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GUIDE AGAINST DISCRIMINATION

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Guide against discrimination

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I Introductory remarks

Today, the respect of equality principle among men is perceived as the ethical imperative of every democratic society and state that is based on the rule of law. All international documents relating to human rights, as well as constitutions of almost every country in the world, contain the rule on prohibition of discrimination. Article 1, of the United Nations Universal Declaration of Human Rights from 1948, is dedicated to the principle of equality and it contains the following words:

„All human beings are born free and equal in dignity and rights.“

In the same spirit, the text of article 2, of International Pact on Civic and Political Rights from 1966, continues:

„Member states of this Pact are committed to respect and guarantee, to all the persons on their territories and those under their jurisdiction, the rights recognized by this Pact, regardless of race, color, language, gender, religion, political or other opinion, national or social origin, property status, birth or any other circumstance.“

Starting from these basic principles, a comprehensive legal regime of prohibition of discrimination, should accomplish two goals. First – to determine what is discrimination, or rather to determine what is prohibited. Second- to offer everybody affected by the discrimination, efficient legal protection mechanisms. Following on these goals, in this Guide, we presented the most important aspects of discrimination treatment,¹ starting from antidiscrimination provisions within Montenegrin legislation, the notion of discrimination, discrimination forms, and review of typical discrimination cases.

Within the Guide, we also listed the selected examples of current antidiscrimination provisions within Montenegrin legislation. The current gap in the local legal system, as a consequence of the fact that we don't have general antidiscrimination law (as well as special antidiscrimination laws) is being poorly substituted by dispersive approach regarding discrimination- through some (justified) norms in different legal areas.

We are stressing that the basic objective of the Guide is to provide useful and usable explanations regarding the legal and real nature of discrimination, to the

¹ *The content of the Guide is in compliance with the solutions proposed in the CEDEM's Model of Antidiscrimination Law.*

readers, and they might be lawyers (judges, prosecutors, attorneys, counselors), or those engaged in the fight against the discrimination (NGOs, media, etc), or those who are the victims of discriminatory behavior. At the same time, the Guide also represents another contribution to the public campaign aiming for quick adoption and promotion of antidiscrimination legislation in Montenegro, but also the Guide provides strong support for adequate processing of discrimination cases.²

Finally, we wish to stress that this Guide was produced with the support of the **Swedish Helsinki Committee**, and written by CEDEM's expert team – M.A. Saša Gajin, Aleksa Ivanović and Rade Bojović.

² The annex of the Guide contains antidiscrimination provisions from European Convention on Protection of Human Rights and Fundamental Freedoms.

II Antidiscrimination provisions in Montenegrin legal system

As we already stated, Montenegrin legal system has neither a general Antidiscrimination Law, nor specific regulations that would comprehensively regulate some of the areas in which protection from discrimination is of special importance. So far, several versions of antidiscrimination regulations have been drafted in Montenegro. One of those drafts is CEDEM's model of a law, which has been tested publicly, gaining the support from relevant NGOs and it was then submitted to MPs.³ It is obvious that adoption of general Antidiscrimination Law, as well as considerations regarding introduction of special antidiscrimination regulative⁴, remains one of legislative priorities of the current Parliament. However, until positive legislation is adopted, it is necessary to understand those legal solutions, which are *ipso iure* present and which, at the moment, represent framework for protection against discriminatory actions.

For a start, in this chapter of our guide, we wanted to point to key anti-discriminatory provisions incorporated in still valid Constitution from 1992, as well as in part of positive regulations in Montenegro. Provisions cited here, directly or indirectly, emphasize the principle of equality of citizens, prohibition of discrimination, and sanctions for discriminatory actions.

Purpose of this part of the guide is to compile at one place and point to legal existence of antidiscrimination norms in our local legal order and, at the same time, to enable better insight in dispersive structure of provisions promoting protection from discriminatory actions. Along each of the provisions, we gave a rule that either explicitly or implicitly confirms anti-discriminatory message of the constitution framer or legislator.

(1) Constitution of Montenegro (1992)

Article 15 Freedom and equality

Citizens are free and equal regardless of any specifics or personal feature.

Everybody is equal before the law.

³ Model of Antidiscrimination Law from December 2005.

⁴ Example - laws that would protect persons with disabilities.

Article 34 Freedoms of the individual

Freedom of conviction and consciousness is guaranteed.

Freedom of thoughts and public expression of thoughts, freedom of religion, public or private exercise of religion, as well as freedom of expressing proper nationality, and use of proper language and writing is guaranteed.

Nobody is obligated to profess about proper opinion, religion, and nationality.

Article 43 Inequality and intolerance

Every instigation and stirring of national, racial, religious, and other inequalities, as well as instigation and stirring of national, racial, religious, and others hatreds or intolerances is Unconstitutional and punishable by law.

Article 56 Protection of disabled persons

Disabled persons are guaranteed to enjoy special protection.

Article 61 Prohibition of children abuse

Abuse of children is prohibited.

It is prohibited to employ children and minors on jobs harmful for their health and development.

Article 62 Education

Every child has right on education under equal terms.

Primary education is obligatory and free of charge.

Article 67 Identity protection

Members of national and ethnic groups are guaranteed the protection of their national, ethnical, cultural, and religious identity.

Protection of national and ethnic groups' member's rights is implemented in line with international protection of human and civic rights.

(2) Expert version of Montenegrin Constitution (2006)

Article 18 Equality and prohibition of discrimination

Every individual in Montenegro is guaranteed human rights and freedoms.

Everybody is equal before the law.

Equality of men and women must be ensured in all areas of social life.

Any, direct or indirect discrimination, based on gender, nationality, race, religion, language, skin color, ethnical or social origin, political or other conviction, property status or any other personal feature, is prohibited.

