article 11)

41. This article contains a list of forms of "serious discrimination".

42. The Venice Commission suggests adding as serious forms of discrimination: victimisation, harassment, as well as advocating and instigating discrimination, since all these acts are characterised by a clear subjective element, and therefore can be considered as serious forms of discrimination.

Affirmative action (Article 13)

43. The introduction in this draft law of the notion of "affirmative actions" and more particularly of temporary affirmative actions is welcome.

44. In this regard, the Venice Commission would recall the importance and necessity of introducing a clear reference to the principle of proportionality.

Special cases of discrimination (Article 14)

45. This article seems unnecessary.

46. The Venice Commission would instead recommend introducing a provision clearly specifying the scope of the law.

Part II: The Commission for protection of equality (Articles 15 - 27)

47. The creation of the Commission for the protection of equality constitutes the second core part of the draft law. The provisions dealing with this issue are quite comprehensive and detailed and offer a solid framework and basis for a sound functioning of the institution.

¹⁰

See footnote 9.

48. However, the following comments are to be taken into consideration in order to improve the content of some provisions and the functioning of the institution.

Position and the composition of the Commission (Article 15)

49. According to the draft law, the Commission shall be an independent and autonomous organ composed of three members.

50. This number seems insufficient both with regard to the large jurisdiction and competencies of the Commission and with regard to the necessary independence of the Commission.

51. It is therefore recommended that the number of members be increased to at least five, in order to have a more collegial body.

Authorized proponents (Article 16)

52. Three entities are entitled to propose candidates for membership of the Commission.

53. The Venice Commission considers that the possibility for the government to propose one candidate out of three could constitute an obstacle to and certainly not a guarantee of a genuine independence of the institution.

54. The Venice Commission would like to draw the attention of the drafters to the alternative possibility of having an open competition allowing candidates to apply directly for membership without changing the procedure foreseen in Article 17.

The procedure of submitting proposals for members of the Commission (Article 17)

55. The procedure described in this article is very precise; it would however need a few modifications in order to gain in clarity and to avoid inconsistencies.

56. The draft refers to an "authorised Committee of the National Assembly" without specifying which Committee is meant. The Venice Commission would instead recommend explicitly specifying the Committee within the National Assembly which would be competent.

57. Some confusion results from the different paragraphs of this article regarding the number of candidates that can be proposed by the authorised proponent (according to paragraph 2, the singular would mean one candidate, while paragraph 4 of the article refers to candidates in plural) .

58. Moreover, as to the list of candidates to be drafted by the "authorised committee" and to be presented to the National Assembly for election, paragraph 5 should specify that this list be obligatorily made up of the proposals of the three proponents. Paragraph 7 provides however for the election of one candidate from each list submitted by the proponents, without mentioning the list drafted by the authorised Committee.

59. The Venice Commission would hence invite the drafters to revise the procedure in order to avoid ambiguities and contradictions in the process of election.

60. The requirement for the candidates to hold a university degree could specify a field of education.

61. Paragraph 7 aims to introduce the respect of the principle of gender equality when electing the members of the Commission.

62. The Venice Commission welcomes this concern of gender equality within this election process.¹¹ As it stands, the implementation of the principle of gender equality seems rather unproductive with regard to the limited and odd (three) number of members of this institution. It would hence be more appropriate to call for a “proportional gender representation”.

63. It could be considered to provide for the inadmissibility of a list (whether the proponents’ list or the list drafted by the “authorised commission”) which would not contain representatives of both genders.

The mandate of the members of the Commission (Article 19)

64. The impossibility of electing as a member the same person twice in a row is welcomed by the Venice Commission since it is a guarantee of independence.

65. However, the Venice Commission would suggest going further by providing for a unique mandate.

66. Paragraph 3 of this article could be used for an oath of office.

Public call for proposing new candidates (Article 22)

67. The Venice Commission would recommend harmonizing the procedure of substitution with the procedure of nomination (Articles 16 and 17).

Electing the Chairman of the Commission (Article 24)

68. Due to the limited number of members (three), the procedure for the election of the Chairman of the Commission among the members themselves is neither effective nor a guarantee for the Chairman’s preponderant role and authority.