Freedom of expressing proper nationality is guaranteed. Nobody is obligated to profess about proper nationality.

(3) Labor Law (2003)

Article 3 Equality regarding right of labor

Employees are equal regarding the rights originating from work, regardless of nationality, race, gender, language, religion, political or other conviction, education, social origin, property status or any other personal feature.

Employer is obligated to respect the rights and equality of the employee in the protection of rights, as well as its privacy and dignity.

(4) The Law on Legal Status of Religious Communities (1977)

Article 7 Freedom to belong to religious communities

Nobody, in any way cannot be forced to become member of some religious community, to remain member of that religious community or to leave the religious community.

Nobody, in any way, cannot be forced to participate in religious ceremonies or other expressions of religious feelings.

Nobody can forbid the citizens to participate in religious ceremonies and other expressions of religious feelings.

Nobody can force members of religious community not to use their civic rights guaranteed by the law.

Article 8 Equality of citizens regardless their religion

Citizens cannot be limited in the implementation of their rights, guaranteed by the law, because of their religious convictions, affiliation to some religion or religious community, or for practicing or participating in some religious ceremonies and other expressions of religious feelings.

Nobody can, based on proper religious convictions, enjoy no benefits, advantages, or special protection.

Affiliation to some religious community or profession of some religion, does not release anybody from constitutionally determined rights and obligations of the citizen.

(5) Media Law (2002)

Article 23 Prohibition of media promotion of discrimination

Publication of information, and opinions stirring discrimination, hatred, or violence against persons or group of persons, because of their affiliation or non-affiliation to some race, religion, nation, ethnic group, gender, or sexual orientation, is prohibited.

The founder of the media and authors will not be taken responsible if the published information and opinions from paragraph 1 of the Article, are part of scientific or author's work dealing with public matters, and they have been published:

- without intention to stir discrimination, hatred or violence, and they are integral part of objective journalist's report;
- with intention to critically point to discrimination, hatred or violence, or at occurrences that represent or might represent stimulation to such behavior.

(6) Law on Sport (2004)

Article 3 Equality of citizens in sports activities

Sport is based on principles of voluntarism, partnership, tendencies, talent, ethics, scientific and expert knowledge, and sports rules.

Sport is accessible to all regardless their race, skin color, gender, language, religion, national affiliation, social origin, political or other convictions, property status or any other personal feature.

(7) Law on Criminal Proceedings (2003)

Article 8 The right to use mother tongue in criminal proceedings

Criminal proceedings are conducted on the language that is officially in use at court.

Parties, witnesses, and other persons participating in the proceedings, have the right to use their language during proceedings. If the proceedings are not conducted in the language of that person, oral interpretation shall be provided for the statements made by him/her or by other persons, as well as translation of documents and other written evidences.

The person from paragraph 2 of the Article will be informed about the right for interpretation, but the person may renounce that right if it knows the language in which proceedings are conducted. Note shall be made in the records that person was informed and the statement of the person as well.

Interpretation is done by the interpreter.

(8) The Law on Civil Proceedings (2004)

Article 7 The right to use mother tongue in the civil proceedings

Civil proceedings are conducted in the language officially in use at court.

Parties and other participants in the proceedings, who do not understand or speak the language officially in use at court, have the right to use their own language or the language they understand.

(9) The Law on Political Parties (2004)

Article 5 Prohibition to use the party for discriminatory purposes

The activity of the party, which goals are directed at: violent change of constitutional order, violation of territorial integrity of Republic of Montenegro,

violation of constitutionally guaranteed human rights and freedoms, stirring and provoking of national, racial, religious, and other hatreds or intolerances, is prohibited.

(10) Penal Code (2003)

Article 158 Violation of right on language and writing

The one who, contrary to regulations on use of language and writing of national minorities and ethnical communities that live in Montenegro, denies or limits the citizen to, when implementing his rights or when addressing bodies or organizations, use his language or writing, shall be punished with fine or imprisonment up to one year.

Article 159 Violation of equality

(1) The one who, because of national or ethnic affiliation, affiliation to race or religion, or because of absence of that affiliation or because of differences regarding political or other convictions, gender, language, education, social status, social origin, property status, or some other personal feature, denies or limits human and civic rights determined by the Constitution, laws, other regulations, or general acts, or internationally ratified agreements, to somebody else, or based on these differences provides benefits and privileges, shall be punished by imprisonment up to three years.

(2) If the offense from paragraph 1 of the Article is committed by official person, during official service, it will be punished by imprisonment ranging from three months up to five years.

Article 160 Violation of freedom to express national or ethnical affiliation

The one, who prevents other from expressing his national or ethnic affiliation or culture, shall be punished by fine or imprisonment up to one year.

(2) Punishment from paragraph 1 of the Article shall be applied also on the person who forces other to profess about proper nationality or ethnic affiliation.

(3) If the offense from paragraphs 1 and 2 of the Article is committed by official person during official service, it will be punished by imprisonment up to three years.

Article 161 Violation of freedom to profess religion and practice religious ceremonies

(1) The one who prevents or limits the freedom of religion or practicing of religion, shall be punished with fine or imprisonment up to two years.

(2) Punishment from paragraph 1 of the Article shall be applied also on the one who prevents or disturbs execution of religious ceremonies.

(3) The one who forces other to profess about proper religious convictions shall be punished with fine or imprisonment up to one year.

(4) Official person who commits offense from paragraphs 1 to 3 of the Article, shall be punished with imprisonment up to three years.

Article 163 **Violation of freedom of movement and settlement**

(1) The one who extralegally denies or limits Montenegrin citizen freedom of movement or settlement on territory of Montenegro, shall be punished with fine or imprisonment up to one year.

(2) If the offense from paragraph 1 of the Article is committed by official person during official service, it will be punished by imprisonment up to three years.

III The notion of discrimination

When defining the discrimination, looking at it from historical and comparatively-legal point of view, our attention is attracted by terms such as 'apartheid', 'racial segregation', 'caste system', 'ethnical cleansing', 'hate crime', 'homophobia', 'xenophobia' and others. All these words denote or describe prohibited activities- discrimination. However, although seldom heard in public speech, they do not exhaust completely the content of illicit behavior.

Discrimination is very complex phenomenon. Not every differentiation between individuals, with respect to their personal features, is prohibited- sometimes unequal treatment can be justified, i.e. marked as permissive. Discrimination may have different forms; sometimes it is hidden; as a rule, it is defined as illicit behavior in different laws or other legal sources; often represents the subject of different or even contrary interpretation of the courts and other government bodies, etc. Therefore, combating discrimination with legal means, primarily asks for precise and complete definition of the notion, forms, and cases of discrimination.

Usually the discrimination is defined as unjustifiable making of differentiation conducted toward one person or group, in respect to their personal features. In line with such defined notion, the procedure of determining whether in concrete case we have the case of discrimination should rely on the analysis of the following five elements.

1. **Discrimination means to make a differentiation, i.e. unequal treatment**

Three aspects of unequal treatment deserve special attention. One relates to the content of making the differentiation, the second to the nature of unequal treatment, and third to its occurrence shapes, i.e. form.

a) The content

By its content, making the differentiation is most commonly reflected in excluding, limiting, or giving privileges.

Examples: Exclusion exists if the owner of the public swimming pool doesn't allow Roma people to enter the pool. Limiting exists if disabled person is not given medical service, at the medical center, when that person's turn come but at the end when there is nobody else left waiting. Giving privileges exist if the minister allows only the people from his/ her own political party to work in the ministry.

Looking from the content point of view, unequal treatment always has two essential features:

- Putting somebody in worse position, which is usually reflected in disenfranchisement, and
- Putting the others in better position, and this is called giving privileges or preferences.

If we bear in mind the consequences of unequal treatment, it is easy to conclude that giving privileges to ones will, at the same time, mean disenfranchising the others and the other way around.

a) The nature

By its nature, unequal treatment can consist from either acting or omission to act.

- If the unequal treatment occurs by the means of acting, i.e. performance of some activity, in that case we are talking about discrimination committed by doing or acting.

Example: Discriminatory activity is when bar owner puts a table on the front door saying that Negroes are forbidden to enter the bar.

- If the unequal treatment occurs because of omission to act, than we are talking about discrimination as a result of omission to act.

Example: Probably one of the most famous examples of omission to act is maintaining, i.e. non removing architectural obstacles for disabled persons- in this way local government is discriminating persons in wheel chairs, unless it brings down the edges of the sidewalks in certain places. The same applies when owner of some facility that is being used by the public, such as, shops, cinemas, universities, sports centers, etc, omitting to provide undisturbed access to disabled persons.

a) Form

By its form, discrimination has many shapes. Sometimes discrimination is visible, direct, and sometimes hidden, indirect. Sometimes it takes the form of disenfranchisement, i.e. depriving the rights to ones, and giving privileges to others. Sometimes it is simply acting or omitting to act, and sometimes insulting, disdaining, i.e. disturbing speech. Sometimes we are talking about common discrimination, and sometimes about severe form of discrimination.

The law is aiming to reveal, determine, and name all discrimination forms. The longer the list of prohibited discrimination forms, the more efficient protection from discrimination will be.

2. Discrimination means making differentiation, i.e. unequal treatment coming from natural or juristic person

When we ask ourselves from who does the discrimination originates, than in each concrete case we have to ask two questions: first, to which person does the prohibition of discrimination relates, i.e. who is the addressee that has to comply with principle of equality; and second, what is the nature of his obligation, what does it consists of.

b) Obligation addressee

Everyone is obligated to respect the principle of equality among men. Nobody has the right to exercise discrimination. Therefore, addressees regarding the legal obligation to restrain from committing discrimination are all individuals, i.e. natural persons, as well as all companies, organizations, institutions, government bodies, and other government institutions, i.e. all juristic persons.

Examples: Prohibition of discrimination equally applies:

- To government body, for example Parliament that has adopted the law ensuring privileges just for members of certain religious communities;
- To public institution, example school that refuses to enroll a pupil infected with HIV virus;
- To company, for example, which is running the shopping centre and denies Roma people entrance;
- To employer, regardless whether in private or public sector, for example for one who fired an employee after discovering that he is homosexual;
- To public media, for example for editor and journalist who publish articles containing hate speech;
- To individuals performing business activities, for example dentist who refuses to fix the tooth to disabled person;
- To the individual, for example the one writing discriminatory symbols or messages, or to one demolishing tombstones belonging to ethnic minorities, etc.

a) The nature of obligation

Obligation to respect the principle of equality can be either negative or positive.

- The first obligation of everyone is not to behave in discriminatory manner, i.e. to restrain from discrimination, and therefore this obligation is called the negative one. Discrimination prohibition is mostly exercised through negative obligation.

Examples: all previously mentioned examples regarding the obligation addressees (I, 1., a), refer to negative obligation. Therefore, the Parliament has negative obligation to restrain from passing discriminatory law, the school must restrain from discriminating the pupil with HIV virus by accepting him to the school, the editor and journalist are obligated to restrain from publishing the hate speech, etc.

■ However, sometimes the addressee might have the positive obligation, meaning the obligation to undertake certain activities in order to prevent or punish the act of discrimination, and therefore this obligation is called the positive one. If the addressee, as a rule that will be some government body, does not act in line with this obligation, it shall be deemed that aforesaid body acted in discriminatory manner.