69. The Venice Commission would hence suggest having the Chairman elected by the National Assembly.

The passing of decisions by the Commission (Article 26)

70. The legitimacy of decisions taken by majority among three members is questionable.

71. Therefore the Venice Commission reiterates its proposal to see the number of the members of the Commission increased.

The technical service of the Commission (Article 27)

72. In view of the wide scope of the competencies of the Commission, this article should describe more precisely the structure and composition of the whole administration of the Commission, which would definitely need a sufficient number of collaborators assigned to the members.

73. Moreover, the Venice Commission can only reiterate the requirement to see this institution as independent as possible. Therefore the draft law should specifically provide for an independent budget, instead of having all resources provided for by the Government as is foreseen in the current draft.

¹¹ Indeed the Venice Commission adopted a “Declaration on women’s participation in election” at its 67th Plenary session on 9-10 June 2006 (CDL-EL(2006)020).

PART III Procedure before the Commission for protection of equality

Initiating the procedure (Article 28)

74. The active locus standing of the Commission provided for in paragraph 1 is welcomed.

75. However, paragraph 2 enumerates restrictively the categories of defendants. This limitative enumeration jeopardises the scope and the effectiveness of the law itself, all the more so since according to Article 32 § 2 a complaint against a person who does not belong to this list could be rejected.

76. The Venice Commission would recommend reconsidering this article in order to avoid the selective choice of defendants currently forseen.

Lodging a complaint (Article 29)

77. The Venice Commission welcomes this procedure which does not require restrictive formal elements. Sufficient staff to process the complaints will, however, be necessary.

Conducting the procedure and other legal remedies (Article 30)

78. The possibility of having a procedure before the Commission irrespective of the existence of concomitant judicial procedures raises concern in that it would minimise the mediation power of the Commission.

79. The Venice Commission would therefore recommend redrafting this article in order to respect the general principle of exhaustion of administrative remedies before resorting to judicial ones. This would not only reinforce the role of the Commission which should be seized first but also be in line with the principle of irreversibility of a judicial decision by administrative means and also with the principle of *res judicata*.

80. The same observations apply with regard to Article 45 of the draft.

Deadline for lodging a complaint (Article 31)

81. The deadline seems rather short; it could be increased to one year.

Rejecting a complaint (Article 32)

82. This article regulates the cases when a complaint is rejected.

83. It generally respects the criteria set down by European standards.¹²

84. However the rejection of a complaint based on the list provided for in Article 28 § 2 raises concern, since the limitative enumeration given by Article 28 § 2 jeopardises the law and effectiveness of the law itself .

85. The Venice Commission would therefore recommend reconsidering the rejection of a complaint based on the list provided for in Article 28 § 2, all the more so since the latter should be modified.

¹² Article 35 of the ECHR.

86. Moreover, the Venice Commission would recommend the drafters to clarify the meaning of “stipulated deadline”.

Reporting on a complaint (Article 33)

87. The deadline of 15 days for submission of the statement from the defendant to the Commission is a solid guarantee, but might be difficult to respect in practice.

Submitting data, reporting and submitting a statement to the Commission (Article 34)

88. This article seems to lack efficiency. It obliges the person or legal entity against which a complaint has been lodged to reply to the questions of the Commission, without specifying any sanction in case of non-observance.

89. Moreover, paragraph 3 seems superfluous and could be deleted since Articles 63 and 64 settle the issue efficiently.

Recommendation and opinion (Article 35)

Acting upon recommendation (Article 36)

90. The deadlines provided for in these articles are quite demanding; they might be difficult to respect in practice.

Part IV Measures passed by the Commission

Measures directed against persons against whom a complaint has been lodged (Article 39)

91. The sanctions, especially public condemnation, provided for in this article are not effective if taken alone.

92. It would be preferable to foresee these sanctions as additional measures to other penal or administrative ones.

A complaint against a decision on passing a measure (Article 40)

93. The two paragraphs seem contradictory.

94. Moreover, the Venice Commission would like to remind the drafters that denying a defendant access to court in a dispute related to his/her/its reputation would be contrary to European standards.¹³

The measures of initiating the appropriate procedure (Article 41)

95. If a violation of the prohibition of discrimination has occurred, the draft law should provide for an obligation for the Commission to intervene and not only for a possibility (“may”) to do so, as it is currently foreseen. This would offer a better protection against discrimination and an effective implementation of the purposes of this law.