Examples: the police has positive obligation to prevent hooligans from physically attacking participants of regularly announced meeting of homosexuals and lesbians, as well as to prevent expulsion of Roma from some settlement or burning down some religious structure. The police have the obligation to thoroughly and efficiently investigate, who are the perpetrators of these acts.

3. Discrimination means making differentiation, i.e. unequal treatment coming from natural or juristic person, which is exercised against the individual or group

Discrimination victim can be any person, natural or juristic, individual alone or as member of a group that is suffering discrimination, even the members of his family or persons close to him can be discrimination victims.

a)Natural and juristic person

Most common victims of discrimination are natural persons- individuals. However, even juristic persons (companies, institutions), as well as entrepreneurs can become discrimination victims, just as the aforesaid individuals.

Examples: If the Law students, from private schools that have the license issued by the Ministry of Education, are excluded or limited in their right to take the qualifying examination for judges, under same terms as the students who graduated at state University, than we are talking about unjustifiable disfranchisement, i.e. discrimination of private law schools.

b) The individual and the group

Individuals can be victims of discrimination either individually or as members of a group of persons sharing the common personal feature. In this case the size of the group or its other features, such as location, members' social structure, etc, are of no importance.

Examples: Beating the individual solely or predominantly because of his nationality represents discrimination directed at him personally. On the contrary, publication of an article in the newspapers, advocating forceful eviction of Roma from certain part of the town, represents hate speech directed at the whole group, i.e. all members of Roma community.

c) Members of family and close persons

In some cases, discrimination victim is not just the individual himself, but also the members of his family and persons close to him.

Examples: Family members of the individual infected by HIV virus or individual having AIDS, very often suffer the same discrimination as the person in question- refusal to enroll their kids to school, or employment for spouse or extra-marital partner, denying medical care for family members, exclusion from social environment, public humiliation etc. The same applies to person close to the infected or sick- girlfriend or boyfriend, friend, etc.

4. Discrimination means making differentiation, i.e. unequal treatment coming from natural or juristic person and directed at person or group with respect to their personal features

Discrimination is the differentiation between individuals based on their personal features. Discrimination occurs when one person is being put into disadvantageous position just because of its personal feature- because of skin color, nationality, religion, gender, etc. In order that unequal treatment would represent discrimination, it is necessary to abstract, ignore complete personality of a man, in all its aspect (identity, character, features, habits, etc), reducing it just one of its personal features- whether he is a Jew, disable, homosexual, etc.

In that context, the answers on two questions are essentially determining the possibility of legal protection from discrimination. First, with respect to which personal features of a person discrimination is prohibited, and second, how to define individual personal features.

d) The list of personal features

Generally accepted rule is that discrimination is prohibited with respect to personal features of people, i.e. with respect to any personal feature of the individual. The lists of personal features, which can be found in different documents (international conventions, constitutions,

laws, court rulings, etc), are not or shouldn't be locked, i.e. reduced to precisely defined and cited personal features. Therefore, these lists are informative; they just indicate the examples of personal features and clearly prohibit discrimination on base of personal feature that is not cited in those lists.

Example: In the „Model of Antidiscrimination Law”, which can be found in the annex of this guide, it is said that discrimination is prohibited is based on race, skin color, ancestors, citizenship, nationality or ethnic origin, language, gender, sexual identity, sexual orientation, property status, birth, genetic capabilities, health condition, disability, marital status, conviction, age, appearance, and other personal features of an individual.

One of the rare exceptions from the rule can be found in the definition of 'hate speech', which contains shortened list of personal features- according to article 23 of Law on Media, hate speech will be prohibited if directed against persons or group of persons because of their affiliation or not-affiliation to some race, religion, nation, ethnical group, gender, or because of his/her sexual orientation. This exceptional legal solution is based on the need to protect the freedom of press from excessive limitation.

e) Defining personal features

Usually there is no need to define more closely one personal feature. Personal features, such as nationality, ethnic origin, religious or political orientation, marital status, age, etc, do not ask for specific definition- it is quite clear what these terms mean. However, there are personal features, which definition needs to be done in advance in order to avoid confusion regarding their meaning.

Examples:

- What is sexual orientation? According to sexual orientation, people are usually divided on heterosexuals and homosexuals. However, already known abbreviation "LGBT" population refers to wider definition that differentiates lesbians, gays, bisexuals, and transsexuals. Article 18 of the "Model of Antidiscrimination Law" specifically points to this wider meaning of sexual orientation.

5. Discrimination means illicit making of differentiation, i.e. prohibited unequal treatment that is coming from natural or juristic person directed against individual or group in respect to their personal features

Not every making of differentiation among people, in respect to their personal features, represents illicit discrimination. Let us compare two examples:

- *If you enter the restaurant and the waiter asks you to declare whether you are smoker or non-smoker, i.e. do you want to sit in the smoking or non-smoking area within restaurant, you will appreciate this freedom of choice (especially if you are non-smoker). If afterward you wish to go to the toilet, you want waste your time thinking in which of the two you should enter- male or female and you will accept this possibility to choose as natural, normal, and even desirable;*
- *If you are Roma and at the entrance of the restaurant, they tell you that Roma are prohibited from entering, you will experience a strong feeling of humiliation and you will think that this is unjustifiable discrimination. You will have the same feeling if they do let you in the restaurant, but ask you to sit in the part of the restaurant reserved for Roma.*

These two examples are pointing to one of the most difficult issues in area of discrimination- the issue of permissibility of unequal treatment, i.e. when, making the differentiation between individuals, with respect to their persona features, shall not be deemed as discrimination. Sometimes the answer to this question will be easy, just as in the case of our two examples. However, sometimes the answer on question of permissibility of unequal treatment will demand the use of special legal rules or application of very complex legal methods in weighing the interests.

Looking at the issue from legal-methodological point of view, the answer on question when unequal treatment is permissible, can be contained either in general rule, i.e. 'test' as it is often called, or in number of special rules.

a) According to general rule, developed through practice of European Court for Human Rights when implementing European Convention on Human Rights, different treatment is prohibited, i.e. it shall be deemed that discrimination exists in the concrete case if: first, if goal or consequence of undertaken activities are unjustifiable, or second, if there is no proportion between undertaken activities and the goal achieved through implementation of these activities.

Examples:

- *According to this test, the restaurant owner from the aforementioned example acted legally when he treated differently smokers and non-smokers, because the goal of his activities, and that is to protect non-smokers from tobacco smoke, is justifiable. In this case we also didn't have disproportion between undertaken activities and achieved goal, because the restaurant owner has limited smokers rights just to a degree which is justifiable in respect to the goal he wanted to achieve. He didn't prevent them from entering the restaurant, just separated them in the special part of the restaurant in order to prevent so called passive smoking. We would get similar result if we would apply the general test to differentiation between men and women regarding the use of toilet.*

▪ However, if the general test is applied on the case where unequal treatment of the restaurant owner is directed at Roma, it is clear that there is no need to review the issue of proportionality because the very goal, and the consequence of different treatment is unjustifiable and unjust. In other words, ban on entering the public facility, such as the restaurant, for Roma, or their exclusion from other guests, cannot be justified and therefore represents illicit unequal treatment, i.e. discrimination on grounds of nationality.

a) Besides this general rule, i.e. test, the law also knows the rules determining whether unequal treatment is allowed or not in special cases. These rules are incorporated in antidiscrimination laws, but also in other regulations as well.

Examples:

- Unequal treatment is allowed when hiring people, when there is a need for employee to have specific personal feature in order to perform the job, under condition that aim of the given job is legitimate and that the need for specific personal features is justifiable. For example when it is required from a candidate to have university degree, or you need a black man for the commercial, or young women to play the mother in theatre play, etc;
- It is allowed to deprive foreign citizen rights and freedoms originating from the citizenship, such as the right to vote and be voted to central government bodies, the right to have passport, the right to change the name, etc;
- It is allowed to satisfy justifiable interests of discriminated, i.e. taking 'affirmative action measures' in order to put certain group of persons that share certain specific personal feature, in the equal position with other persons. For example, setting up audio- traffic lights to help the blind and those with poor vision to safely cross the street, or providing for minimal share of women in government bodies;
- Article 23 of Media Law, says that 'hate speech' is considered as special form of discrimination- journalist's article which is not encompassed by legal definition of 'hate speech' will not be legally sanctioned in line with provisions of this Law;
- Penal Code contains number of criminal offenses incriminating discriminatory behavior- in line with the principle of legality of the act, only what is described, in the nature of criminal offense, as the prohibited activity, is subjected to criminal-legal sanctioning.

IV Discrimination forms

Analysis of discrimination notion is necessary but not sufficient condition for acquiring complete knowledge on what is prohibited. In the concrete life situations, discrimination doesn't have just one appearance form, but it is usually represented by a dozen different forms of illicit behavior. The task of the law is to identify and prohibit all these forms of discriminatory behavior.

1. Direct discrimination

Direct discrimination represents typical form of discrimination. It is perfectly visible, because those who are acting in discriminatory manner are not hiding their actions. On the contrary they will often publicly defend making the differentiation between individuals calling upon the need to protect 'legitimate' interests or 'higher' cause.

According to the Model of Antidiscrimination Law, direct discrimination exists if the person or group, which is in the same or similar situation, by any act or doing, are being put or have been put into disadvantageous position, because of their personal features. Typical example of this discrimination form was already mentioned- refusal of the restaurant owner to serve the people of Roma nationality.

2. Indirect discrimination

Indirect discrimination differs from direct discrimination, primarily because it is hidden- the one who acts in discriminatory manner doesn't want that to be visible. He is hiding behind allegedly equal treatment, although his exclusive or dominant motive is exactly the desire to exercise discrimination.

Examples:

- *Restaurant owner wants to avoid hiring Chinese by demanding from candidates for the job of waiter to have natural blond hair and blue eyes;*
- *Owner of the printing firm wants to avoid hiring deaf-mute person by demanding from candidates to sing nicely.*

According to the Model of Antidiscrimination Law, indirect discrimination exists if the person or a group, because of their personal features, is being put into

disadvantageous position, by adoption of some act or undertaking of some activity, which is allegedly based on the principle of equality and non-discrimination. The only exception is in the case when such act or activity is justifiable by a legal goal, and the means for accomplishment of that goal are appropriate and necessary. This rule is directly taken from the Antidiscrimination Directives of European Union.

When analyzing the notion of discrimination, we pointed to one of its most important characteristics- discrimination is unequal treatment, i.e. making the differentiation. Regarding the indirect discrimination, we have apparently paradoxical prohibition of equal treatment and that might cause confusion. However, European Court for Human Rights in Strasburg, in case '*Thlimmenos against Greece*' had the opportunity to point out, very precisely, that discrimination exists even when "*the contracting-states, without reasonable justification, do not treat differently persons who are in essentially different situations*". Therefore indirect discrimination is illicit, exactly because two persons or groups having different personal features are unjustifiable treated in the same way.

3. Violation of equal rights and obligations principle

General legal rule, or basic legal principle of contemporary law is that all individuals, regardless their differences, enjoy equal rights and obligations. "Everybody is equal before the law"- that is the sentence used every time when one wants to make a point, that law is equally applicable to all individuals, regardless their personal features.