96. The Venice Commission would recommend redrafting the third paragraph of this article in this way.

¹³ See for instance the judgment of the European Court of Human Rights concerning the case of *British American Tobacco v. Netherlands*, 20 November 1995, Series A No. 331.

Measures of initiating the procedure for amending laws and decrees in the area of the prohibition of discrimination (Article 42)

97. The obligation to seek the opinion of the Commission on draft laws and other regulations pertaining to protection against discrimination, as provided for in § 2, should also be mentioned in Article 25 of the draft law.

Part V. Judicial protection

Initiating the procedure (Article 47)

98. In comparison with Article 28 § 1 of the draft law, this article seems to limit further the subjects having the right to present charges requesting protection against discrimination.

99. This would be regrettable for the purposes of the law.

Charges (Article 48)

100. Paragraph 4 prevents the association which have brought charges in accordance with Article 47.3 from receiving compensation for the damages incurred.

101. This exclusion of association from compensation jeopardises the very meaning of this draft law, in view of the crucial role of associations in the fight against discrimination.

102. The Venice Commission would recommend reconsidering this issue.

Burden of proof (Article 50)

103. This article seems to institute a partition of the burden of proof, which can be considered as a very positive and important measure.

104. The necessity of paragraph 3 remains, however, unclear.

Part VI Supervision

Supervision of the implementation of this Law (Article 54)

105. The supervision by the authorised Ministry as provided for by the draft would likely undermine the independence and autonomy of the Commission.

106. The Venice Commission would recommend having the National Assembly, through its plenary or competent Committee, as the organ supervising the implementation of this law.

Part VII Penal provisions

107. Some sanctions provided for in this part might be either ineffective or sufficient, particularly with regard to serious violations (Article 59).

108. The Venice Commission would invite the drafters to make sure that the level of the sanctions provided for is sufficiently and correctly evaluated for the purposes and effectiveness of this law.

VI. Conclusions

109. The draft law on prohibiting discrimination constitutes a comprehensive, complete and well-structured legal act for the protection against discrimination. The draft law offers detailed definitions and establishes important remedies for making the fight against discrimination effective. It complies with International standards in this area and therefore constitutes a significant step towards the ban of discrimination.

110. The Venice Commission particularly welcomes:

- the numerous causes of prohibited discrimination provided for by the draft law;
- the establishment of the Commission for protection of equality which enjoys wide competencies;
- the principle of partition of the burden of proof provided for by the draft law;
- the introduction of the notion of affirmative actions;
- the use of the principle of equality as grounds for protection against discrimination;

111. The Venice Commission would however recommend that the drafters reconsider as a priority the following issues in order to improve the quality of the law and provide for an efficient implementation of the prohibition of discrimination:

- Defining the scope of the law;
- Adding the principle of proportionality;
- Improving the clarity of the draft law with regard to the general definition of direct and indirect discrimination, by adopting ECRI's definitions;
- With regard to the Commission for the protection of equality: further guaranteeing its independence by providing for an independent budget, reconsidering the role of the executive power in the candidature of the Commission's members and in the supervision of the implementation of this draft law; increasing the number of the Commission's members and providing for a sufficient number of staff;
- Reconsidering a few procedural provisions in light of the specific comments under Part IV of the present opinion;
- Reconsidering the restrictions given to the quality of defendants;
- Reconsidering the sanctions provided for in Articles 34, 35, 36, 39 in order to make them more efficient;
- Clarifying several provisions as identified in Part IV of the present opinion (Considerations related to specific provisions).

112. The Venice Commission would like to remind the Serbian authorities that the compatibility and complementary nature of this draft law with the Serbian Criminal and Civil Codes should be ensured.