However, not every discrimination represents the violation of equal rights and obligations principle. In the already cited example, when restaurant owner splits the space in two areas, one for the guests of Roma nationality, and the other for everybody else, than he, with his discriminatory behavior, doesn't violate the equal rights principle- he is in fact discriminating the Roma. Still, discriminatory treatment is often reflected in disenfranchising of ones, i.e. in legal or general privileging of others, based on their personal features.

According to the Model of Antidiscrimination Law, violation of equal rights and obligations principle occurs if the discriminated, solely or predominantly because of his personal features, is unjustifiably deprived of rights and freedoms, or imposed obligations, that in the same or similar circumstances are not denied or imposed to other person or a group.

This form of discrimination has very complex structure that can be reviewed from two aspects.

- a) From the legal point of view, discriminatory behaviour can have three forms:
 - legal privileging occurs when individual or a group, which are sharing the same personal features, is granted the right that other persons do not enjoy, for example the right to organize religious instructions lectures in public schools, for members of some, but not all, religious communities;
 - disenfranchising occurs when individual or a group is deprived of rights that the others enjoy, for example the child infected with HIV virus is denied the right

to go to school, and attend the classes;

- limitation of rights occurs when individual or a group is partially deprived of rights that others enjoy fully, for example when women get smaller salaries from the one given to men for the same work at the same workplace.

b) From the obligations point of view, it is also possible to notice the difference between three forms of discrimination:

- imposing the obligation that other side doesn't have to fulfil, for example when the soldier- member of minority nation is ordered by the commander to clean the toilets until the end of his military service, instead of other soldiers;
- imposing unequal obligations, for example when museum director sets up higher ticket prices for foreigners;
- imposing equal obligations for the benefit of just one side, for example Government decree obligates all the citizens to buy additional stamp when sending letters or postcards, and states that all the income generated from this activity will be paid to just one religious community.

4. Victimization

Victimization is form of discrimination in which the one seeking legal protection from discrimination or the one ready to help the victim in the protection of its rights, is being put into position of the victim, i.e. he also suffers the unequal treatment. Therefore, victimization has two forms:

a) Victimization directed at discrimination victim occurs in the case when the person, who has already suffered discriminatory behavior, is being put into disadvantageous position because he/she has asked, or intends to ask for legal protection from the discrimination. For example, disabled person, who has suffered humiliation from his colleagues at work is seeking protection from the employer, and the employer instead of giving such protection to the victim, transfers the disabled person to another, lower ranking job, without working conditions in respect to his disability and even giving him lower salary;

b) Victimization directed at other persons occurs if the person, who hasn't suffered discriminatory behavior, is ready to help or is helping the other person to get legal protection from discrimination. For example, the person who is ready to testify against hooligan who has physically abused children of some specific ethnic group, or who has already testified on behalf of victims, is exposed to threats, that is, physical abuse by the bully.

According to the Model of Antidiscrimination Law, victimization exists "if the discriminated is treated in unjustifiably worse manner than the treatment of others,

exclusively or predominantly because the discriminated asked, or intends to ask for legal protection from discrimination, or because he has offered or intends to offer proofs on discriminatory behavior" (article 6, paragraph 5, line 1).

5. Association to commit discrimination

The general rule states that, those who violate the rights and freedoms of others, cannot hide behind the human rights and freedoms- in this case the freedom of association. Therefore, association to commit discrimination, incitement on discrimination, or promotion of discrimination, from the legal point of view cannot be seen as manifestation of freedom of association, but exclusively prohibited element of discriminatory behavior.

According to the Model of Antidiscrimination Law, "association to commit discrimination, that is to say the activity of political, trade union, and other organizations, which is directed at violating constitutionally, legally and by international agreements guaranteed freedoms and rights or stirring up national, racial, religious, and other hatreds, discord, and intolerance" is prohibited (article 6, paragraph 5, line 2).

Forms of this type of discrimination are well known. In developed democracies, mechanisms for protection of human rights and freedoms usually means prohibition for Nazi, Fascist, and Communist political parties, as well as other associations that are established with purpose of promoting or executing racial, religious, and other types of discriminations. Very often, proceedings to determine criminal responsibility against members of these prohibited associations, are undertaken.

6. Hate speech

European Court of Human Rights from Strasburg has said on several occasions that "hate speech" is not legally permissible manifestation of freedom of expression, and that those practicing "hate speech" cannot hide behind article 10 of the European Convention on Human Rights. Similar to association to commit discrimination, even here we are dealing with the issue, that every public speech promoting discrimination, hatred, and violence against the ones who do not share certain personal feature, that is the speech which incites the others to commit discriminatory actions, should be prohibited.

Hate speech in practice is identified through three special forms of discriminatory behavior:

- a) Public expression of discriminatory positions, for example writing the graffiti such as –"Albanians get lost", "Knife, wire, Srebrenica", etc, and symbols of discriminatory contents- the most favorite one is Nazi swastika on facades of buildings, tombstones, etc. According to the Model of Antidiscrimination Law "it is prohibited to write and post on public places, or dissemination in other way, messages and symbols calling on discriminatory behavior against other people" (article 10);

b) Hate speech in media which is giving motive to person or group against which the hate speech is directed, to ask the court to ban repeated publication of given information. According to Media Law, “it is prohibited to publish, information, and opinions stirring discrimination, hatred, or violence against person or group of persons, because of their affiliation or non-affiliation to some race, religion, nation, ethnic group, gender, or because of their sexual orientation” (article 23). On the first sight, it is visible that this legal provision is banning the hate speech only if directed against persons or group that shares precisely cited personal features, but not if directed against those sharing some other personal feature. The basic reason motivating the legislator to shorten the list of personal features, just as in the case when we are dealing with limitations of rights on privacy, honor, and reputation, is the need to set the right balance between freedom of the press and rights of the individual that might be violated with publication of some information.

c) Qualified form of hate speech, which is giving motive to the public prosecutor to demand the court to ban the distribution of information, which hasn’t been published in the media yet. According to the Media Law, the court will ban the distribution of information if the court finds that ban to be suitable in one democratic society, in order to prevent “violation of guaranteed rights and freedoms of men and citizens, or stirring of national, racial, or religious intolerance or hatred” (article 11). There is a very clear idea behind this, on the first sight, complicated legal provision: it is prohibited to publish the information, which is inciting on direct acts of discrimination, hatred, or violence against the person or a group that shares any kind of personal feature.

Therefore, first and foremost, we are not dealing here with classic example of hate speech, for example expressing position that all Roma should be expelled from the country, but something far more dangerous; the editor of certain media has decided to publish information, for example an open call to readers to take part in burning down the Roma settlement, citing concrete place and time where to gather. Likewise, there is a danger to publish information calling readers to break down pastry shop window because its owner is Albanian, or an open call on violent disruption of regularly announced meeting of homosexuals, etc. In any of these cases, the task of the legal order is to prevent publication of these types of information. On the other hand, for legal order, it is not important against whom, the call on violence, hatred, and discrimination was made. Contrary to classic hate speech, the list of personal features in this case is not limited. Regardless of what personal feature is shared by individuals against which the information is directed, whether we are talking about members of different national minority or religious organization, homosexuals, disabled persons, or others, the task of legal order is to protect these individuals and groups by banning the distribution of information.

7. Disparagement and harassment

Insulting behavior, disparagement, and harassment of others, represents flagrant violation of human dignity. Probably nothing can so easily, hurt human dignity as inhuman behavior. Regardless whether accompanied by other forms of discrimination, disparagement, and harassment of one person because of its personal feature, it represents, by itself, illicit discriminatory behavior.

There are two basic types of this form of discrimination:

a) Verbal disparagement and harassment, exists when person is treated in discriminatory manner through use of words whether in written or oral form, for example when somebody says to Chinese, "I don't talk to Chinks", or when somebody addresses disabled persons in insulting way, using words such as, "moron", "blind", "lame", etc;

b) Disparagement and harassment through gestures and acts, exists when one person is treated in discriminatory way by the means of gesticulation, for example by sticking one's tongue, closing the nose, showing the middle finger, etc, or by doing some other activity, for example spitting, pushing, pulling somebody's ears, taking away crutches or stick, scaring dog-guide, etc.

According to Model of Antidiscrimination Law, this form of discrimination will exist, "if the discriminated is being treated in clearly humiliating way, solely or predominantly because of his personal features" (article 6, paragraph 5, line 3).

Special case of humiliating treatment is sexual harassment, directed predominantly at persons of female gender. Sexual harassment occurs quite often in situations in which there is relationship of dominance over the victim, such as the relationship between employer and employee or professor and the student, etc. Sexist behavior (that is how this case is called), encompass, on one hand, verbal attacks at the victim, for example calling out or sending messages with lascivious words and expressions, calling for sexual intercourse, indecent "courtship", etc, and on the other hand non-verbal attacks, for example, tickling, cuddling, peeking under the skirt, slapping on the bottom, etc.

8. Severe forms of discrimination

Among numerous discrimination forms and cases, the legislator will choose those, which, from the legal point of view, that is moral standards, appear as particularly sever violations of the equality principle. The purpose of this selection is, primarily, to qualify those illicit acts that are considered to be particularly dangerous for social community. On the other hand, qualification of illicit action is indirectly instructing everybody, and courts and other bodies in charge of protecting human rights in particular, to take tougher legal reaction, because of illicit behaviour. Therefore, regardless whether we are dealing with civil suite, criminal

charge, or some other form of legal protection from discrimination, government body is instructed to sanction more harshly those forms of discrimination, which the legislator has identified as particularly sever.

In the Model of Antidiscrimination Law (article 9), the following forms of discrimination have been identified as particularly sever:

- Stirring, inciting, and inflaming hatred, divisions or intolerances, based on national, racial or religious affiliation, language, political orientation, gender, sexual identity, sexual orientation, and disability;
- Promotion or well-thought execution of discrimination by state bodies, in the proceedings before state bodies, through media, in political life, when providing public services, in area of labor relations, healthcare, education, culture, sport, etc;
- Promotion of racial, national or religious superiority, misogyny, and homophobia;
- Slavery, human trafficking, apartheid, genocide, ethnical cleansing, and promotion of aforesaid;
- Discriminating persons based on two or more personal features (multiple or crossed discrimination).

V Discrimination cases

If the legislator wants to provide individuals even better protection from discrimination, he won't stop at defining the notion and defining prohibited forms of discrimination. He will try to even more, to determine what, in the concrete social circumstances, shall be deemed as discrimination. In this way, the legislator, having in mind primarily the real situation in the society, will try to identify and then ban the discrimination in certain typical cases.

1. Two groups of discrimination cases

All typical discrimination cases can be divided in two basic groups of cases.

a) According to areas of social life

First, the legislator can define what is deemed to be discrimination in certain areas of organized society, for example in actions of government bodies, in labor relations, providing of public services, usage of public facilities and areas, in education and vocational training, provision of healthcare services, etc.

Example: According to the Model of Antidiscrimination Law (article 20, paragraph 1), discrimination in area of pre-school, and school education, university education and vocational training, is “every making of differentiation, limitation or privileging, based on personal features, aiming to or having as a consequence, violation of equality within educational process and vocational training, and especially with regard to:

-disabling access to different types or levels of education;
-limiting schooling to a lower level;
-introducing or maintaining special school systems or schools for certain persons or groups,
-non taking actions in order to ensure equal access to high vocational training;
-putting certain person or a group, within the educational process, in a position, which is not in line with human dignity”.

b) According to discriminated groups

The legislator can, afterward, define what is discrimination in regard to gender, religious or political orientation, discrimination of children, discrimination in regard to sexual identity and sexual orientation, discrimination of disabled, discrimination of national minorities, etc.

Example: According to the Model of Antidiscrimination Law (article 19, paragraph 2), discrimination of a child is deemed to be, in particular:

- discrimination of a child in regard to its marital or extramarital birth;
- discrimination of a child in regard to property status, profession and other social features of its parents or caretaker;
- unjustifiable separation of children, in any form and shape of education, in regard to their gender;
- public invitation on giving the advantage to children of one gender in respect to children of opposite gender;
- discrimination of a child in regard to activities, expressed opinions or beliefs of its parents, legal caretakers, or family members.

VI Disciplinary and penal liability

Disciplinary liability for discriminatory behavior during work.

Article 33

- (1) Employee, who, by his own doing behaves in discriminatory manner, is violating labour obligations, for which he can be fined or temporarily removed from his workplace, in line with the legal provisions regulating labour and labour relations.
- (2) Employee, who, by his own fault repeats discriminatory behaviour, despite written warning of the employer because of prior discriminatory behaviour, can be sanctioned by disciplinary measure-firing.
- (3) Penal liability does not exclude disciplinary liability from paragraphs 1 and 2 of the article.

Fines

Article 34

Everybody who commits the following offences will be fined from 200 up to 2000 €:

1. who writes down or posts at the public place or in other way disseminates messages or symbols calling for discriminatory behaviour against other persons (article 9, paragraph 1);
2. violates or intends to violate equal opportunities regarding employment, performance of work, or cessation of work, as well as the one who violates equal opportunities for employment or the right to enjoy all the rights, under equal terms, originating from performed work, or the rights related to labour relations (article 13, paragraph 1);
3. refuses to provide public service, or for the delivery of the services demands certain requirements to be met, which are not asked from other persons or groups, or the one who provides the service with delay, although the service was asked and conditions for receiving the service met before other persons or groups (article 14, paragraph 1);
4. violates the principle of separation of state and religious communities, that is acts contrary to obligation of state to be impartial regarding religious communities, as well as the one who violates the principle of free profession of religion (article 15);
5. who violates principle of equality between women and men (article 16, paragraph 1);

6. who violates the freedom of sexual orientation and its expression (article 17, paragraphs 1, and 2);
7. who violates the principle of equal protection for minors (article 18, paragraph 1);
8. who violates equality within educational process or vocational training (article 19, paragraph 1);
9. who rescind or limits special rights for minorities or their members, which aim to preserve their identity (article 20, paragraph 2);
10. who violates ban on discrimination because of expressing political beliefs (article 21, paragraph 1);
11. acts contrary to discrimination ban regarding disable (article 22, paragraphs 1, and 2);
12. executes forceful medical measures (article 23, paragraphs 2, and 3).

Other penalties

Article 35

(1) If particularly severe consequences have occurred due to discriminatory behavior, such as discrimination of large number of persons or big material damage, along with the fine from article 34 of the Law, ban on performance of certain activities for the responsible person lasting 3 to 12 months can be delivered, as well as ban for the employer or other natural person that performs some business activity or delivers a service, to conduct that business activity or provides service in duration 3 to 12 months.

(2) Along with delivering a fine, the court, for the offence:

- From article 34, paragraph 1, of the Law, will obligate the offender to compensate the costs of bringing the structure, on which the message or symbol were written down, into the prior state; ruling on compensation of the costs has the quality of ministerial.
- From article 34, point 2, of the Law, can ban the participation in the bodies deciding on hiring new employees in duration 3 to 12 months;
- From article 34, point 5, of the Law, can ban the offender to approach the discriminated person, either at the workplace or other public place, from 3 to 12 months;
- From article 34, point 12, of the Law, can ban the offender to approach discriminated person at the place were medical treatment is provided or at other public place, from 3 to 12 months.

(3) If the offender does not comply with the ban from paragraph 2, lines 2-4 of the Article, the ban shall be executed in line with the implementation of Law on Execution Procedure, regarding the obligation that can be executed only by the obligator.

VII Final and Transitional provisions

Supervision regarding the implementation of the Law
Article 36

The Ministry in charge of judicial matters conducts supervision over the implementation of the Law.

Entry into force
Article 37

This Law enters into force on the eighth day since its publication in the Official Gazette of Montenegro.

European Convention on Protection of Human Rights and Fundamental freedoms
(Rome, November 4, 1950)

Antidiscrimination provisions

Prohibition of discrimination
Article 14

Enjoyment of rights and freedoms from this Convention is provided without any discrimination upon any ground, such as gender, race, skin color, language, religion, political or other opinion, national or social origin, link with some national minority, property status, birth, or other status.

Protocol no. 12, from the Convention on Protection of Human Rights and Fundamental Freedoms
(Rome, November 4, 2000)

General prohibition of discrimination

Article 1

1. Every right provided for by the law, shall be implemented without discrimination upon any ground, such as, for example, gender, race, skin color, language, religion, political and other beliefs, national or social origin, links to national minority, property, birth or other status.
2. Public authorities shall not apply discrimination against anybody upon grounds, as previously mentioned in paragraph 1.

GUIDE AGAINST DISCRIMINATION

